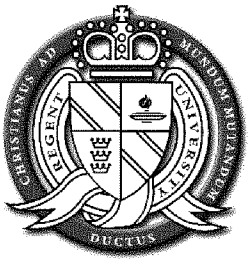
REGENT UNIVERSITY LAW REVIEW



VOLUME 29 **2016–2017** **NUMBER 1**

REGENT UNIVERSITY LAW REVIEW

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REGENT UNIVERSITY LAW REVIEW: KEEPING THE REPUBLIC!

*Barbara S. Weller**

This year, 2016, marks the twenty-fifth anniversary of the Regent University Law Review, first published in the spring of 1991, with articles on public school chaplains and school prayer,[1] school choice,[2] and integrating the biblical command of love in modern law.[3] Over the next few years, its contributors continued to focus on topics related to living out the Christian faith, such as an examination of the relevance of Hebrew law,[4] biblical foundations in the common law,[5] demonstrations at abortion clinics,[6] and the free exercise of religion generally,[7] as well as more secular and practical topics such as employee handbooks[8] and the Second Amendment.[9]

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* Barbara Weller served as Editor-in-Chief of the Regent University Law Review during the 1994–1995 school year, with the distinction of being the first woman to serve in that role. She now works as the Executive Director of the Center for Life Defense at the National Center for Life and Liberty.

1 Herbert W. Titus, *Public School Chaplains: Constitutional Solution to the School Prayer Controversy*, 1 REGENT U. L. REV. 19 (1991).

2 Timothy T. Blank, Note, *The Milwaukee Parental Choice Program, Its Policies, and Its Legal Implications*, 1 REGENT U. L. REV. 107 (1991).

3 James R. Chamberlain, Rex Downie, Jr., Karl E. Osterhout & John J. Porter, Commentary, *The Love Command as Modern Law*, 1 REGENT U. L. REV. 59 (1991).

4 Julian H. Wright, Jr., *Pardon in the Hebrew Bible and Modern Law*, 3 REGENT U. L. REV. 1 (1993).

5 *See, e.g.*, Herbert W. Titus, *God's Revelation: Foundation for the Common Law*, 4 REGENT U. L. REV. 1 (1994).

6 Barbara Specht Weller, Comment, *Bursting the Bubble Zone in Texas: An Analysis of* Ex Parte Tucci, 4 REGENT U. L. REV. 143 (1994).

7 *See, e.g.*, Michael P. Farris & Jordan W. Lorence, Employment Division v. Smith *and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV. 65 (1995).

8 Stephen Carey Sullivan, Note, *Unilateral Modification of Employee Handbooks: A Contractual Analysis*, 5 REGENT U. L. REV. 261 (1995).

9 Michael I. Garcia, Comment, *The "Assault Weapons" Ban, the Second Amendment, and the Security of a Free State*, 6 REGENT U. L. REV. 261 (1995).

Much has happened, both at Regent University School of Law and in American law and culture since that time of small, but properly focused, beginnings. Over the past two and a half decades, the law review has addressed many of the nation's most important legal topics from a biblical and conservative perspective. This publication has been blessed by the high caliber of its contributors, including Justice Clarence Thomas,[10] former Attorney General John Ashcroft,[11] former Attorney General Edwin Meese III,[12] federal judges,[13] and many other notable legal minds. Regent University Law Review articles were cited in over 100 treatises and other secondary sources, and, in 2015 alone, over 100 other law reviews and journals.[14]

I had the privilege of serving as editor-in-chief during the 1994–1995 school year, when the law review had relocated to the second floor of the brand new (and gorgeous) Robertson Hall building. From my new law review office window, I had an unobstructed view of the entire campus at that time. Years later, when I returned for a visit, I noticed that the tree under the window had grown a lot and obstructed that view—at least when it was in full leaf. Just like that tree, however, both Regent University School of Law and its law review have grown a lot over the years. In fact, it is no longer even possible to see the entire, expanded Regent campus from that window.

I had three goals in mind upon entering law school in 1992 at age fifty—the oldest Regent law student ever at that time. I wanted to be editor-in-chief of the law review; I wanted to keep my scholarship (not an easy feat); and I wanted to graduate in the top 10% of my class. Those were lofty goals considering that, at the time, I thought all torts were either cream-filled or jelly-filled! Every final exam brought panic attacks and a strong desire to quit. But I kept trusting God and working as hard as I could. In the end, two of my three goals were met—although I fell just a few points shy of graduating at the top 10% mark.

While studying for the Florida bar exam, I took a temporary job with a bar review company to try to gain a competitive edge. During those months, I was surprised to realize that students from America's traditional top law schools knew a lot less about the law than I did. Since

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[10] Clarence Thomas, *Personal Responsibility*, 12 REGENT U. L. REV. 317 (2000).

[11] John D. Ashcroft, *Justice Clarence Thomas: Reviving Restraint and Personal Responsibility*, 12 REGENT U. L. REV. 313 (2000).

[12] Edwin Meese III, *The Jurisprudence of Clarence Thomas*, 12 REGENT U. L. REV. 349 (2000).

[13] *E.g.*, Henry Coke Morgan, Jr., *Predictive Coding: A Trial Court Judge's Perspective*, 26 REGENT U. L. REV. 71 (2013); Diane S. Sykes, *Religious Liberties: The Role of Religion in Public Debate*, 20 REGENT U. L. REV. 301 (2008).

[14] This list was compiled by the Regent University Law Library. It is on file with the Regent University Law Review.

passing the bar exam (on the first try!), I have had the great privilege of working with Christian legal organizations to defend God's people in many different situations. I know that my story is similar to many other stories Regent Law School graduates could tell. I thank God every day for the privilege of serving Him and for the unique legal preparation He provided at Regent.

One of the accomplishments of the Regent University School of Law, in addition to both spiritual and academic excellence, has been the development of the same tight networking for Christian attorneys that is exemplified in other prestigious law schools. I have never contacted a fellow Regent alum and not had the call returned. Nor do I ever refuse a call from any Regent grad. That is a great advantage as more and more Regent alums are on the rise in their respective fields of politics, law, and government, as well as other professions.

In particular, over the past twenty-five years, many alumni from the Regent University Law Review staff have made outstanding contributions in their fields. It is always risky to give special recognition for outstanding achievement. Someone is always missed and there are so many outstanding former Regent University Law Review staff members changing America and the law for good. However, special recognition must be given to the very first editor-in-chief, Daniel Kelly, who was recently appointed to the Wisconsin Supreme Court by Governor Scott Walker.[15]

America has seen a tremendous shift in law and culture over the past twenty-five years—and not all of those changes have been good. In fact, some of them are downright alarming. Regent University School of

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[15] Molly Beck, *Scott Walker Picks Waukesha Lawyer Daniel Kelly for Seat on Supreme Court*, WIS. STATE JOURNAL (July 23, 2016), http://host.madison.com/wsj/news/local/govt-and-politics/scott-walker-picks-waukesha-lawyer-daniel-kelly-for-seat-on/article_17eb913d-91d2-5c8a-8921-45409b8b65c8.html. Other notable law review alumni include, but are definitely not limited to:

- Dale Schowengerdt (Senior Editor, 2002–2003), Solicitor General for the State of Montana, who argued on behalf of the State of Montana before the United States Supreme Court this year in *Betterman v. Montana*, 136 S. Ct. 1609 (2016), and prevailed 8-0.
- Dr. Shawn D. Akers (Internal Articles Editor, 1999–2000), Dean of Liberty University Helms School of Government, Professor of Government, and Assistant Adjunct Professor of Law at Liberty University School of Law.
- Kristen K. Waggoner (Internal Editor, 1996–1997), senior counsel and senior vice president of U.S. legal advocacy at Alliance Defending Freedom, who formerly clerked for the Honorable Justice Richard B. Sanders of the Washington Supreme Court and who received the Regent Alumnus of the Year award at Regent Law's 2016 Commencement Ceremony.
- The Honorable Jim Cox (Issue Planning Editor, 1995–1996), Member of the Pennsylvania House of Representatives.
- The Honorable Joseph A. Migliozzi (Managing Editor, 1993–1994), Norfolk Circuit Court Judge for the 4th Judicial District in Virginia.

Law and the Regent University Law Review, however, have continued to be fiercely engaged in the battle for good in our changing legal culture. I am always proud to acknowledge my connection.

If John Adams, my favorite American Founder, were alive today, I think he would want to offer a word of encouragement to the Regent University Law Review during this twenty-fifth anniversary year of publication. Adams, a lawyer himself, and our nation's second president, understood that America was established as a uniquely Judeo-Christian nation, and that it would not long survive if that religious foundation was ever removed.[16] He shared those beliefs with the vast majority of America's Founders,[17] but I particularly appreciate his strong expression of this truth:

> [W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge, or gallantry, would break the strongest cords of our Constitution as a whale goes through a net. Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.[18]

President Adams, who participated in drafting both the Declaration of Independence and the Constitution, also issued a strong admonition to those countrymen (and women) who would follow him. It is an admonition that the Regent University Law Review staff has been uniquely qualified to heed, given Regent's focus on Judeo-Christian legal education.[19] John Adams gave us, his Posterity, this stern warning: "Posterity! You will never know, how much it cost the present Generation, to preserve your Freedom! I hope you will make good a Use of it! If you do not, I shall repent in Heaven, that I ever took half the Pains to preserve it!"[20]

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[16] Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), *in* 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS 228, 228–29 (Charles Francis Adams ed., 1854) [hereinafter Letter from John Adams].

[17] The vast majority of delegates who attended the Constitutional Convention were professing Christians. JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION: THE FAITH OF OUR FOUNDING FATHERS 43 (1987). Only Benjamin Franklin and James Wilson of Pennsylvania were known to be deists, *id.* at 42, while Hugh Williamson of North Carolina and James McClung of Virginia may also have been non-Trinitarian, *id.* at 42–43. Dr. John Eidsmoe concludes that, at most, 5.5% of those attending the Constitutional Convention were deists. *Id.* at 43.

[18] Letter from John Adams, *supra* note 16, at 228, 229.

[19] *Regent's Vision - A Leading Global Christian University*, REGENT UNIVERSITY, http://www.regent.edu/about_us/overview/mission_statement.cfm (last visited Aug. 30, 2016).

[20] *John Adams to Abigail Adams, 26 April 1777*, NATIONAL ARCHIVES: FOUNDERS ONLINE (last modified Oct. 5, 2016), http://founders.archives.gov/documents/Adams/04-02-02-0169.

It is an undeniable truth of America's Founding that our national union was uniquely based on the Bible.[21] It is also undeniable that many in America, including those on the Highest Court in our land, seem to have forgotten that truth, which previously bound Americans together. One example of the overthrow of this truth during the twenty-five years the Regent University Law Review has been in existence was the United States Supreme Court's reaffirmation of its pro-abortion/pro-choice standard in 1992 in the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[22]

There is a particular passage from the *Casey* decision that has since become known in legal and philosophical circles as "the mystery passage," in which the Court seems to have completely changed the nation's original Divine orientation of liberty by stating that the constitutional right to "liberty" is so expansive that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[23] In this "mystery passage," the Court declared that every individual has the right to determine the boundaries of his own liberty and, thereby, to define his own religious and moral standards in whatever way he chooses.[24] The government then seemingly becomes obligated to legally recognize whatever notions of liberty any individual might concoct.[25]

Judge Robert Bork later commented on this "mystery passage" from *Casey* in the context of a discussion on euthanasia, noting:

> One would think that grown men and women, purporting to practice an intellectual profession, would themselves choose to die with dignity, right in the courtroom, before writing sentences like those. They mean nothing and were intended to mean nothing. They were intended, through grandiose rhetoric, to appeal to a free-floating spirit of radical autonomy.[26]

Judge Bork continued to argue that this "mystery passage" and similar decisions by the United States Supreme Court have placed America in a position where her original covenant of union is dissolving

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[21] *See* D. JAMES KENNEDY & JERRY NEWCOMBE, WHAT IF THE BIBLE HAD NEVER BEEN WRITTEN? 78 (1998) (asserting that even some secularists have noted the role the Bible played in the United States Constitution).

[22] 505 U.S. 833, 845–46 (1992).

[23] *Id.* at 851.

[24] *Id.*

[25] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting) ("Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage . . . . [F]or those who believe in a government of laws, not of men, the majority's approach is deeply disheartening.").

[26] ROBERT H. BORK, SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 111 (1996).

and civil society as we have known it may find it difficult to continue.[27] Judge Bork observes:

> Judicial radical individualism weakens or destroys the authority of what sociologists call "intermediate institutions"—families, schools, business organizations, private associations, mayors, city councils, governors, state legislatures—that stand between the individual and the national government and its bureaucracies. All of this has happened within the lifetimes of many Americans. We are worse off because of it, and none of it was commanded or contemplated by the Constitution.[28]

Judge Bork correctly describes the current direction of American law. Nevertheless, the Founders' generation was profoundly influenced by Judeo-Christian values.[29] That truth continues to be recognized and defended at Regent University School of Law. The Regent University Law Review is well situated to continue to speak that truth clearly to the legal world in the future, just as it has done for the past twenty-five years.

In Eric Metaxas' new book, *If You Can Keep It*, he clearly spells out the undeniable nexus between virtue, faith, and freedom.[30] He points out that self-government, as a political concept, did not exist before America existed, and that self-government depends, first of all, on citizens properly governing themselves.[31] He argues that the only basis on which self-government is able to exist is in the context of that uniting principle recognized at America's Founding, which is that self-government—the basis for freedom—requires virtue; virtue requires faith; faith requires freedom; and freedom requires virtue.[32] Round and round it goes. Metaxas calls this The Golden Triangle,[33] endlessly connecting virtue,

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[27] *Id.* at 112–115.

[28] *Id.* at 105.

[29] *See, e.g.*, *Washington's Farewell Address 1796*, AVALON PROJECT, http://avalon.law.yale.edu/18th_century/washing.asp (last visited Oct. 12, 2016) ("[L]et us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."); Thomas Jefferson, *Notes on the State of Virginia*, AVALON PROJECT, http://avalon.law.yale.edu/18th_century/jeffvir.asp (last visited Oct. 12, 2016) ("And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath?").

[30] ERIC METAXAS, IF YOU CAN KEEP IT: THE FORGOTTEN PROMISES OF AMERICAN LIBERTY 54 (2016).

[31] *Id.* at 36.

[32] *Id.* at 36–37, 54.

[33] *Id.* at 54.

faith, and freedom, and warns that "[i]f you take God and faith and morality out of the equation, everything inevitably falls apart."[34]

Metaxas demonstrates that recognizing this Golden Triangle is the only appropriate response to the challenge issued by Dr. Benjamin Franklin to Mrs. Powell in the summer of 1787, when he emerged from Independence Hall following the drafting of the new American Constitution:

> [W]hen Benjamin Franklin emerged from the building that day, he was accosted by a certain Mrs. Powell of Philadelphia. . . . Mrs. Powell put her question to Franklin directly: "Well, doctor," she asked him, "what have we got? A republic or a monarchy?" Franklin . . . shot back: "A republic, madam—if you can keep it." [35]

That is the ongoing challenge for America today. Can we keep it? Truly, the success, contributions, and accomplishments of the Regent University Law Review and its staff have been a light pointing in the right direction for the past twenty-five years. This publication has been a tremendous asset in the fight to "keep" our American Republic. John Adams should be smiling down from Heaven on the efforts of this portion of his Posterity! We pray that God will enable the Regent University Law Review and its future staff to continue to work diligently toward that goal over the next 25, 50 and even 100 years and beyond.

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[34] *Id.* at 48.

[35] *Id.* at 8–9, 37.

JUSTICE SCALIA AND THE RULE OF LAW: ORIGINALISM VS. THE LIVING CONSTITUTION

*Richard F. Duncan**

> What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have *regarded* as constitutional for 200 years, is in fact unconstitutional? . . . The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize.[1]

INTRODUCTION

Justice Antonin Scalia's sudden death in February, 2016, was a great loss for his family, a great loss for his friends, and a great loss for the "Written Constitution" of the United States of America.[2] We will have no more of his brilliant, witty, and pugnacious judicial opinions. Instead, we will have to settle for the body of work he left behind as his legacy. But, as one commentator has said, his opinions are "so consistent, so powerful, and so penetrating in their devotion to the rule of law"[3]—the real rule of *law*, not the political decrees of judges creating the so-called "Living Constitution"[4]—"that one may take one or two almost at random and catch a glimpse of the great patterns of his jurisprudence, as well as flashes of his famous wit."[5] Scalia was the greatest Supreme Court Justice of his generation, perhaps of all time.[6] Professor Steven G. Calabresi, a former

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* Sherman S. Welpton, Jr. Professor of Law, University of Nebraska College of Law.

1 Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 688–89, 711 (1996) (Scalia, J., dissenting). This quote is so powerful that Judge Bork borrowed it as the title of his book, ROBERT H. BORK ET AL., "A COUNTRY I DO NOT RECOGNIZE": THE LEGAL ASSAULT ON AMERICAN VALUES (Robert H. Bork ed., 2005).

2 The phrase "Written Constitution" represents a major characteristic of the originalist school of Constitutional thought: the application of a fixed meaning of the law of the Constitution. DAVID A. STRAUSS, THE LIVING CONSTITUTION 3 (2010). The Written Constitution contrasts the "Living Constitution," the idea that those applying the Constitution must revise it to adapt "to new circumstances, without being formally amended." *Id.* at 1.

3 Matthew J. Franck, *Scalia's Last Opinions*, NAT'L REV. (March 14, 2016), https://www.nationalreview.com/nrd/articles/431866/scaliaslastopinions.

4 STRAUSS, *supra* note 2, at 2.

5 Franck, *supra* note 3.

6 Other commentators agree with the author's opinion. *See, e.g.*, Symposium, *Antonin Scalia—A Justice in Full*, NAT'L REV. (Feb. 29, 2016), http://www.nationalreview.com/article/432005/antonin-scalia-justice-full (statement by

law clerk of Justice Scalia, recently said that "[Justice Scalia] is the most important justice in American history—greater than former Chief Justice John Marshall himself."[7] I will not dissent from Professor Calabresi's opinion.

When Justice Scalia passed away, I lost the hero of my life in the law. But he lives on in his written words, a body of work that was designed to shape our understanding of the Constitution for generations yet to come. I love the pugnacious poetry of his opinions, particularly of his dissents.[8] Margaret Talbot once referred to Justice Scalia's provocative style as "the jurisprudential equivalent of smashing a guitar onstage."[9] And so it was.

Justice Scalia was once asked why he took such pains to use memorable terms and provocative phrases in his Supreme Court opinions (particularly in his dissents), and he said that he wrote them this way for

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attorney and former FCC chairman Richard Wiley describing Scalia as "one of this nation's all-time greatest justices").

[7] Steven G. Calabresi, *Scalia Towered over John Marshall*, USA TODAY (Feb. 14, 2016), http://www.usatoday.com/story/opinion/2016/02/13/scalia-text-legacy-clerk-steven-calabresi-column/80349810/; *see also* Steven G. Calabresi, *The Unknown Achievements of Justice Scalia*, 39 HARV. J.L. & PUB. POL'Y 575, 575 (2016) ("Scalia was the greatest Justice ever to sit on the Supreme Court . . . .").

[8] For example, Justice Scalia demonstrated a witty use of satire in *PGA Tour, Inc. v. Martin*:

> It has been rendered the solemn duty of the Supreme Court of the United States . . . to decide What Is Golf. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot *really* a golfer?

532 U.S. 661, 700 (2001) (Scalia, J., dissenting). His way with words is also on display, with a much more serious tone, in the famous Establishment Clause case of *Lee v. Weisman*:

> I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays . . . has come to "requir[e] scrutiny more commonly associated with interior decorators than with the judiciary." But interior decorating is a rock-hard science compared to psychology practiced by amateurs. A few citations of "[r]esearch in psychology" that have no particular bearing upon the precise issue here . . . cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing. The Court's argument that state officials have "coerced" students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent.

505 U.S. 577, 636 (1992) (Scalia, J., dissenting) (citations omitted) (quoting American Jewish Congress v. Chicago, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting)).

[9] Margaret Talbot, *Supreme Confidence*, NEW YORKER (Mar. 28, 2005), http://www.newyorker.com/magazine/2005/03/28/supreme-confidence.

law students.[10] If his dissents are provocative and memorable, they will appear in law school casebooks, and if they are in the casebooks, they will be read by law students who might well decide that his views about the original meaning of the Written Constitution are persuasive.[11] This made him a Justice who wrote in the spirit of a teacher or professor of constitutional law, and in the long run, this pedagogical function will likely stand as his most significant achievement.

Although some credibly believe that his greatest contributions to the law are in the area of statutory construction and the merits of textualism over legislative history,[12] for me, Justice Scalia's most important legacy is his work on originalism versus the Living Constitution and his persuasive conclusion that originalism is the "lesser evil."[13]

Together with former Attorney General Edwin Meese III and the late, great Judge Robert H. Bork, Justice Scalia was, in his own words, one of "a small hearty minority who believe in a philosophy called originalism"[14] as an essential component of "a government of laws and not of men."[15] To Justice Scalia, the text of the Written Constitution is law, and the duty of the Court is to interpret the constitutional text based upon its original meaning.[16] The so-called Living Constitution is not law but rather clay in the hands of Justices who shape it to mean whatever they believe it "*ought* to mean."[17]

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[10] Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), http://nymag.com/news/features/antonin-scalia-2013-10/.

[11] A few months before his death, Justice Scalia told students at St. Thomas School of Law that he writes his dissents "for you guys." He continued: "If I write it I know it will be in the casebook, because the professors need something to talk about." His hope was that by writing colorful dissents that are must reading, he may be able to persuade future generations of law students about "what he believed to be true principles of law." Michael Stokes Paulsen, *Scalia at St. Thomas: Closing Arguments*, PUB. DISCOURSE (Feb. 18, 2016), http://www.thepublicdiscourse.com/2016/02/16501/.

[12] *See* Robert Post, *Justice for Scalia*, N.Y. REV. OF BOOKS (June 11, 1998), http://www.nybooks.com/articles/1998/06/11/justice-for-scalia/ (referencing a study on the recent drop in Supreme Court cases that use statutory construction, and stating: "Scalia's relentless campaign against the use of legislative history, and his refusal to join opinions interpreting statutes by referring to that history, have been astonishingly effective.").

[13] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 862–63 (1989).

[14] Talbot, *supra* note 9.

[15] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (1997).

[16] *See* Howard Slugh, *Antonin Scalia, the Forward-Looking Justice*, NAT'L REV. (Feb. 23, 2016), http://www.nationalreview.com/article/431795/antonin-scalia-originalism-why-critics-are-wrong (explaining Scalia's belief that the Supreme Court must follow the Constitution's original meaning to uphold the balance of power between our governmental branches).

[17] SCALIA, *supra* note 15, at 39.

The purpose of this Article is to focus on the part of Justice Scalia's incredible legacy that concerns the so-called "Great Debate" in constitutional law between originalism and the Living Constitution.[18] I will focus particularly on Justice Scalia's argument that the Living Constitution is the greater evil because it substitutes the rule of unelected judges for the rule of law.

Importantly, Scalia's vision of original understanding originalism is not a vacuous call for total judicial disengagement. Rather, Scalia believed, quite simply, that the Written Constitution "says what it says and doesn't say what it doesn't say."[19] When the Constitution speaks, it is the duty of the Court to practice judicial engagement and apply the Constitution's precepts to decide cases governed by its original meaning.[20] When the Constitution is silent, however, it is the duty of the Court to practice judicial restraint and permit Congress and state legislatures to make laws within their respective powers.[21] In other words, the Court's job is to apply the Constitution, not to write the Constitution.

This is the remarkable legacy left behind by a giant of the law. So, saddle up your horses, and let's go for a ride down some of the paths Justice Scalia has blazed.

I. JUSTICE SCALIA'S ORIGINAL MEANING ORIGINALISM VS. THE LIVING CONSTITUTION

> I have never heard of a law that attempted to restrict one's "right to define" certain concepts; and if the passage calls into question the

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[18] *See infra* note 23.

[19] In a 2014 speech entitled "Interpreting the Constitution: A View From the High Court," Justice Scalia said this: "The Constitution is not a living organism. It's a legal document, and it says what it says and doesn't say what it doesn't say." *Justice Scalia: 'Constitution Is Not a Living Organism'*, FOX NEWS POLITICS (March 15, 2014), http://www.foxnews.com/politics/2014/03/15/justice-scalia-constitution-is-not-living-organism.html; *see also* Antonin Scalia, *Constitutional Interpretation*, at 18:38, C-SPAN (Mar. 14, 2005), https://www.c-span.org/video/?185883-1/constitutional-interpretation&start=1073.

[20] MICHAEL STOKES PAULSEN & LUKE PAULSEN, THE CONSTITUTION: AN INTRODUCTION 26 (2015) ("The rights of the people are written down, and government is bound to honor and enforce those rights in strict accordance with what was written. Actions of government that infringe those rights are unconstitutional and illegal . . . because the words of the Constitution are supreme."); Slugh, *supra* note 16 (explaining Scalia's view on the proper role of the Court, which is to interpret and discern the written text of the Constitution and apply it).

[21] *Cf.* Scalia, *supra* note 13, at 854 (describing how, if the Constitution did not have a fixed meaning, then it should be left entirely to the legislature—rather than the courts—to determine the content and meaning of the law through reference to modern social values).

government's power to regulate *actions based on* one's self-defined "concept of existence, etc.," it is the passage that ate the rule of law.[22]

A. The Great Debate

The "Great Debate" in constitutional law[23]—one that has raged for over 200 years and recently came to a boil in *Obergefell v. Hodges*[24]—is this: Should courts interpret the Written Constitution's text as it would have been understood by ordinary citizens alive at the time the text was adopted? Or, should they interpret the Constitution as a "living" organism, one meant to evolve to suit the changing needs and values of contemporary American society?

Originalists believe that if the Constitution must evolve to keep pace with our constantly changing world, we should seek this change through the legitimate amendment process of Article V.[25] Simply put, amendments should come from the people, not the Supreme Court.

Conversely, proponents of a Living Constitution believe that the formal amendment process is too "cumbersome" to keep the Constitution current because it is too difficult to amend the Constitution under the process set forth in Article V, and that necessity, therefore, requires the Supreme Court to amend the Constitution from the bench.[26] For example, if the duly-ratified Constitution does not give Congress sufficient power to deal with a global economy and contemporary social issues such as same-

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[22] Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (emphasis in original).

[23] I am referring to the great debate between Justice Chase and Justice Iredell that took place in 1798 in *Calder v. Bull*, regarding the question of whether judges should impose their own interpretation of natural justice when reviewing legislative enactments or simply apply the fixed principles of the Constitution. *Compare* Calder v. Bull, 3 U.S. (3 Dall.) 386, 387–88 (1798) (opinion of Chase, J.) (arguing that judges have the right to impose their own interpretation of natural justice), *with id.* at 398–99 (opinion of Iredell, J.) (arguing that judges have no such right, and can only determine the validity of a law by judging whether it is within the power delegated to the legislature by the Constitution).

[24] *Compare* Obergefell v. Hodges, 135 U.S. 2584, 2598 (2015) (claiming that "[h]istory and tradition guide and discipline" the inquiry of constitutional interpretation, "but do not set its outer boundaries," and that the Constitution must be adapted to "new insight[s]" into the meaning of liberty), *with id.* at 2624 (Roberts, C.J., dissenting) (stating that this conception of the judiciary's role as a deliverer of social change is contrary to the Founder's conception of the judiciary).

[25] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 18 (5th ed. 2015). *See generally* U.S. CONST. art. V (delineating how the Constitution is to be amended).

[26] *See* CHEMERINSKY, *supra* note 25, at 24 (stating that the "cumbersome amendment process" makes it too difficult for we the people to amend the Constitution and thus judicial amendments are "necessary if the Constitution is to meet the needs of a changing society"). David Strauss also argues that we need a Living Constitution created by the Court because "the world has changed in incalculable ways" and "it is just not realistic to expect the cumbersome amendment process to keep up with these changes." STRAUSS, *supra* note 2, at 1–2.

sex marriage, then it is the duty of the Court to recognize that the Constitution has somehow evolved to meet our ever-changing political needs.[27] After all, why should contemporary Americans be encumbered with the views and philosophies of long-dead white males who had no understanding of the needs and values of America in 2016?[28] And, as Justice Brennan liked to say, there are so many "majestic generalities and ennobling pronouncements"[29] in the Constitution—due process, equal protection, privileges and immunities—and these "luminous and obscure" terms make it so easy to interpret the Constitution to mean whatever the Court wants it to mean while still claiming faithfulness to the written text.[30]

B. Justice Scalia's Originalism

The Living Constitution is not the supreme law of the land. Rather, "*this* Constitution," the Written Constitution as duly ratified by we the people in the several states from time to time, is explicitly recognized in Article VI as "the supreme Law of the Land."[31] Indeed, it was the existence of a Written Constitution, as a "paramount" and "unchangeable" law that binds and governs the courts, which allowed Chief Justice Marshall to infer the power of judicial review in *Marbury v. Madison*.[32] As Justice

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[27] CHEMERINSKY, *supra* note 25, at 24.

[28] *See* Thomas E. Baker, *Constitutional Theory in a Nutshell,* 13 WM. & MARY BILL RTS. J. 57, 73 (2004) (explaining how non-originalists reject "being ruled by dead white men"). Of course, Supreme Court Justices do not live forever, and yet their opinions under the Living Constitution "rule" us from the grave. For example, all of the Justices who decided *Roe v. Wade*, 410 U.S. 113 (1973), are now dead. *See* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 310 (Steven G. Calabresi, ed., 2007) (noting that "*Roe v. Wade* represents the dead hand of the past for us now").

[29] Justice William J. Brennan, Jr., *Speech to the Text and Teaching Symposium*, *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE, *supra* note 28, at 55, 56.

[30] *Id.* In Justice Brennan's mind, the ambiguity of these majestic generalities "calls forth interpretation, the interpretation of reader and text." *Id.* And for himself, as a modern Justice reading the text of the Constitution, Brennan explained that "the ultimate question must be: What do the words of the text mean in our time?" *Id.* at 61.

[31] U.S. CONST. art. VI, cl. 2 (emphasis added). The full clause states:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

Id.

[32] 5 U.S. (1 Cranch) 137, 177–78 (1803). The Court in *Marbury* made clear that the Constitution is a law of written rules for the government of judges interpreting it. *Id.* at 180 ("Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if [sic] it is closed upon him and cannot be inspected by him?").

Scalia observed, Chief Justice Marshall's inference depended upon the "perception that the Constitution, though it has an effect superior to other laws, is in its nature that sort of 'law' that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law."[33] Indeed, if the Constitution were not a fixed law but rather an open invitation to apply contemporary meanings and values, "what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature?"[34] Thus, the Written Constitution governs the judiciary as well as Congress and the President. Just as an act of Congress or an executive decision that violates the Constitution is unconstitutional, a judicial ruling contrary to the Constitution is also illegitimate and unconstitutional.[35]

In an important book he co-authored with Bryan A. Garner, Justice Scalia summarized his view of originalism as follows: "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now."[36] Thus, the Written Constitution is not a living organism that changes, evolves, or is self-amending. It is the product of a supermajority consensus among we the people of the several states, and only becomes law when ratified by three-fourths of the states.[37] In other words, the Constitution may only be changed when an amendment is ratified by thirty-eight of the present fifty states.[38] Since the Supremacy Clause makes the Constitution the supreme law of the land, binding Congress and all fifty state legislatures, the requirement of ratification by a supermajority ensures that democratically enacted laws will be invalidated only when there is strong consensus among the states concerning the entrenchment of new national norms.[39] This supermajority consensus ensures that regional differences about basic values and liberties are settled and compromised before new principles are

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[33] *See* Scalia, *supra* note 13, at 854.

[34] *Id.*

[35] *See* PAULSEN & PAULSEN, *supra* note 20, at 26 ("No branch of the federal government—not the Congress, not the President, not even the Supreme Court—can legitimately act in ways contrary to the words of the Constitution.").

[36] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 81 (2012) (quoting South Carolina v. United States, 199 U.S. 437, 448 (1905)).

[37] U.S. CONST. art. V.

[38] *Id.* (stating that an amendment to the Constitution shall take effect only "when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof").

[39] U.S. CONST. art. VI, cl. 2. *See* John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE, *supra* note 28, at 164, 168 (explaining how a supermajority allows the enactment of laws based on a significant consensus).

entrenched in the Constitution.[40] This process helps citizens "transcend their differences" and may even result in greater and more widespread allegiance to the Constitution and the Court.[41]

Justice Scalia once provided this pithy description of his approach to interpreting the Constitution: "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."[42] In other words, it is the objective meaning of the text that was ratified—not the subjective intentions of those who drafted the text—that governs Justice Scalia's interpretation of the Constitution. In his landmark majority opinion in *District of Columbia* v. *Heller*,[43] Justice Scalia was finally able to write his version of originalism into law:

> The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.[44]

The *Heller* opinion, using original meaning originalism to hold, for the first time, that the Second Amendment creates "an individual right to keep and bear arms,"[45] is, perhaps, Scalia's greatest achievement. But it is a 5-4 opinion[46] and may not long outlive him.[47] Thus, his lasting legacy is likely to be his entire body of work that sets forth his defense of originalism and his convincing critique of Living Constitutionalism.

C. Justice Scalia's Two Imperfect Librarians

Justice Scalia recognized that the choice between original meaning originalism and Living Constitutionalism is a search for the lesser of two evils, like being asked to choose between two librarians: one who speaks

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[40] *See* McGinnis & Rappaport, *supra* note 39, at 168 (explaining why a supermajority consensus is important and what happens if the Supreme Court establishes national norms rather than a substantial consensus).

[41] *Id.*

[42] SCALIA, *supra* note 15, at 38.

[43] 554 U.S. 570 (2008).

[44] *Id.* at 576–77 (citations omitted) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).

[45] *Id.* at 595.

[46] *Id.* at 572.

[47] *Justice Ginsburg Once Again Shares Her Intent to Overturn Heller*, NRA-ILA, (July 15, 2016), https://www.nraila.org/articles/20160715/justice-ginsburg-once-again-shares-her-intent-to-overturn-heller.

too softly and one who speaks too loudly.[48] For example, he admitted that the greatest defect of originalism "is the difficulty of applying it correctly . . . [because] it is often exceedingly difficult to plumb the original understanding of an ancient text."[49] But that simply requires hard work and serious research: something lawyers are well-equipped to do.[50]

On the other hand, the greatest defect of the Living Constitution—its total reliance on the subjective moral and philosophical preferences of nine unelected lawyers who serve on the Supreme Court[51]—is its incompatibility with the rule of law, "the very principle that legitimizes judicial review of constitutionality."[52] The Living Constitution, which evolves to mean whatever the Supreme Court thinks it ought to mean at any given time, is the rule of man, not the rule of law.[53]

Proponents of the Living Constitution have no answer to the charge of "judicial personalization of the law."[54] As Judge Bork has said, "The truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else."[55] Even when a judge purports to apply contemporary moral principles or fundamental community values to "discover" constitutional doctrine, the reality is that there are always competing moral systems and values in society, and the judge will always (or almost always) decide cases based upon his or her own moral

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[48] Scalia, *supra* note 13, at 863. Obviously, the librarian who speaks too softly, although not perfect, is the lesser evil.

[49] *Id.* at 856.

[50] As Steven Calabresi has observed, we are literally "awash in pamphlets, newspapers and books" from the Founding Era and "the most authoritative sources of all for original meaning textualists—dictionaries and grammar books from the 1780s—abound, and can easily be consulted." Steven G. Calabresi, *Introduction to* ORIGINALISM: A QUARTER-CENTURY OF DEBATE, *supra* note 28, at 1, 11.

[51] Scalia, *supra* note 13, at 852.

[52] *Id.* at 854. Judicial review is based upon the idea that "the constitution is to be considered, in court, as a paramount law." *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 177–78 (1803) (explaining how the Constitution is either foundational to our law or simply another piece of legislation)). Judge Bork similarly says that Marshall's justification for judicial review was based "on the ground that the Constitution is a written document, that it is law, that it governs courts as well as legislatures, and that its principles are those contemplated by the ratifiers and the framers who produced it." ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 28 (1990).

[53] In his dissent in *Obergefell v. Hodges*, Justice Scalia explicitly accused the majority of violating the rule of law by creating a constitutional right of same-sex marriage with complete disregard for the Constitution's original meaning, declaring: "Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court." 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting).

[54] Scalia, *supra* note 13, at 863.

[55] Robert Bork, *The Struggle Over the Role of the Court*, NAT'L REV., Sept. 17, 1982, at 1138.

preferences and values.[56] To me, as to Justice Scalia and Judge Bork, the issue is a simple one: We can either have the rule of law or the Living Constitution, but we cannot have both. The power of judicial review does not give the Court the power to write or amend the Constitution but only the power to apply the Written Constitution as ratified by the founding society.[57] The Constitution is the work of *we the people*, not *they the Court*. Like Justice Scalia's librarian who speaks too loudly, the Living Constitution should be rejected because it is the greater evil.[58]

D. Is a "Common Law" Constitution the Rule of Law or the Rule of Man?

Defenders of the Living Constitution sometimes try to argue that the Living Constitution is consistent with the rule of law because it has developed as a kind of common law system under which the "content" of constitutional law "is determined by the evolutionary process that produced it."[59] It is evolution, not creation, and therefore the Supreme Court does not act as a creator or a ruler but merely as a body of judges presiding over this "evolutionary process through the development of a body of precedents."[60] Justice Scalia begged to disagree. He once described the Living Constitution as:

> [A] body of law that . . . grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and "find" that changing law. . . . Yes, it is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures.[61]

This common law process, Justice Scalia persuasively argued, is illegitimate because the "evolution" of constitutional law begins and ends with Supreme Court decisions. "The starting point of the analysis will be Supreme Court cases, and the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how

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[56] *Id.*

[57] *See* Scalia, *supra* note 13, at 854 (explaining that, if the meaning of the constitution is not fixed, then there would be no reason why the judiciary should be entrusted with the power to discern its meaning rather than the legislature).

[58] *Id.* at 864. Originalism is the lesser evil, "the librarian who talks too softly," because it "establishes a historical criterion" for interpreting the Constitution "that is conceptually quite separate from the preferences of the judge himself." *Id.*

[59] STRAUSS, *supra* note 2, at 38.

[60] *Id.*

[61] SCALIA, *supra* note 15, at 38.

far that logic, thus extended, has distanced us from the original text and understanding."[62]

Thus, a constitutional right to abortion may "evolve" like so: On day one, the Court creates a new right for parents to direct the education and upbringing of their children by choosing to send them to private rather than public schools.[63] On day two, the Court reasons that if parents have a right to direct the education of their children, then surely they must also have the right to decide whether to conceive children in the first place; thus, first married couples,[64] and then all individuals[65] have the right to use contraceptives. Finally, on day three, the Court cites the Day One and Day Two precedents as creating a "right of privacy" that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[66] Like Tinker to Evers to Chance,[67] the Court went from one decision to another and yet another to create a right to abortion-on-demand in a Constitution that says not one word about parental rights, or contraception, or abortion, or privacy.[68]

Moreover, this judge-made abortion amendment became part of constitutional law without any ratification by we the people in the several states. Indeed, one may well ask whether there was ever a time in American history when the abortion right created by the Supreme Court in *Roe* v. *Wade* could have been ratified by three-fourths of the several states as required by Article V.[69] It seems unimaginable that thirty-eight

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[62] *Id.* at 39. Moreover, if today's Court disagrees with yesterday's decisions, it "will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to mean." *Id.* (emphasis in original).

[63] *See* Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) (discussing the parents' right to teach children a foreign language); *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (discussing parents' right to direct the education and upbringing of their children by enrolling them in nonpublic schools).

[64] Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (discussing the right of married couples to use contraceptives).

[65] Eisenstadt v. Baird, 405 U.S. 438, 452–53 (1972) (discussing the right of an individual, whether married or single, to use contraceptives).

[66] Roe v. Wade, 410 U.S. 113, 152–53 (1973).

[67] "Tinker to Evers to Chance" is a reference to a line from *Baseball's Sad Lexicon*, a baseball poem written by Franklin Pierce Adams and referring to the 1910 Chicago Cubs infield of shortstop Joe Tinker, second baseman Johnny Evers, and first baseman Frank Chance. Thus, a double play on a ball hit to the shortstop would go from Tinker to Evers to Chance. *See* Tom Singer, *Power of Poem Immortalizes Cubs Trio*, MLB.COM (2008), http://m.mlb.com/news/article/3000452.

[68] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 951–53 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (citing Bowers v. Hardwick, 478 U.S. 186, 194 (1986)).

[69] This was certainly not the case in 1973 when *Roe v. Wade* was decided; at that time, all but four states had laws prohibiting abortions in most cases, and thirty-three states prohibited it nearly entirely. Sarah Kliff, *CHARTS: How Roe v. Wade Changed Abortion*

states would ratify an amendment proposing the Court's abortion doctrine. And yet, all it took for such a right to be grafted on to the living common law constitution was for the Court to decide that such a right ought to exist. This is not the rule of law; it is "judicial despotism."[70]

Professor David A. Strauss believes that a common law approach to changing the Constitution is legitimate because "the common law has been around for centuries"[71] and because it is better to be ruled by contemporary legal elites than by "[t]he will of the people who lived so long ago."[72] But the ancient common law of property, torts, and contracts that first-year law students study in every law school in the country, unlike the Living Constitution's judicial decrees amending the Written Constitution, does not give courts the power to strike down acts of Congress and the laws of all fifty states.[73] Ordinary common law rules can be changed or even abolished by ordinary acts of legislatures.[74] I spend half of my course in first-year property law teaching students about all the common law rules that have been repealed or altered by state legislatures. It is this legislative supremacy over judge-made law that renders the ordinary common law compatible with the rule of law.[75] Judges make rules to decide cases that come before them, but the legislature always has the last word. At the end of the day, free men and women should prefer democratic self-governance by means of legislative enactments over subjective rule by the decrees of an unelected body of lawyers. The former is the rule of law; the latter is the rule of man.

E. "Constitutional Law" vs. "This Constitution": The Latter is Supreme, the Former is Not

There is a crucial distinction between the Written Constitution and what we call "constitutional law."[76] The Written Constitution of 1789, as

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Rights, WASH. POST (Jan. 22, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/01/22/charts-how-roe-v-wade-changed-abortion-rights/.

[70] BORK, *supra* note 52, at 41.

[71] STRAUSS, *supra* note 2, at 43.

[72] *Id.* at 49.

[73] Baker, *supra* note 28, at 66.

[74] Mohamad v. Palestinian Authority, 132 S. Ct. 1702, 1709 (2012) (stating that Congress "plainly can override [common law] principles").

[75] *See* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283 (1989) (explaining the subordinate role of judge-made common law to law duly enacted by the legislature).

[76] *See* Edwin Meese III, *The Law of the Constitution*, *in* ORIGINALISM: A QUARTER CENTURY OF DEBATE, *supra* note 28, at 99, 101 (explaining that the distinction is necessary to maintain a limited government).

amended from time to time under Article V,[77] is the real Constitution, the one Article VI refers to when it declares that "[t]his Constitution . . . shall be the supreme Law of the Land."[78] In contrast, "constitutional law" is the case law of the Supreme Court that is decided in the name of the Constitution but often has little or nothing to do with the text or original meaning of the Written Constitution.[79]

When one looks at Supreme Court opinions decided under the Living Constitution, it becomes apparent "that what the judges have done and are continuing to do is to treat the document [the Written Constitution] as having authorized courts to create a body of constitutional law related only in the most general sense to the original understanding."[80] In other words, Judge Richard A. Posner sees constitutional law as a body of law which is "legislative in character, [with] the judges being the legislators."[81] As Judge Posner correctly observes, "[c]onstitutional law is the Supreme Court's practice of forbidding whatever a majority of the Justices consider egregious invasions of rights that those Justices think people in the United States *should have.*"[82]

Speaking at the 2015 Loyola Constitutional Law Colloquium,[83] Judge Posner explained his views about constitutional law under the Living Constitution. Basically, he said that he is "not particularly interested" in the "text of the Constitution" or in the history of the framing and ratification of the Written Constitution.[84] Remarkably, here are Judge Posner's actual words as transcribed:

> I'm not particularly interested in the 18th century, nor am I particularly interested in the text of the Constitution. I don't believe that any document drafted in the 18th century can guide our behavior today. Because the people in the 18th century could not foresee any of the problems of the 21st century. . . . I think we can forget about the 18th century, much of the text. We ask with respect to contemporary constitutional issues . . . what is a sensible response.[85]

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[77] U.S. CONST. art. V.

[78] U.S. CONST. art. VI.

[79] RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 94 (2016) ("What is called 'constitutional law' is for the most part not in the Constitution itself.").

[80] *Id.* at 94–95.

[81] *Id.* at 96.

[82] *Id.* (emphasis added).

[83] Hon. Richard A. Posner, U.S. Court of Appeals for the Seventh Circuit, Address at the Loyola University Chicago School of Law Sixth Annual Constitutional Law Colloquium (Nov. 7, 2015).

[84] Josh Blackman, *Judge Posner on Judging, Birthright Citizenship, and Precedent*, JOSH BLACKMAN'S BLOG (Nov. 6, 2015), http://joshblackman.com/blog/2015/11/06/judge-posner-on-judging-birthright-citizenship-and-precedent/.

[85] *Id.*

Judge Posner went on to describe his personal, pragmatic approach, when acting as a judge deciding constitutional issues:

> I'm a pragmatist. I see judges as trying to improve things within certain bounds. There are practical restrictions on the exercise of one's moral views. There are specific laws that are deeply entrenched. Where the judges are free, their aim, my aim, is to try to improve things. My approach with judging cases is not to worry initially about doctrine, precedent, and all that stuff, but instead, try to figure out, what is a sensible solution to this problem, and then having found what I think is a sensible solution, without worrying about doctrinal details, I ask "is this blocked by some kind of authoritative precedent of the Supreme Court"? If it is not blocked, I say fine, let's go with the common sense . . . solution.[86]

Having freed themselves from the text and original meaning of the Written Constitution, non-originalists are free to write a Living Constitution that requires everything they think is good and prohibits everything they think is bad. Indeed, within weeks after Justice Scalia's sudden death earlier this year, two prominent non-originalist scholars, Dean Erwin Chemerinsky of UC Irvine School of Law and Professor Mark V. Tushnet of Harvard Law School, began dreaming about what a liberal Supreme Court could accomplish under the Living Constitution. Dean Chemerinsky's wish list included decisions by a liberal Supreme Court:

- extending abortion rights;
- upholding affirmative action programs giving racial preferences to minorities;
- overruling *Citizens United v. Federal Election Commission*[87] and its protection of corporate political speech;
- upholding broad "congressional power to regulate interstate commerce and to tax and spend for the general welfare;"
- "returning to the view that the Second Amendment protects only a right to have guns for the purpose of militia service;" and
- using the Establishment Clause "to strike down religious prayers at government functions, religious symbols on government property, and government support for religious schools."[88]

Moreover, according to Dean Chemerinsky, "[t]he possibility of five or six Democratic justices allows one to imagine"[89] what other liberal policies

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[86] *Id.*

[87] 558 U.S. 310, 319 (2010).

[88] Erwin Chemerinsky, *What if the Supreme Court Were Liberal?*, THE ATLANTIC (Apr. 6, 2016), http://www.theatlantic.com/politics/archive/2016/04/what-if-the-supreme-court-were-liberal/477018/.

[89] *Id.*

could be imposed on all 320 million Americans in the name of the Living Constitution. Of course, one man's dream is another man's nightmare.

Professor Tushnet was even more extreme than Dean Chemerinsky. Licking his lips at the prospect of a liberal Supreme Court, Professor Tushnet blogged that it is now time for liberals to abandon "defensive-crouch liberalism" and go on offense.[90] Believing mistakenly that liberal control of the Court was in reach, Tushnet said liberal constitutionalists should compile "lists of cases to be overruled at the first opportunity," to take a "hard line" approach toward the losers in the LGBT culture wars by denying them religious accommodations, and to always remember that evolving constitutional doctrine "is a way to empower our allies and weaken theirs."[91]

The Living Constitution is a weapon of ideological war when wielded by legal elites who view constitutional law as the means of imposing their views of the good life on everyone else through the supreme law of the land. Justice Scalia understood this, and it was his life's work to protect we the people from being ruled by an unelected body of lawyers with the power to shape the Constitution to mean whatever they want it to mean.[92] The Written Constitution as originally understood is law; the Living Constitution as decreed by 5-4 majorities of the Supreme Court is power.[93] As to which is better, the choice should be a simple one.

II. JUSTICE SCALIA'S DEFENSE OF ORIGINALISM FROM ITS CRITICS

> It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.[94]

Living constitutionalists attack originalism primarily on two fronts. First, they argue that originalism produces a dead and inflexible constitution, one that was created "hundreds of years ago by people who are no longer alive."[95] In the words of Justice Scalia, the argument most frequently made against originalism and "in favor of The Living Constitution is a pragmatic one: Such an evolutionary approach is necessary in order to provide the 'flexibility' that a changing society

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[90] Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016, 1:15 PM), http://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html?m=0.

[91] *Id.*

[92] *See supra* Part I.B.

[93] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) (declaring that "[t]he majority's decision is an act of will, not legal judgment.").

[94] SCALIA, *supra* note 15, at 40.

[95] STRAUSS, *supra* note 2, at 18.

requires."[96] Since the "cumbersome amendment process" makes it too difficult for we the people alive today to amend the Constitution to keep it up to date, "it is desirable to have the Constitution evolve by interpretation and not only by amendment."[97]

Second, living constitutionalists attack originalism because they believe it will not allow the Court to reach results that they believe are desirable.[98] They argue that under original meaning originalism the Constitution would not protect abortion rights, same-sex marriage, women's equality, or even racial equality and integration in public schools.[99]

The critics of originalism are wrong on both counts. The Written Constitution may not be easy to amend, but it creates a republican system of government that is designed to allow laws to be updated from time to time to take account of changing times, new technologies, and the contemporary policy preferences of we the people alive today.[100] Within the scope of its enumerated powers—powers that, while limited, give it broad and sweeping authority over interstate commerce,[101] taxing and spending,[102] declaring war,[103] and the raising and support of armed forces[104]—Congress has the power to pass any law that is required to meet the needs of changed times and circumstances.[105] Moreover, with respect to issues beyond the enumerated powers of Congress, our system of federalism allows the states reserved powers extending "to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State."[106] Indeed, when the Court constitutionalizes an issue committed to Congress or the States by the Written Constitution, it deprives the people of the most fundamental liberty of all: the liberty to

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[96] SCALIA, *supra* note 15, at 41.

[97] CHEMERINSKY, *supra* note 25, at 24.

[98] *See, e.g.*, STRAUSS, *supra* note 2, at 12–16 (discussing a number of holdings the author claims are unsupportable by an originalist theory of interpretation).

[99] *See* CHEMERINSKY, *supra* note 25, at 18, 24; STRAUSS, *supra* note 2, at 12–16 (discussing these specific outcomes the authors claim would not be constitutionally protected using an originalist theory of interpretation).

[100] *See* SCALIA & GARNER, *supra* note 36, at 410 (discussing the flexibility of changing the Constitution via amendment or legislative action rather than by judicial activism).

[101] U.S. CONST. art. I, § 8, cl. 3.

[102] *Id.* art. I, § 8, cl. 1.

[103] *Id.* art. I, § 8, cl. 11.

[104] *Id.* art. I, § 8, cl. 12.

[105] *See* PAULSEN & PAULSEN, *supra* note 20, at 43–48, 50.

[106] THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961).

make laws through the cherished right of democratic self-government.[107] As G.K. Chesterton once said, "What is the good of telling a community that it has every liberty except the liberty to make laws? The liberty to make laws is what constitutes a free people."[108] Chesterton's observation has the ring of a deep truth. The right of democratic self-government is what separates free men and women from serfs tugging their forelocks in total obedience to the decrees of the great lords and ladies of the feudal estate (or of the Supreme Court).

The original Constitution is not dead and inflexible; rather, it creates a flexible and enduring system of democratic self-government. Justice Scalia powerfully turned the tables on the Living Constitutionalists and explained how originalism creates flexibility—not rigor mortis—and how it is the Living Constitution that is inflexible:

> [T]he notion that the advocates of the Living Constitution want to bring us flexibility and openness to change is a fraud and a delusion. All one needs for flexibility and change is a ballot box and a legislature. The advocates of the Living Constitution want to bring us what constitutions are designed to impart: rigidity and difficulty of change. The originalists' Constitution produces a flexible and adaptable political system. Do the people want the death penalty? The Constitution neither requires nor forbids it, so they can impose or abolish it, as they wish. And they can change their mind—abolishing it and then reinstituting it when the incidence of murder increases. When, however, Living Constitutionalists read a prohibition of the death penalty into the Constitution . . . all flexibility is at an end. It would thereafter be of no use debating the merits of the death penalty, just as it is of no use debating the merits of prohibiting abortion. The subject has simply been eliminated from the arena of democratic choice. And that is not, we emphasize, an accidental consequence of the Living Constitution: It is the whole purpose that this fictitious construct is designed to serve. Persuading five Justices is so much easier than persuading Congress or 50 state legislatures—and what the Justices enshrine in the

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[107] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2626–27 (2015) (Scalia, J., dissenting) (discussing the problem of allowing the courts to decide issues that the Constitution says should be left to the states or to Congress).

[108] G.K. CHESTERTON, *Mr. Bernard Shaw*, *in* HERETICS 54, 61 (1905). Justice Scalia made the same point, perhaps more colorfully, in his powerful dissent in the Court's recent same-sex marriage decision: "This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves." *Obergefell*, 135 S. Ct. at 2627 (Scalia, J., dissenting). *See also* Bork, *supra* note 55, at 1139 (making the same point).

> Constitution lasts forever. In practice, the Living Constitution would better be called the Dead Democracy.[109]

The Living Constitution is not a one-way ratchet that only creates new rights and freedoms. Rather, it is a make-it-up-as-you-go body of law that gives and takes based upon the moral and policy preferences of five members of the Supreme Court.[110] And when the Court speaks, the debate is over and the decree of the Court is embedded forever (or until the Court decides to overrule itself). As Justice Scalia has said, "the reality of the matter is that, generally speaking, devotees of the Living Constitution do not seek to facilitate social change but to prevent it."[111] The Court's job is to decree amendments to the Living Constitution, and the job of we the people is to shut up and obey.[112]

The idea of a Living Constitution being revised by the Court to keep up with changing times is nothing more than a results-oriented theory of interpretation.[113] Basically, Living Constitutionalists say that because it is too difficult to amend the Constitution under Article V to reach desirable contemporary results, then it is the duty of the Court to sit as an ongoing constitutional convention with the power to both propose and ratify constitutional revisions by a vote of at least 5-4.[114] This is the law of rulers, not the rule of law, and no results, no matter how desirable, are

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[109] SCALIA & GARNER, *supra* note 36, at 410; *see also* SCALIA, *supra* note 15, at 41–42 (discussing how judicial decisions can actually reduce, rather than increase, constitutional flexibility).

[110] *See* SCALIA, *supra* note 15, at 43 ("[T]he record of history refutes the proposition that the evolving Constitution will invariably enlarge individual rights.").

[111] *Id.* at 42.

[112] Consider the infamous "we-rule-you-shut-up-and-obey" passage on the abortion liberty from the plurality opinion of *Planned Parenthood of Southeastern Pennsylvania v. Casey* (delivered by Justices O'Connor, Kennedy, and Souter):

> Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present *whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.*

505 U.S. 833, 866–67 (1992) (plurality opinion) (emphasis added). Of course, the national division over the abortion issue is based upon the fact that the Court's abortion jurisprudence is not rooted in the Constitution, but rather is the product of the Court's subjective policy preferences about abortion versus the right to life.

[113] *See* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 943–44 (2016) (explaining the problem with results-oriented interpretation of the Constitution, but suggesting that it cannot be avoided).

[114] *See* CHEMERINSKY, *supra* note 25, at 24 (discussing the need for non-originalist revision of constitutional provisions due to the difficulty of the amendment process).

worth taking the Constitution away from we the people to whom the Constitution belongs.

Living constitutionalists also use another kind of results-based justification for allowing the Court to revise the Constitution. Non-originalists reject originalism based upon "the old canard that originalism cannot justify *Brown v. Board of Education*,[115] which struck down segregation in schools, or *Loving v. Virginia*,[116] which struck down anti-miscegenation laws."[117] Not only is this wrong, but the opposite is actually true. Originalism not only supports the racial equality rulings in *Brown* and *Loving*,[118] but only originalism can avoid holdings like that in *Plessy v. Ferguson*,[119] which upheld racial segregation in public transportation and created the Orwellian notion of "separate but equal."[120]

For example, in the *Slaughter-House Cases*,[121] in which the Supreme Court first considered the meaning of the Civil War Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments), the Court carefully considered "the history of the times"[122] and concluded that "the one pervading purpose"[123] of the Civil War Amendments was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[124] Thus, the original meaning of the equal protection explicitly guaranteed by the Fourteenth Amendment is to strike down "any action of a State" resulting in "discrimination against the negroes as a class, or on account of their race."[125] Thus, any state action involving racial discrimination or racial segregation, whether in public transportation, or

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[115] 347 U.S. 483, 495 (1954).

[116] 388 U.S. 1, 12 (1967).

[117] ORIGINALISM: A QUARTER-CENTURY OF DEBATE, *supra* note 28, at 34.

[118] *See* SCALIA & GARNER, *supra* note 36, at 87–88 (discussing how the Court did not need to rely on the changing times in its reasoning because the original meaning of the Thirteenth and Fourteenth Amendments supports the holding in *Brown v. Board of Education*).

[119] 163 U.S. 537, 544 (1896).

[120] *Id.* at 552 (Harlan J., dissenting).

[121] 83 U.S. (16 Wall.) 36, 66–67 (1873); *id.* at 125, 128 (Swayne J., dissenting) (indicating that the Thirteenth, Fourteenth, and Fifteenth Amendments were products of the Civil War).

[122] *Id.* at 67 (majority opinion).

[123] *Id.* at 71.

[124] *Id.*

[125] *Id.* at 81 ("The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this [equal protection] clause, and by it such laws are forbidden.").

public schools, or marriage, violates the original meaning of the Fourteenth Amendment.[126]

Of course, some results that liberal elites love, such as the Court-created right to abortion-on-demand and the judicial re-definition of marriage to include same-sex couples, are based upon non-originalist reasoning. Originalism could *never* have reached these results.[127] Indeed, much of the attraction of the Living Constitution to legal elites and their allies is that it allows them to constitutionalize their moral and policy preferences.[128] If you like abortion and same-sex marriage, they are constitutionally protected even though the Written Constitution says nothing about abortion, or privacy, or marriage, or sexuality.[129] If you don't like the right to bear arms or property rights, they are not protected even though the Written Constitution explicitly covers them.[130] The Constitution can be whatever Living Constitutionalists want it to be. But be careful, because a constitution of clay that can be molded into the shape of your happiest dreams of the good life can just as easily morph into the form of your worst nightmares of dystopia.

The subjectivity of the Living Constitution and the oligarchic powers it gives to an unelected legal elite are, for me, the conclusive argument for rejecting this dangerous theory. Or, to put it differently: "The conclusive argument in favor of originalism is a simple one: It is the only objective standard of interpretation even competing for acceptance."[131]

The original Written Constitution creates a flexible system of government with the capacity of passing laws necessary to meet the needs and challenges of contemporary America while at the same time

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[126] *See, e.g.*, BORK, *supra* note 52, at 74–76 (discussing how the original understanding of the equal protection clause supports the holdings in desegregation cases); SCALIA & GARNER, *supra* note 36, at 87–88 (discussing how the original meaning of the Fourteenth Amendment supports the desegregation of schools and how reliance on changing times is not necessary to support such a holding); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 960–61, 1140 (1995) (discussing the strong support of the desegregation cases by the original meaning of the Fourteenth Amendment).

[127] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2627–28 (2015) (Scalia, J., dissenting) (discussing how the original meaning of the Fourteenth Amendment could not have supported a conclusion that a prohibition of same-sex marriages is unconstitutional).

[128] *See supra* Part I.C.; *see also* STRAUSS, *supra* note 2, at 37–39 (summarizing the originalist argument that going beyond the intent and original understanding of a law inherently requires personal preferences, and discussing the value of individual judges' notions of fairness and beliefs of what social policy should be).

[129] *See Obergefell*, 135 S. Ct. at 2640–41 (Alito, J., dissenting) (discussing the Constitution's silence as to same-sex marriage and the majority's opinion that it is a constitutionally protected right nonetheless).

[130] *See* U.S. CONST. amends. II, V (guaranteeing the right to bear arms and protecting private property).

[131] SCALIA & GARNER, *supra* note 36, at 89.

embedding certain liberties deemed essential by a consensus of we the people in the several states who ratified them.[132] If the rule of law means anything, it means that changes in the Constitution should come from a strong consensus of the people acting pursuant to Article V, and not from a 5-4 majority of the Supreme Court acting in accordance with its subjective beliefs about what the Constitution ought to be.[133] The Constitution says what it says and it doesn't say what it doesn't say. Those are the only results permitted by the rule of law. Justice Scalia believed that originalism was a lesser evil because it rejects the rule of man in favor of the rule of law.[134] And that is where I stand as well.

III. JUSTICE SCALIA'S DISSENT IN *OBERGEFELL* AND THE RULE OF LAW: "JUST WHO DO WE THINK WE ARE?"[135]

Recently, Justice Kennedy spoke at Harvard Law School and, in answer to a question from an audience member, said that under the rule of law a public official who cannot in good conscience obey a Supreme Court decision, such as its same-sex marriage decree in *Obergefell*, must either enforce the law or resign from public office.[136] This exchange was obviously a reference to Kim Davis, the Kentucky county clerk recently jailed for refusing to issue marriage licenses to same-sex couples in violation of a federal court order requiring her to do so.[137]

Rather than focus on Kim Davis and her disobedience of the Court's decree in *Obergefell*, I want to ask a different question. Is Justice Kennedy's opinion in *Obergefell* a legitimate exercise of the rule of law? In

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[132] *See id.* at 410 (discussing the flexibility of the legislative process).

[133] *See, e.g.*, *Obergefell*, 135 S. Ct. at 2622–23 (Roberts, C.J., dissenting) (discussing how the rule of law should be rooted in the objective security of formalism rather than the subjective personal beliefs of a majority of the Court).

[134] SCALIA, *supra* note 15, at 25.

[135] *Obergefell*, 135 S. Ct at 2612 (Roberts, C.J., dissenting). Justice Scalia joined this opinion "in full." *Id.* at 2626 (Scalia, J., dissenting).

[136] HarvardLawSchool, *Supreme Court Associate Justice Anthony Kennedy Visits HLS*, at 50:42, YOUTUBE (Oct. 26, 2015), https://www.youtube.com/watch?v=ZHbMPnA5n0Q. Here is the transcript of Justice Kennedy's response:

> Great respect, it seems to me, has to be given to people who resign rather than do something they think is morally wrong in order to make a point. However, the rule of law is that, as a public official, in the course of performing your legal duties, you are bound to enforce the laws.

John Riley, *Justice Kennedy: Public Officials Can't Ignore Supreme Court Rulings*, METRO WKLY. (Oct. 28, 2015), http://www.metroweekly.com/2015/10/justice-kennedy-public-officials-cant-ignore-supreme-court-rulings/.

[137] Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), http://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html.

other words, is it a valid application of the Written Constitution, or is it an illegitimate exercise of raw judicial power?

Obergefell, of course, held that same-sex couples have a fundamental right to marry under the Due Process Clause of the Fourteenth Amendment, and that therefore, "there is no lawful basis for a State to refuse to recognize" same-sex marriages.[138] Of course, in *Obergefell*, Justice Kennedy made absolutely no effort to root the right to same-sex marriage in the original meaning of the Written Constitution.[139] Instead, he relied on his "reasoned judgment" and a "new insight,"[140] on his "understanding of what freedom is and must become,"[141] and on "a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[142] Or, in the words of Chief Justice Roberts, Justice Kennedy's *Obergefell* decree is based merely on his personal belief "that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society."[143]

Justice Kennedy's majority opinion in *Obergefell* is not law; it is full of moral philosophy and bad poetry, but not a speck of constitutional law.[144] As both Chief Justice Roberts and Justice Scalia made clear in their dissenting opinions, Justice Kennedy's "judicial policymaking . . . is dangerous for the rule of law."[145] Or, in the words of Justice Scalia, Justice Kennedy's opinion constitutes a "judicial Putsch," lacks "even a thin veneer of law," and amounts to "a naked judicial claim to legislative . . . power . . . fundamentally at odds with our system of government."[146]

Although the Written Constitution is silent about homosexuality and same-sex marriage,[147] it is not silent about which level of government is entrusted with the power to define and regulate "all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State."[148] Under the Tenth Amendment, the power to define and regulate

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[138] *Obergefell*, 135 S. Ct. at 2607–08.

[139] *Id.* at 2598.

[140] *Id.*

[141] *Id.* at 2603.

[142] *Id.* at 2602.

[143] *Id.* at 2616 (Roberts, C.J., dissenting). Or to put it another way, "The majority's driving themes are that marriage is desirable and petitioners desire it." *Id.* at 2619 (Roberts, C.J., dissenting).

[144] *Id.* at 2611.

[145] *Id.* at 2622.

[146] *Id.* at 2628–29 (Scalia, J., dissenting).

[147] *See id.* at 2613 (Roberts, C.J., dissenting) (discussing the Constitution's silence as to marriage in general).

[148] THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961).

marriage is "reserved to the States respectively, or to the people."[149] Indeed, even Justice Kennedy, in his opinion in *U.S. v. Windsor*,[150] recognized that under the Constitution, "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." Moreover, as Chief Justice Roberts' principal dissent in *Obergefell* made absolutely clear: "There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way . . . as the union of a man and a woman."[151]

Chief Justice Roberts and Justice Scalia, dissenting in *Obergefell*, did not hesitate to declare the majority's decree in the case a clear violation of the rule of law. Justice Scalia joined Chief Justice Roberts' dissent in full.[152] He also wrote a separate dissent "to call attention to this Court's threat to American democracy."[153] Chief Justice Roberts' dissent brought the light, and Justice Scalia's dissent brought the thunder to Justice Kennedy's non-originalist majority opinion in *Obergefell*. Here are just a few of the points Chief Justice Roberts and Justice Scalia made:

- "[W]e have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean."[154]
- "If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can?"[155]
- "The majority's decision is an act of will, not legal judgment."[156]
- "Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges . . . . The Court's accumulation of power does

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[149] U.S. CONST. amend. X.

[150] 133 S. Ct. 2675, 2691 (2013) (quoting *In re* Burrus, 136 U.S. 586, 593–594 (1890)).

[151] *Obergefell*, 135 S. Ct. at 2614 (Roberts, C.J., dissenting).

[152] *Id.* at 2626 (Scalia, J., dissenting).

[153] *Id.*

[154] *Id.* at 2617 (Roberts, C.J., dissenting) (quoting Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 621 (1857) (Curtis, J., dissenting)).

[155] *Id.* at 2622 (Roberts, C.J., dissenting).

[156] *Id.* at 2612.

not occur in a vacuum. It comes at the expense of the people."[157]

- And finally, Justice Scalia leaves not a hint of doubt as to his view that *Obergefell* is not a legitimate part of the rule of law: "Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court."[158]

If "this" Written Constitution is not only law, but "the supreme Law of the Land," as Article VI explicitly prescribes,[159] then Justice Kennedy's lawless opinion in *Obergefell* does not follow the rule of law. As Chief Justice Roberts said so well in his dissent, if you like the results in *Obergefell*, by all means celebrate those results: "But do not celebrate the Constitution. It had nothing to do with it."[160]

If the Constitution had nothing to do with the doctrine of *Obergefell*, then the rule of law had nothing to do with it either. Here is a way to think about *Obergefell* and whether it is an activist, extra-constitutional decision by the Supreme Court. Think about this: Was there ever a time in American history when three-fourths of the States—thirty-eight of the fifty states today—would have ratified a constitutional amendment proposing to redefine marriage as decreed by the Court in *Obergefell*?

Remember, the Constitution is supposed to represent a consensus among we the people in the states, not a national democratic vote or poll and not the policy preferences of unelected judges.[161] So was there ever a time in American history when three-fourths of the states would have ratified a proposed constitutional amendment redefining marriage as including same-sex marriage? 1789? 1868 (when the Fourteenth Amendment was ratified)? 1920? 1973? 2015? Ever?

If your answer is "no, never," then that tells you something about *Obergefell* and whether it is legitimate. How can same-sex marriage be a legitimate constitutional right if we all agree it could never have been ratified as a legitimate part of the Written Constitution?

Thus, perhaps it is Justice Kennedy, not Kim Davis, who is guilty of violating the rule of law. And Justice Scalia is surely correct when he concludes that the Living Constitution is a clear and present danger to the precious right of we the people to democratic self-government in the several states.[162] As Justice Scalia said in his last great dissent: "[T]o allow

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[157] *Id.* at 2624.

[158] *Id.* at 2627 (Scalia, J., dissenting).

[159] U.S. CONST. art. VI.

[160] *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting).

[161] *See* U.S. CONST. art. V (stating that the Constitution may only be amended by the consent of three-fourths of the state legislatures).

[162] *Obergefell*, 135 S. Ct. at 2626–27 (Scalia, J., dissenting).

the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation."[163] Justice Scalia should have dropped the microphone when he published this truth about the threat of the Living Constitution to liberty and democratic self-government. His voice on the Court will be missed more than we can quantify.

CONCLUSION: JUSTICE SCALIA'S LEGACY

"When I'm dead and gone, I'll either be sublimely happy or terribly unhappy."[164]

When we talk about the passing of a great man, we ask: what was his legacy? What did he leave behind? In the smash Broadway hip-hop musical about the life and death of Alexander Hamilton, *Hamilton: An American Musical,* Hamilton, after being mortally wounded in a duel with Aaron Burr, raps about his legacy:

> Legacy. What is a legacy?
> It's planting seeds in a garden you never
> get to see.
> I wrote some notes at the beginning of a song
> someone will sing for me.
> America, you great unfinished symphony, you
> sent for me.
> You let me make a difference.
> A place where even orphan immigrants
> can leave their fingerprints and rise up.[165]

So, as we think about the legacy of Justice Scalia, what would the song of his legacy sound like? Justice Scalia, of course, believed that the Written Constitution should be interpreted based upon the original understanding, the original public meaning, of the ratified text of the Constitution, rather than a subjective and evolving meaning based upon the moral and policy preferences of "nine unelected lawyers" who happen to serve on the Supreme Court.[166] He wrote his opinions with powerful and

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[163] *Id.* at 2629.

[164] Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), http://nymag.com/news/features/antonin-scalia-2013-10/. Justice Scalia was referring to his belief in the existence of both heaven and hell. Ms. Senior seemed surprised when he said this and asked him whether he actually believed in heaven and hell, to which Scalia replied "Oh, of course I do." *Id.*

[165] LIN-MANUEL MIRANDA, *The World Was Wide Enough*, *on* HAMILTON: AN AMERICAN MUSICAL (Atlantic Recording Corp. 2015). *Hamilton* is a work of artistic genius.

[166] *Obergefell*, 135 S. Ct. at 2629 (Scalia, J., dissenting).

provocative prose so that they would survive his time on earth and be read by law students and law professors for generations to come.[167]

Like Rafael Sabatini's delightful character, Scaramouche, Justice Scalia "was born with a gift of laughter and a sense that the world was mad."[168] He was the hero of my life in the law. Like Hamilton, Justice Scalia left behind an enormous legacy of scholarship published in his brilliant, pugnacious, and often bitingly humorous judicial opinions, books, law review articles, and speeches.[169] He has slipped this mortal coil, and his absence leaves a hole in constitutional law that may never be filled. But I know where he is; he is in a place in which he is "sublimely happy," one in which "justice roll[s] on like a river, [and] righteousness like a never-failing stream!"[170]

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[167] *See supra* notes 10–11 and accompanying text.

[168] RAFAEL SABATINI, SCARAMOUCHE: A ROMANCE OF THE FRENCH REVOLUTION 1 (1976).

[169] *Compare* Joyce O. Appleby, *Foreword* to THE REVOLUTIONARY WRITINGS OF ALEXANDER HAMILTON vii, viii–x (Richard B. Vernier, ed., 2008) (discussing the skill and impact of Hamilton's writings), *with* notes 9–11 and accompanying text (discussing Justice Scalia's lasting legacy, as evidenced by his writings).

[170] *Amos* 5:24 (New International Version).

THE CONSTITUTIONALITY OF STATE LAW TRIGGERING BURDENS ON POLITICAL SPEECH AND THE CURRENT CIRCUIT SPLITS

*Randy Elf**

INTRODUCTION

Recognizing that political speech is at the "core" of what the First Amendment protects,[1] the Supreme Court has applied constitutional scrutiny and established the two-track system under which government may regulate political speech.[2]

Under "Track 1," government may under some circumstances—and subject to further inquiry[3]—trigger political-committee or political-committee-like burdens.[4]

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* Randy Elf has been a teacher, an assistant to authors and lecturers Russell and Annette Kirk, a newspaper reporter, and a law clerk to federal Judges Brevard Hand of the Southern District of Alabama and Alice Batchelder of the Sixth Circuit. He practices political-speech and election law, lives in Jamestown, New York, and dedicates this Article to the memory of Dr. Kirk (1918–1994) and Judge Hand (1924–2008). On the issues that this Article presents, Dr. Elf has written more briefs and presented more oral arguments than anyone else since *Citizens United v. FEC*, 558 U.S. 310, 366–71 (2010), which is at the epicenter of the circuit splits. *Infra* text accompanying notes 74–78, 97–106, 125–37, 255–61, 272–75. He has addressed these issues during several presentations and debates, including before chapters of the Federalist Society across the country.

1 *E.g.*, Buckley v. Valeo, 424 U.S. 1, 44–45 (1976) (per curiam).

2 In other words, require disclosure of, which differs from "ban" or otherwise "limit." *See* Yamada v. Kuramoto, 744 F. Supp. 2d 1075, 1082 & n.9 (D. Haw. 2010) (distinguishing restrictions, i.e., bans or other limits, from regulation, i.e., disclosure). *See generally* Larry Geller, *Definitive Paper on Free Speech in Campaign Spending Law Cases*, DISAPPEARED NEWS (Feb. 17, 2016), http://www.disappearednews.com/2016/02/definitive-paper-on-free-speech-in.html (recalling *Yamada* and endorsing this Article). The umbrella term "disclosure" can cover registration, recordkeeping, reporting, attributions, and disclaimers in all their forms. Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 812–16, 836 (7th Cir. 2014). *Barland* understands the difference between attributions and disclaimers. *Id.* at 815–16. By definition, an "attribution" attributes and says who *is* speaking, while a "disclaimer" disclaims and says who is *not* speaking. *Id.*

3 *See, e.g.*, *Buckley*, 424 U.S. at 74 (allowing speakers to avoid Track 1 disclosure if they show a reasonable probability it would lead to "threats, harassment, or reprisals"). *Compare Barland*, 751 F.3d at 816, 832 (striking down an attribution and disclaimer requirement), *with* Gable v. Patton, 142 F.3d 940, 944–45 (6th Cir. 1998) (upholding an attribution requirement for a political committee).

4 *See, e.g.*, *Buckley*, 424 U.S. at 63, 79 (allowing government to trigger Track 1 burdens only for "organizations" that are "under the control of a candidate" or candidates in their capacities as candidates or have "the major purpose" of "nominat[ing] or elect[ing] . . . a candidate" or candidates); *see also* McConnell v. FEC, 540 U.S. 93, 170 n.64 (2003) (quoting *Buckley,* 424 U.S. at 79), *overruled on other grounds by Citizens United*, 558 U.S. at 365–66; FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 252 n.6, 262 (1986) (following *Buckley*); Sampson v. Buescher, 625 F.3d 1247, 1249, 1251, 1261 (10th Cir. 2010)

While *Citizens United v. FEC*[5] strikes down a ban on spending for political speech, it does not change the *Buckley v. Valeo* tests, which address not a speech *ban* but instead whether government may trigger Track 1, political-committee or political-committee-like burdens when speech *occurs*.[6]

Under "Track 2,"[7] apart from whether government may trigger Track 1, political-committee(-like) burdens, government may—subject to further inquiry[8]—require attributions, disclaimers, and *non*-political-committee reporting for:

- independent expenditures properly understood,[9] and
- Federal Election Campaign Act electioneering communications.[10]

The Supreme Court has allowed government to regulate only these two types of political speech with Track 2 law.[11] If government, working

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(addressing organizations with the *Buckley* major purpose but only small-scale speech). For ballot-measure speech, see *infra* text accompanying notes 84, 150, 169.

[5] *Citizens United,* 558 U.S. at 336–66. Full United States Reports pagination to *Citizens United* was first available in early 2013. *See, e.g.*, Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 587–603 (8th Cir. 2013) (citing *Citizens United* in the United States Reports). Because this Article cites earlier opinions that cite *Citizens United* in the Supreme Court Reporter, this Article includes—when helpful for clarity—*Citizens United* cites to both the United States Reports and the Supreme Court Reporter as follows: Citizens United v. FEC, 558 U.S. 310, 130 S. Ct. 876 (2010).

[6] *Compare, e.g.*, *Citizens United*, 558 U.S. at 337–40 (describing Track 1 burdens), *with Mass. Citizens for Life*, 479 U.S. at 252 n.6, 262 (addressing when government may trigger Track 1 burdens), *and Buckley,* 424 U.S. at 63, 79 (same).

[7] The *terms* "Track 1" and "Track 2" are the author's, yet the *concepts* have been in the case law since the Supreme Court first distinguished what the author calls Track 1 law and Track 2 law in *Buckley,* 424 U.S. at 63–64.

[8] *See, e.g.*, *Citizens United*, 558 U.S. at 370 (quoting *McConnell*, 540 U.S. at 198) (allowing speakers to avoid Track 2 disclosure if they show a reasonable probability it would lead to "threats, harassment, or reprisals").

[9] *Buckley,* 424 U.S. at 63–64, 79–82; *cf.* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 354–56 (1995) (rejecting a Track 2, non-political-committee disclosure requirement for other speech). Under the Constitution, "independent expenditure" means *Buckley* express advocacy, *Buckley,* 424 U.S. at 44 & n.52, 80, that is not coordinated with a candidate, *id.* at 46–47, 78. Thus, *non*-coordinated spending for political speech that is not *Buckley* express advocacy is independent *spending* but not an independent *expenditure*. *See id.* at 44 & n.52, 80 (addressing express advocacy and thereby independent expenditures); *infra* text accompanying notes 168–71 (addressing express advocacy).

[10] *Citizens United,* 558 U.S. at 366–71. Federal Election Campaign Act electioneering communications (1) are broadcast, (2) run in the thirty days before a primary or sixty days before a general election, (3) have a clearly identified candidate in the jurisdiction, (4) are targeted to the relevant electorate, and (5) do not expressly advocate. *McConnell,* 540 U.S. at 189–94. To be a Federal Election Campaign Act electioneering communication, speech about presidential or vice-presidential candidates need not be targeted to the relevant electorate, *id.* at 189–90, yet it must meet the other criteria, *id.* at 189–94.

within Track 2, wants to regulate political speech beyond how current case law allows, government must prove the law survives scrutiny.[12]

Some law—such as state laws that *Wisconsin Right to Life, Inc. v. Barland*,[13] *Minnesota Citizens Concerned for Life, Inc. v. Swanson*,[14] and *New Mexico Youth Organized v. Herrera*[15] strike down—regulates spending for political speech only by triggering Track 1, political-committee(-like) burdens. States are free to make that choice, yet when they do, only Track 1 analysis applies.[16]

The First Amendment limits when government may trigger Track 1, political-committee(-like) burdens. This Article examines when it is constitutional for government—particularly state government—to trigger such burdens.

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[11] Indep. Inst. v. Williams, 812 F.3d 787, 791 (10th Cir. 2016) (holding that "Supreme Court precedent allows limited [Track 2] disclosure requirements for certain types of" speech); *id.* at 795 (holding that Track 2 law may reach *some* speech beyond *Buckley* express advocacy); *id.* at 793 (addressing independent expenditures properly understood); *id.* at 789–90, 794–95, 797 (addressing Federal Election Campaign Act electioneering communications in state law); Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 836–37, 841 (7th Cir. 2014) (discussing Track 2 disclosure for independent expenditures properly understood and Federal Election Campaign Act electioneering communications).

[12] *See, e.g.*, *Indep. Inst.*, 812 F.3d at 797–98 (addressing overbreadth); Ctr. for Individual Freedom, Inc. v. Tennant, 706 F.3d 270, 282–85 (4th Cir. 2013) (addressing underinclusiveness). *Citizens United* does not hold that all Federal Election Campaign Act electioneering communications, much less other forms of non-express-advocacy spending for political speech, are regulable under Track 2 now and forevermore. Instead, it rejects an as-applied challenge based on what the *Citizens United* plaintiff called the "functional equivalent of express advocacy," *Citizens United,* 558 U.S. at 368–69, the former name of the appeal-to-vote test. *Id.* at 335 (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 470 (2007) (opinion of Roberts, C.J.)). The possibility of other as-applied challenges—beyond "threats, harassment, or reprisals"—remains. *Supra* note 8; *see* Wis. Right to Life, Inc. v. FEC, 546 U.S. 410, 411–12 (2006) (per curiam) (holding that *McConnell*'s facial upholding of Federal Election Campaign Act electioneering-communication law does not foreclose as-applied challenges); Indep. Inst. v. FEC, 816 F.3d 113, 115–16 (D.C. Cir. 2016) (citing *Citizens United*, 558 U.S. at 368–69) (holding that *Citizens United* leaves the door open for future as-applied challenges and rejects "one particular as-applied challenge" and "one such as-applied challenge").

[13] *Barland,* 751 F.3d at 836–37, 841.

[14] Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 871–77 (8th Cir. 2012) (en banc).

[15] New Mexico Youth Organized v. Herrera, 611 F.3d 669, 676–79 (10th Cir. 2010).

[16] *See Barland*, 751 F.3d at 841–42 (declining to apply Track 2 analysis to Track 1 law); *accord* Coal. for Secular Gov't v. Williams, 815 F.3d 1267, 1280 n.6 (10th Cir.) (considering Track 1 law and distinguishing the Tenth Circuit's *Independence Institute* opinion, *supra* note 11, as considering "a different disclosure framework," *i.e.*, Track 2 law), *cert. denied,* 85 U.S.L.W. 3143 (2016).

I. FIRST PRINCIPLES

Political-speech laws[17] regulate speech at the heart of republican government.[18] Thus, it is useful to back up and recall the underlying principles.[19] First principles do not begin with the First Amendment.[20] Even before the First Amendment come the separation of powers[21] and the limited and enumerated powers of government.[22] Even before these principles come citizens' struggles to establish their sovereignty and restrain government's power to discourage—to put it mildly—speech criticizing government.[23] Centuries of history, including Western history,[24] are replete with ill-begotten efforts to ban, otherwise limit, or regulate political speech.[25] This is not a new problem: Moses confronted it when he said, "Let my people go," and Pharaoh was none too pleased.[26]

Yet unlike in America's mother country, where government power flows from the Crown,[27] the framers established government with the consent of the governed,[28] and government has only those powers that

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[17] These are also known as campaign-finance laws, but they reach beyond candidate or ballot-measure campaigns. *See Citizens United*, 558 U.S. at 337–40 (addressing Track 1 law); *id.* at 366–71 (addressing Track 2 law); Buckley v. Valeo, 424 U.S. 1, 63–64 (1976) (per curiam) (addressing Track 1 law and Track 2 law).

[18] *E.g., Buckley*, 424 U.S. at 14–15.

[19] *See, e.g.*, FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 481–82 (2007) (opinion of Roberts, C.J.) ("[A]s is often the case in this Court's First Amendment opinions, we have gotten this far in the analysis without quoting the Amendment itself . . . .").

[20] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[21] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 697–99 (1988) (Scalia, J., dissenting) (addressing the separation of powers).

[22] *See, e.g.*, U.S. CONST. art. I, § 8 (limiting and enumerating powers).

[23] *See, e.g.*, THE DECLARATION OF INDEPENDENCE (1776) (articulating such a struggle).

[24] *See generally* RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER (1974) (chronicling Western history).

[25] A ban is a limit of zero. Ala. Democratic Conference v. Strange, No. 11-cv-02449-JEO, at 17 (N.D. Ala. Dec. 14, 2011) (Bloomberg Law, Dockets), *vacated on other grounds*, 541 F. App'x 931, 935–37 (11th Cir. 2013).

[26] *Exodus* 8:1, 8:15 (English Standard Version).

[27] *See, e.g.*, MAGNA CARTA (1215) (addressing this power).

[28] *See, e.g.*, U.S. CONST. pmbl. ("We the People of the United States . . . do ordain and establish this Constitution for the United States of America."). *See generally* RUSSELL KIRK, THE CONSERVATIVE CONSTITUTION (1990) (discussing the Constitution).

State constitutions have similar preambles. *See, e.g.*, WIS. CONST. pmbl. ("We, the people of Wisconsin, grateful to Almighty God for our freedom . . . do establish this constitution."); HAW. CONST. pmbl. ("We, the people of Hawaii, grateful for Divine Guidance . . . reaffirm our belief in a government of the people, by the people and for the people, and . . . do hereby ordain and establish this constitution for the State of Hawaii.").

the governed surrendered to it in the first place.[29] Although states "do not need [federal] constitutional authorization to act,"[30] they too have only limited and enumerated powers.[31]

The enumerated "constitutional power of Congress to regulate federal elections,"[32] and each state's parallel enumerated power over its own, though not other states', elections,[33] is self-limiting. Other parts of the Constitution further constrain this limited and enumerated power.[34]

Nevertheless, even today when some people advocate political-speech laws, they appear to presume government may ban, otherwise

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With circuit-splitting results, the constitutionality under the First Amendment of Wisconsin law and Hawaii law triggering Track 1, political-committee and political-committee-like burdens is at issue in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 838–41 (7th Cir. 2014), and *Yamada v. Weaver*, 872 F. Supp. 2d 1023, 1042–45, 1047–53 (D. Haw. 2012), *aff'd in part and rev'd on other grounds sub nom. Yamada v. Snipes*, 786 F.3d 1182, 1194–1201 (9th Cir.), *cert. denied*, 136 S. Ct. 569 (2015). *Certiorari* denials carry no weight on the merits. United States v. Carver, 260 U.S. 482, 490 (1923).

[29] *See, e.g.*, NFIB v. Sebelius, 132 S. Ct. 2566, 2577–78 (2012) (addressing limited and enumerated powers). In some instances, those powers may be large. Nevertheless, they are limited and enumerated.

> Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action [that] lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. . . . Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 528–29 (1935) (footnote omitted) (citing Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934)).

Thus, courts—even federal courts with respect to state governments—start with the premise that government may do what the Constitution permits and not with the premise that government may do everything except what the Constitution forbids. *See, e.g.*, N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 281–82 (4th Cir. 2008) (applying this premise).

[30] *NFIB*, 132 S. Ct. at 2578.

[31] *See, e.g.*, *id.* at 2577 ("[T]he National Government possesses only limited powers; the States and *the people* retain the remainder.") (emphasis added).

The Supreme Court has noted that the "powers delegated by the . . . Constitution to the federal government are few and defined. Those which are to remain in the State governments [under the federal Constitution] are numerous and indefinite." United States v. Lopez, 514 U.S. 549, 552 (1995) (quoting THE FEDERALIST No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961)). However, state governments' powers are still limited and enumerated. *See, e.g.*, U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively *or to the people*.") (emphasis added); Knapp v. Schweitzer, 357 U.S. 371, 375 (1958) ("[O]ur Constitution is one of particular powers given to the National Government with the powers not so delegated reserved to the States or, *in the case of limit[s] upon both governments, to the people*.") (emphasis added), *overruled on other grounds by* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 75–77 (1964).

[32] Buckley v. Valeo, 424 U.S. 1, 13 & n.16 (1976) (per curiam).

[33] *See, e.g.*, Shelby Cty. v. Holder, 133 S. Ct. 2612, 2623 (2013) (addressing such power); *N.C. Right to Life*, 525 F.3d at 281 (same).

[34] *See, e.g.*, U.S. CONST. amends. I, V, XIV (limiting this power).

limit, or regulate political speech however it likes, unless speakers can somehow swim to some small island where they are safe from the ocean of government power.[35] In the United States, this presumption has it exactly backwards: Freedom of speech is the norm, not the exception.[36] Government's limited and enumerated power to regulate elections is an exception to the norm of freedom of speech.[37]

Furthermore, under the Fifth and Fourteenth Amendments, law regulating political speech must not be vague.[38] Indeed, when law burdens free speech, courts apply "a more stringent vagueness test" than they apply to other law.[39] Political speech is at the core of what the First Amendment protects.[40] Law "so closely touching our most precious freedoms" must be precise.[41] Vague law threatens to "trap the innocent by not providing fair warning," gives reign to "arbitrary and discriminatory application," and forces "citizens to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked."[42] Vague law "puts the speaker[s] in these circumstances wholly at the mercy of the varied understanding of [their] hearers and consequently of whatever inference may be drawn as to [the speakers']

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[35] This presumption is often subtle. *See, e.g.*, 11 C.F.R. § 114.15 (2008) (post-*Wisconsin Right to Life* regulation saying what political speech is "permissible"); *cf.* Citizens United v. FEC, 558 U.S. 310, 335 (2010) (criticizing this regulation).

[36] *See, e.g.*, *Citizens United*, 558 U.S. at 361 ("[M]ore speech, not less, is the governing rule."); *Buckley*, 424 U.S. at 14–15 (describing freedom of speech); *see also* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2828–29 (2011) (quoting *Buckley*, 424 U.S. at 14–15).

[37] *Buckley,* 424 U.S. at 13–14.

[38] *See id.* at 41–43 (addressing vagueness). In this respect, the Fifth Amendment, U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."), applies to the federal government, *see, e.g.*, A.B. Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 238–39 (1925) (understanding this point), while the Fourteenth Amendment applies to the states, U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

[39] Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982); *see also* Holder v. Humanitarian Law Project, 561 U.S. 1, 19 (2010) (quoting *Vill. of Hoffman Estates*, 455 U.S. at 499).

[40] *See, e.g.*, *Citizens United*, 558 U.S. at 329 (citing Morse v. Frederick, 551 U.S. 393, 403 (2007)) (addressing political speech); *id.* at 334 (emphasizing "the primary importance of speech itself to the integrity of the election process").

Other "speech" is *not* at the core of the First Amendment. *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 411–12, 412 nn.1–2 (2000) (Thomas, J., dissenting) (addressing lesser "speech" and collecting authorities); *see also* ACLU of Ohio Found., Inc. v. Ashbrook, 375 F.3d 484, 508 (6th Cir. 2004) (Batchelder, J., dissenting) (following *Shrink Missouri*).

[41] *Buckley,* 424 U.S. at 41 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

[42] *Id.* at 41 n.48 (ellipsis omitted) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972)).

intent and meaning. [This] blankets with uncertainty whatever may be said. It compels the speaker[s] to hedge and trim."[43] Vague law thereby "chill[s] speech: People 'of common intelligence must necessarily guess at the law's meaning and differ as to its application.' "[44]

To avoid the problems vagueness causes, law regulating political speech must also be simple and concise. "First Amendment standards must eschew the open-ended rough-and-tumble of factors, which invites complex argument in a trial court and a virtually inevitable appeal."[45] Complex laws regulating political speech are in effect prior restraints.[46] "Prolix laws chill speech for the same reason that vague laws chill speech,"[47] and "First Amendment freedoms need breathing space to survive."[48] "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . or seek declaratory rulings before discussing the most salient political issues of our day."[49]

Vague law does not "provide the kind of notice that will enable ordinary people to understand what conduct" it regulates; furthermore, "it may authorize and even encourage arbitrary and discriminatory enforcement."[50] The latter can occur when laws lack "explicit standards" for those who enforce them.[51]

Even non-vague law regulating political speech must comply with the First Amendment,[52] which guards against overbreadth.[53] What the

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[43] *Id.* at 43 (quoting Thomas v. Collins, 323 U.S. 516, 535 (1945)).

[44] *Citizens United*, 558 U.S. at 324 (brackets omitted) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)). The Supreme "Court and judges generally should adopt clear, bright-line rules that . . . you can explain to the gas station attendant as easily as to a law professor." Clarence Thomas, *Be Not Afraid*, AM. ENTER. INST. (Feb. 13, 2001), http://www.aei.org/publication/be-not-afraid.

[45] *Citizens United*, 558 U.S. at 336 (brackets and internal quotation marks omitted) (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.)).

[46] *Id.* at 335.

[47] *Id.* at 324.

[48] *Id.* at 329 (quoting *Wis. Right to Life*, 551 U.S. at 468–69 (opinion of Roberts, C.J.)).

[49] *Id.* at 324.

[50] City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

[51] Grayned v. City of Rockford, 408 U.S. 104, 108 & n.4 (1972) (collecting authorities).

[52] The Fourteenth Amendment applies the First Amendment to the states via the Due Process Clause, Gitlow v. New York, 268 U.S. 652, 666 (1925) (addressing freedom of speech and freedom of the press), or, alternatively and straightforwardly, via the Privileges or Immunities Clause, *see* McDonald v. City of Chicago, 561 U.S. 742, 805–58 (2010) (Thomas, J., concurring) (addressing the Second Amendment). *The result is the same either way.* *See id.* (reaching the same result).

[53] *See* Buckley v. Valeo, 424 U.S. 1, 80 (1976) (per curiam) (referring to "impermissibly broad" law). "Overbreadth" applies to both as-applied and facial claims.

Supreme Court has held regarding the Second Amendment also pertains to the First:

> The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrongheaded views. . . . [T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table."[54]

This Article now turns to how the First Amendment applies to law—particularly state law—triggering Track 1 burdens. The principles of law that follow apply to any organization, large or small, on any side of any issue. The organization might be a club, an association, a house of worship, a group of neighbors, a union, a mom-and-pop business, or a larger business, any of which might or might not be incorporated, and any of which might work with other similar or different organizations. These principles apply across the board, because the freedom of speech is for everyone, not just the well-heeled few who can afford to hire professionals to help them comply with law triggering Track 1 burdens.[55]

E.g., Alaska Right to Life Comm. v. Miles, 441 F.3d 773, 785 (9th Cir. 2006) (analyzing overbreadth in an as-applied challenge).

The absence of vagueness does not make law banning, otherwise limiting, or regulating political speech constitutional. *See, e.g.*, FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 479 (2007) (opinion of Roberts, C.J.) (quoting FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263 (1986)) (rejecting a contention that law is constitutional merely because it is not vague). If it did, government could ban all political speech and then fend off a constitutional challenge by saying the law is not vague. While this may seem obvious, the Federal Election Commission, in briefs authored not by FEC counsel but by the solicitor general's office, unsuccessfully tried a similar tactic in *Wisconsin Right to Life* by asserting the Federal Election Campaign Act's electioneering-communication ban, 52 U.S.C. § 30118(a), (b)(2) (Supp. II 2015), was constitutional, because it was not vague. *See, e.g.*, Brief for Appellant Federal Election Commission at 41, FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007) (Nos. 06-969 & 06-970), http://fec.gov/law/litigation/wrtl_sc06_fec_brief.pdf (taking this position); Brief for Appellee Federal Election Commission at 10, 27–28, 34, Wis. Right to Life, Inc. v. FEC, 546 U.S. 410 (2006) (No. 04-1581), http://fec.gov/pages/bcra/wrtl_sc_appellee_brief.pdf (same).

[54] District of Columbia v. Heller, 554 U.S. 570, 634–36 (2008) (citations omitted).

[55] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 324 (2010) ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . or seek declaratory rulings before discussing the most salient political issues of our day.")

II. POLITICAL-COMMITTEE AND POLITICAL-COMMITTEE-LIKE BURDENS

Some laws inherently *ban* political speech. For example, an organization and a political committee that it *forms or has* are separate entities, so law requiring an organization to *form or have* a political committee, and letting *only* the political committee engage in political speech, inherently bans such speech by the organization itself.[56]

By contrast, some other laws do *not* inherently ban such speech by the organization itself. Nevertheless, when the organization itself engages in its speech, the organization itself must *be* a political committee[57] or a political-committee-like organization.[58] Alternatively, such laws require—or *in effect* require—a fund or account that is part of the organization to *be* a political-committee-like fund or account.[59]

Political committees, political-committee-like organizations, and political-committee-like funds or accounts "are expensive to administer

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[56] *See id.* at 337–40 (describing such law).

[57] *See Buckley*, 424 U.S. at 63 (describing such law). This is as opposed to having to *form or have* a separate political committee.

[58] Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 834 (7th Cir. 2014) (describing such an organization).

[59] *E.g.*, *id.* at 825, 839–40, 844–46 (describing such an account); Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 868–72 (8th Cir. 2012) (en banc) (describing such a fund/account); *see infra* note 92.

To be clear, such law does not require an organization to *form or have* a political committee. When an organization *forms/has* a political committee, the political committee is *separate* from the organization. *Citizens United*, 558 U.S. at 337; Cal. Med. Ass'n v. FEC, 453 U.S. 182, 196 (1981). An organization does not speak through a political committee it *forms/has;* such a political committee, not its parent organization, speaks and bears Track 1, political-committee burdens as a separate entity. *Citizens United*, 558 U.S. at 337. This *Citizens United* holding supersedes *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) (holding that organizations "speak through" their political committees), *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252 (1986) (opinion of Brennan, J.) (same), and *FEC v. Beaumont*, 539 U.S. 146, 163 (2003) (asserting an organization's political committee is an "avenue for" the organization's own "contributions"). That an organization may wholly control a political committee that it *forms/has, Beaumont*, 539 U.S. at 149, does not change the point of law that the organization and such a political committee are separate under *Citizens United*, 558 U.S. at 337.

By contrast, when an organization itself must *be* a political committee or political-committee-like organization to speak, the organization itself speaks and bears Track 1, political-committee or political-committee-like burdens. *Barland*, 751 F.3d at 812–16, 822, 825–26. The same holds when a fund or account that is part of the organization must *be* a political-committee-like fund or account. *E.g.*, *id.* at 825, 839–40, 844–46; *Minn. Citizens Concerned for Life,* 692 F.3d at 868–72.

Some courts conflate *forming/having* and *being* a political committee. *See, e.g.*, Cook v. Tom Brown Ministries, 385 S.W.3d 592, 601, 604 (Tex. Ct. App. 2012) (incorrectly holding that law banning an organization's speech and letting the organization "create its own political committee," which then speaks, does not ban the organization's speech).

and subject to extensive regulations."[60] Government may trigger far greater burdens for them than for other organizations.[61]

Being a political committee or a political-committee-like organization, and being an organization with a political-committee-like fund or account, can trigger what the Supreme Court has established are Track 1, political-committee or political-committee-like burdens:[62]

- registration (including treasurer-designation, bank-account-designation, and termination (i.e., deregistration) requirements);
- recordkeeping; and
- extensive[63] and ongoing[64] reporting, which extends beyond Supreme Court-approved Track 2, non-political-committee reporting.[65]

Such organizational and administrative burdens are "onerous" as a matter of law—not only for,[66] but "particularly" for, small organizations[67]—even when there are neither limits nor source bans on

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[60] *Citizens United*, 558 U.S. at 337; *see also Barland*, 751 F.3d at 823 (quoting *Citizens United*, 558 U.S. at 337–38); *Minn. Citizens Concerned for Life*, 692 F.3d at 872 (same).

[61] *See Citizens United*, 558 U.S. at 338 (describing such law); *Mass. Citizens for Life,* 479 U.S. at 251, 252 & n.6, 253, 254 & n.7, 255 & n.8, 256 & n.9 (opinion of Brennan, J.) (same); *Buckley*, 424 U.S. at 63 (same); *see also Barland*, 751 F.3d at 840 (quoting *Mass. Citizens for Life*, 479 U.S. at 255 (opinion of Brennan, J.)).

[62] *Citizens United*, 558 U.S. at 338; *Buckley*, 424 U.S. at 63.

[63] *See, e.g.*, *Citizens United,* 558 U.S. at 338 (describing such law); *Mass. Citizens for Life*, 479 U.S. at 253–54, 254 n.7, 255 & n.8, 256 & n.9 (opinion of Brennan, J.) (same); *Buckley*, 424 U.S. at 63 (same).

[64] *E.g.*, *Minn. Citizens Concerned for Life*, 692 F.3d at 871, 873 & n.7, 874, 875 & nn.9–10, 876–77. This is periodic reporting. *E.g.*, *Mass. Citizens for Life*, 479 U.S. at 255 (opinion of Brennan, J.).

[65] *See supra* text accompanying notes 8–12. Track 2, non-political-committee reporting includes neither registration, recordkeeping, nor extensive or ongoing reporting. *See infra* text accompanying notes 125–28.

[66] *Citizens United,* 558 U.S. at 339; *cf.* McCutcheon v. FEC, 134 S. Ct. 1434, 1448 (2014) (quoting FEC v. Nat'l Conservative PAC, 470 U.S. 480, 493 (1985)) (holding that the First Amendment applies to big players and little players); *see also Barland*, 751 F.3d at 823 (quoting *Citizens United*, 558 U.S. at 339); *Minn. Citizens Concerned for Life,* 692 F.3d at 872 (same). This is *not* a question of fact, notwithstanding *Yamada v. Snipes,* 786 F.3d 1182, 1196 (9th Cir.) (quoting Yamada v. Weaver, 872 F. Supp. 2d 1023, 1053 (D. Haw. 2012)) (distinguishing Hawaii law from the Wisconsin law struck down in *Barland,* which is a distinction without a difference because both laws trigger Track 1 burdens), *cert. denied,* 136 S. Ct. 569 (2015); *id.* at 1199 n.8 (citing Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1013–14 (9th Cir. 2010)) (disagreeing that such burdens are onerous "as a general matter," which is incorrect because such burdens *are* onerous "as a general matter").

[67] FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 477 n.9 (2007) (opinion of Roberts, C.J.) (citing *Mass. Citizens for Life,* 479 U.S. at 253–55 (opinion of Brennan, J.)); *see also Barland,* 751 F.3d at 839 (quoting *Wis. Right to Life*, 551 U.S. at 477 n.9 (opinion of

contributions received.[68] Thus, Track 1 burdens that state law imposes are "onerous,"[69] even without limits or source bans.[70]

To trigger Track 1 burdens, law need not trigger all forms of registration, recordkeeping, and reporting burdens. Even when law does not expressly require recordkeeping, one must undertake recordkeeping to comply with reporting requirements.[71] And law triggering registration and recordkeeping with extensive or ongoing reporting, but not both, still requires Track 1 analysis.[72]

Roberts, C.J.)). Many organizations would rather forgo their speech than bear such burdens. *See infra* text accompanying notes 129–34.

[68] *See, e.g.*, *Citizens United*, 558 U.S. at 338 (mentioning the Track 1 burdens of registration, recordkeeping, and extensive and ongoing reporting, but not limits or source bans on contributions received); *Buckley,* 424 U.S. at 63 (same); *Mass. Citizens for Life,* 479 U.S. at 266 (O'Connor, J., concurring) (focusing on the registration burden, or "organizational restraints"); *cf. Yamada,* 786 F.3d at 1196 (holding that neither limits nor source bans on contributions received change the analysis).

This supersedes *Alaska Right to Life Committee v. Miles,* 441 F.3d 773, 791 (9th Cir. 2006). *See* Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 597 (8th Cir. 2013) (understanding this point). Nevertheless, *Yamada* elsewhere relies on *Alaska Right to Life. Yamada,* 786 F.3d at 1196.

[69] Coal. for Secular Gov't v. Williams, 815 F.3d 1267, 1280 (10th Cir.), *cert. denied*, 85 U.S.L.W. 3143 (2016); *Minn. Citizens Concerned for Life,* 692 F.3d at 872 (quoting *Citizens United*, 558 U.S. at 339).

[70] *See, e.g.*, *Coal. for Secular Gov't*, 815 F.3d at 1270–72 (describing state law without limits or source bans on contributions received); *Barland*, 751 F.3d at 825, 839–40, 844–46 (same); *Minn. Citizens Concerned for Life*, 692 F.3d at 868–70 (same); N.M. Youth Organized v. Herrera, 611 F.3d 669, 672–73 (10th Cir. 2010) (same). These opinions do not mention source bans under 52 U.S.C. § 30118(a), (b)(2) (Supp. II 2015) (national banks/corporations), or 52 U.S.C. § 30121 (Supp. II 2015) (foreign nationals).

All political committees, including non-federal political committees, must comply with source bans on contributions received, except for contributions received from non-foreign nationals for only independent spending for political speech. *Compare, e.g.*, Texans for Free Enter. v. Tex. Ethics Comm'n, 732 F.3d 535, 537–39 (5th Cir. 2013) (addressing a source ban), *with* Bluman v. FEC, 800 F. Supp. 2d 281, 286–89 (D.D.C. 2011) (addressing foreign nationals), *aff'd*, 132 S. Ct. 1087 (2012) (mem.). A Supreme Court affirmance without opinion of a three-judge-district-court judgment affirms only the judgment, not the reasoning. Fusari v. Steinberg, 419 U.S. 379, 391 & n.* (1975) (Burger, C.J., concurring); *see also* Mandel v. Bradley, 432 U.S. 173, 176 (1977) (adopting *Fusari*).

[71] *See, e.g.*, Justice v. Hosemann, 771 F.3d 285, 288–89 (5th Cir. 2014) (addressing law with extensive and ongoing reporting burdens yet not recordkeeping burdens), *cert. denied*, 136 S. Ct. 1514 (2016). Other recent Fifth Circuit appeals are distinguishable, because organizations *accept* being political committees, *see* Joint Heirs Fellowship Church v. Akin, 629 F. App'x 627, 630 (5th Cir. 2015) ("The churches did not appeal the district court's determination that they would be deemed a political committee or that the statutory requirements that thereby apply are constitutional."), and *then* challenge particular Track 1 burdens one-by-one, *see* Catholic Leadership Coal. of Tex. v. Reisman, 764 F.3d 409, 418–19 (5th Cir. 2014) (addressing such a challenge), as others have. Let's Help Fla. v. McCrary, 621 F.2d 195, 197–98 (5th Cir. 1980), *aff'd sub nom.* Firestone v. Let's Help Fla., 454 U.S. 1130 (1982) (mem.); *see infra* text accompanying notes 236–37.

[72] Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1013 (9th Cir. 2010) (addressing extensive but not ongoing reporting). Delaware electioneering-communication

That organizations are "*capable*" of complying with law—including "complicated and burdensome" law—does not make the law constitutional.[73]

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law uses the phrase "electioneering communication," so it initially sounds like Track 2 law, *see supra* text accompanying note 10, yet it "sweeps far broader than" and "bears little resemblance to the federal [Track 2] disclosure requirements that [the Supreme] Court has considered." Del. Strong Families v. Denn, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting) (denial of certiorari). This Delaware law is *not* Track 2 law. Instead, it triggers Track 1, political-committee-like burdens: registration (including treasurer designation), DEL. CODE. ANN. tit. 15, § 8031(a)(1) (LEXIS through 80 Del. Laws, ch. 427) (citing *id.* § 8005(1)), recordkeeping, *id.* § 8031(f), and extensive but not ongoing reporting, *id.* § 8031(a)(2)-(5), (b); *see also Del. Strong Families,* 136 S. Ct. at 2376 (Thomas, J., dissenting) (discussing § 8031(a)). Nevertheless, "[p]laintiffs are masters of their complaints and remain so at the appellate stage of a litigation." Webster v. Reprod. Health Servs., 492 U.S. 490, 512 (1989) (citing Caterpillar Inc. v. Williams, 482 U.S. 386, 398–99 (1987)). In the challenge to this law, the parties addressed it as Track 2 law, not Track 1 law, and the court did as well. *See* Del. Strong Families v. Attorney Gen. of Del., 793 F.3d 304, 312–13 n.10 (3d Cir. 2015) (addressing this challenge), *cert. denied*, 136 S. Ct. 2376 (2016) (denial of certiorari after subsequent Third Circuit appeal). However, Track 1 burdens are greater than Track 2 requirements, so Track 1 analysis is more stringent than Track 2 analysis. *See Mass. Citizens for Life*, 479 U.S. at 262 (contrasting Track 1 and Track 2); *Buckley*, 424 U.S. at 63–64 (same). Applying Track 2 analysis to Track 1 law makes it *less* difficult for government to trigger Track 1 burdens; it lowers the hurdle that government must clear to trigger Track 1 burdens.

[73] *Minn. Citizens Concerned for Life*, 692 F.3d at 874; *see Coal. for Secular Gov't*, 815 F.3d at 1279 (striking down law triggering Track 1 burdens for an organization even though the organization "is better prepared to comply" than another organization). *But see, e.g.*, *Justice*, 771 F.3d at 300 (quoting Worley v. Fla. Sec'y of State, 717 F.3d 1238, 1250 (11th Cir. 2013)) (considering capability and contradicting *Buckley, Massachusetts Citizens for Life, Wisconsin Right to Life,* and *Citizens United, supra* text accompanying notes 3–12, 60–70; *infra* text accompanying notes 74–86, 131, by incorrectly finding that bearing Track 1 burdens is "what a prudent person or group would do in these circumstances"); State v. Green Mountain Future, 2013 VT 87, ¶ 37, 194 Vt. 625, 86 A.3d 981 (following *Worley*). Government's helping organizations comply with law triggering Track 1 burdens does not save "an overly burdensome regulatory framework." *Coal. for Secular Gov't*, 815 F.3d at 1279.

Sometimes wealthy organizations do not object to Track 1 burdens, *see Barland*, 751 F.3d at 827 (describing two other challenges), because they can afford to bear them. Many other organizations cannot afford to bear them. *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 477 n.9 (2007) (opinion of Roberts, C.J.) (citing *Mass. Citizens for Life*, 479 U.S. at 253–55 (opinion of Brennan, J.)) (recognizing that political committees "impose well-documented and onerous burdens, particularly on small nonprofits"); *cf.* Van Hollen v. FEC, 811 F.3d 486, 501 (D.C. Cir. 2016) (quoting Majors v. Abell, 361 F.3d 349, 357–58 (7th Cir. 2004) (Easterbrook, J., dubitante)) (addressing Track 2 law).

Indeed, where people stand on this issue may depend on where they sit. It is not necessary to question the motives or "the openness and candor of those on either side of the debate" to appreciate that it quite naturally may not occur to those who can benefit from law unconstitutionally triggering Track 1 burdens to challenge its constitutionality. Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1639 (2014) (Roberts, C.J., concurring). Those who can *benefit* from Track 1 law may quite naturally *not* be thoroughly familiar with constitutional law with which one can *challenge* Track 1 law. *Cf. infra* notes 106, 154, 156 (citing opinions overlooking such constitutional law or treating it as an afterthought). Who can benefit? Those who:

III. *BUCKLEY*: THE FIRST INQUIRY

Law need not ban or otherwise limit political speech to be unconstitutional.[74] Although "burdens" and "bans" differ, pre- and post-*Citizens United*, "the 'distinction between laws burdening and laws banning speech is but a matter of degree' and . . . the 'Government's content-based[75] burdens must satisfy the same rigorous scrutiny as its content-based bans.'[76] Lawmakers may no more silence unwanted speech

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- professionally advocate or defend such law reaching beyond Track 1 boundaries, *see infra* Part V;
- hold public office and avoid criticism when such law chills political speech;
- work for government and whose livelihoods depend to whatever extent on civilly enforcing or criminally prosecuting such law;
- work in the private sector and whose livelihoods depend to whatever extent on helping people comply with such law, and thereby avoid civil enforcement and criminal prosecution; or
- engage in political speech themselves, can afford to hire professionals to help them comply with such law, and have less competition in the marketplace of ideas, because others cannot afford such help, *see infra* text accompanying notes 129–37.

Nevertheless, those who engage or seek to engage in political speech themselves and can afford to hire such help can have standing to challenge such laws, *infra* note 130, and they have the same First Amendment rights as others, *see*, *e.g.*, Davis v. FEC, 554 U.S. 724, 741–42 (2008) (addressing a big player, holding that government may not level the playing field, and collecting authorities). *However, for the First Amendment—and the Constitution in general—to fulfill its promise, it must protect not only the big players, but also the little ones. See, e.g., Wis. Right to Life,* 551 U.S. at 477 n.9 (opinion of Roberts, C.J.) (citing *Mass. Citizens for Life,* 479 U.S. at 253–55 (opinion of Brennan, J.)) (addressing a little player and recognizing that political committees "impose well-documented and onerous burdens, particularly on small nonprofits"). After all, big players can often fend for themselves when little ones cannot. *See infra* text accompanying notes 153–57.

[74] *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2816 & n.5, 2817–18 (2011) (striking down law that does not ban or otherwise limit speech); *Buckley,* 424 U.S. at 63–64, 79–82 (same); *infra* notes 102, 130.

[75] Political-speech law is content based as a matter of law, because it depends "on the communicative content of the" speech. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227, 2230 (2015) (holding that law based on whether speech "is 'designed to influence the outcome of an election' " "is content based on its face" as a matter of law and calling this "obvious"). Such law is content based "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 2228 (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)). Moreover, "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 2230 (citing Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 537 (1980)). In addition, "the fact that a distinction is speaker based" or "event based does not render it content neutral." *Id.* at 2230–31. *Reed* thereby supersedes the *Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d 576, 601–02 (8th Cir. 2013), holding that political-speech law is not content based.

[76] The scrutiny level does not affect the result. *See infra* text accompanying notes 236–56.

by burdening its utterance than by censoring its content."[77] Thus, government "does not alleviate the First Amendment problems" with a speech ban by allowing organizations to speak while triggering Track 1 burdens for them.[78]

The First Amendment limits when government may trigger Track 1, political-committee(-like) burdens. With Track 1 burdens in mind,[79] with an understanding that group association enhances effective advocacy, particularly but not only when ideas or subjects are controversial,[80] and to counter as-applied and facial overbreadth,[81] *Buckley* allows government—subject to further inquiry[82]—to trigger Track 1 burdens only for "organizations"[83] that (a) are "under the control of a candidate" or candidates in their capacities as candidates, or (b) have "the major purpose of . . . nominat[ing] or elect[ing] . . . a candidate" or candidates or passing or defeating a ballot measure or ballot measures.[84] Neither

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[77] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2664 (2011) (citations omitted). The use of money for political speech is itself political speech. *See, e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 657 (1990) (quoting *Buckley*, 424 U.S. at 39) (holding that using money to support a candidate is speech), *overruled on other grounds by* Citizens United v. FEC, 558 U.S. 310, 365 (2010); *Buckley*, 424 U.S. at 19 & n.18 (explaining that limiting money limits speech).

[78] *Citizens United*, 558 U.S. at 337 (holding that even if allowing speech by a political committee that an organization *forms or has* allowed the organization itself to speak—"and it does not"—that would "not alleviate the First Amendment problems" with a speech ban).

[79] *See generally id.* at 338 (describing such burdens); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 253, 254 & n.7, 255 & n.8, 256 & n.9 (1986) (opinion of Brennan, J.) (same); *Buckley,* 424 U.S. at 63 (same).

[80] *See Buckley*, 424 U.S. at 15 (quoting NAACP v. Alabama, 357 U.S. 449, 460 (1958)) (recalling such a holding).

[81] Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 839 (7th Cir. 2014); *see Mass. Citizens for Life*, 479 U.S. at 252 n.6, 262 (addressing as-applied and facial overbreadth). *Buckley* does not hold that the challenged political-committee definition *itself* is vague. Instead, it holds that the included terms "contributions" and "expenditures" are vague and limits these two federal-law terms accordingly. *Buckley*, 424 U.S. at 63, 79 & n.105.

[82] *See supra* notes 3–4.

[83] Government may trigger Track 1 burdens only for organizations. *Buckley,* 424 U.S. at 63, 79. It may not trigger them for an individual, Volle v. Webster, 69 F. Supp. 2d 171, 174–77 (D. Me. 1999), or for a husband and wife, Osterberg v. Peca, 12 S.W.3d 31, 47, 48 & n.23 (Tex. 2000). Mississippi law, however, triggers Track 1, political-committee-like extensive and ongoing reporting for individuals. Justice v. Hosemann, 771 F.3d 285, 289 (5th Cir. 2014) (citing MISS. CODE ANN. §§ 23-17-51(2), 23-17-53(c)) (LEXIS through 2016 Legis. Sess.), *cert. denied*, 136 S. Ct. 1514 (2016). Mississippi also in effect triggers Track 1 recordkeeping necessary for extensive and ongoing reporting for individuals. *See supra* note 71. However, *Justice* does not addresses these issues. *Justice,* 771 F.3d at 287–300.

[84] *Buckley*, 424 U.S. at 63, 79; *see also* McConnell v. FEC, 540 U.S. 93, 170 n.64 (2003) (quoting *Buckley*, 424 U.S. at 79), *overruled on other grounds by* Citizens United v. FEC, 558 U.S. 310, 365–66 (2010); *Mass. Citizens for Life*, 479 U.S. at 252 n.6, 262 (following *Buckley*); Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) (quoting *Mass. Citizens for Life*, 479 U.S. at 252–53) (applying the test pre-

FEC v. Wisconsin Right to Life, Inc. nor *Citizens United* changes this.[85] Nor does *McCutcheon v. FEC.*[86]

The *Buckley* tests go to the tailoring part of constitutional scrutiny,[87] not the government-interest part, which *Buckley* describes

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Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990 (9th Cir. 2010), to an organization engaging in ballot-measure speech); *accord* Wis. Right to Life, Inc. v. Barland, No. 10-C-0669, at 6–7, 2015 WL 658465 (E.D. Wis. Jan. 30, 2015, as amended Feb. 13, 2015) (declaratory judgment and permanent injunction following *Barland,* 751 F.3d at 844). This is *assuming* it is constitutional to trigger Track 1 burdens based on ballot-measure speech in the first place. *Infra* note 150.

FEC v. Akins mentions, yet has no holding on, the major-purpose test. *See* FEC v. Akins, 524 U.S. 11, 26–29 (1998) (discussing the major-purpose test, addressing an FEC rule on another subject, and remanding for the FEC "to develop a more precise rule that may dispose of this case, or at a minimum, will aid the Court in reaching a more informed conclusion").

Whether organizations "are, by definition, campaign related" is *not* a test for whether government may trigger Track 1 burdens for them. *Buckley,* 424 U.S. at 79. *Contra* N.M. Youth Organized v. Herrera, 611 F.3d 669, 676 (10th Cir. 2010) (quoting *Buckley,* 424 U.S. at 79) (creating an unambiguously-campaign-related test for constitutionality of Track 1 law); N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 287–88 (4th Cir. 2008) (quoting *Buckley,* 424 U.S. at 80) (same). Besides, this phrase is vague. How is anyone to know whether some bureaucrat, some court, or worse yet some jury would conclude (*after* the fact, mind you) that an organization is, "by definition, campaign related"? *Buckley,* 424 U.S. at 79; *cf. infra* note 181 (rejecting the unambiguously-campaign-related test under Track 2).

Nevertheless, *Buckley* protects not only organizations "engag[ing] purely in issue discussion," *Buckley,* 424 U.S. at 79, but also other non-candidate-controlled/non-major-purpose organizations, including those making contributions or engaging in *Buckley* express advocacy, *e.g.*, *Iowa Right to Life,* 717 F.3d at 581; *N.C. Right to Life,* 525 F.3d at 277–78, and even including for-profit organizations. *Minn. Citizens Concerned for Life,* 692 F.3d at 867.

[85] S.C. Citizens for Life, Inc. v. Krawcheck, 759 F. Supp. 2d 708, 720 (D.S.C. 2010).

[86] McCutcheon v. FEC, 134 S. Ct. 1434, 1459–60 (2014) (addressing disclosure); *see Barland*, 751 F.3d at 840–41 (considering *McCutcheon*). *But see* Yamada v. Snipes, 786 F.3d 1182, 1197, 1200 (9th Cir.) (considering *McCutcheon*), *cert. denied*, 136 S. Ct. 569 (2015). Nor does *Williams-Yulee v. Florida Bar,* 135 S. Ct. 1656, 1666–68 (2015) (addressing a ban on judicial candidates' directly soliciting campaign contributions).

The Supreme Court has approved no other as-applied-overbreadth or facial-overbreadth test for whether government may trigger Track 1 burdens. *Supra* text accompanying notes 3–4. In political-speech law, when Supreme Court precedent establishes the norm and circuit precedent—such as Sampson v. Buescher, 625 F.3d 1247, 1249, 1251, 1261 (10th Cir. 2010)—protects additional speakers, courts consider the Supreme Court precedent first. If it does *not* protect speakers, courts *then* consider the circuit precedent. *E.g.*, *Colo. Right to Life,* 498 F.3d at 1147–49. Although *Sampson* overlooks the *Buckley* tests, *New Mexico Youth Organized* and *Colorado Right to Life* do not. *See N.M. Youth Organized*, 611 F.3d at 677–78 (addressing *Buckley*); *Colo. Right to Life*, 498 F.3d at 1153–55 (same). Being the earlier Tenth Circuit panel opinions, *New Mexico Youth Organized* and *Colorado Right to Life* control. *See* Haynes v. Williams, 88 F.3d 898, 900 n.4 (10th Cir. 1996) (establishing when earlier panel opinions control).

[87] *Barland*, 751 F.3d at 841–42; Buckley v. Valeo, 519 F.2d 821, 869 (D.C. Cir. 1975) (en banc), *aff'd in part and rev'd on other grounds*, 424 U.S. 1 (1976) (per curiam); *see Human Life of Wash.*, 624 F.3d at 1008–12 (addressing—under "Tailoring Analysis"—a

elsewhere.[88] Courts "do not [look to a government interest and] truncate this tailoring test at the outset."[89] Thus, pounding the table about the *government interest* in regulating political speech is no answer to the *tailoring* part of constitutional scrutiny.

The major-purpose test applies to state law, both when the entire organization must *be* a political committee[90] or a political-committee-like

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Human Life of Washington-created "a priority"-"incidentally" test, a watered-down substitute for the major-purpose test); *see also Yamada,* 786 F.3d at 1198–1200 (following *Human Life of Washington* and creating an "a significant participant in [the] electoral process" test for an organization that "may not make political advocacy a priority").

Similarly, what government may regulate with Track 2 attributions, disclaimers, and non-political-committee reporting, *see supra* text accompanying notes 8–12, goes to the tailoring part of constitutional scrutiny, *see, e.g.*, Indep. Inst. v. Williams, 812 F.3d 787, 792–93, 797–98 (10th Cir. 2016) (addressing overbreadth); Ctr. for Individual Freedom, Inc. v. Tennant, 706 F.3d 270, 282–85 (4th Cir. 2013) (addressing underinclusiveness), not the government-interest part. *But see, e.g.*, *Human Life of Wash.*, 624 F.3d at 1016–19 (overlooking that under tailoring, *Buckley/Citizens United* reach only independent expenditures/Federal Election Campaign Act electioneering communications, while creating an express-advocacy strawman). *But cf.* Van Hollen v. FEC, 811 F.3d 486, 501 (D.C. Cir. 2016) (addressing Track 2 law and stating incorrectly that "the Supreme Court[] treats speech . . . and transparency . . . as equivalents").

This Track 2 *Buckley/Citizens United* point, *see supra* text accompanying notes 8–12, does *not* apply when government may trigger Track 1 burdens. *Infra* note 149; *cf.* Gable v. Patton, 142 F.3d 940, 944–45 (6th Cir. 1998) (upholding an attribution requirement for a political committee). *But cf. Yamada,* 786 F.3d at 1203 (incorrectly believing the plaintiff asserts this Track 2 point applies if government *may* trigger Track 1, political-committee(-like) burdens). Other attribution/disclaimer points, however, apply both when government *may* trigger Track 1 burdens and when it may *not. See, e.g.*, *Barland*, 751 F.3d at 816, 832 (striking down an attribution and disclaimer requirement that applies to both political committees and individuals). *See generally id.* at 815–16 (understanding the difference between attributions and disclaimers).

[88] *Buckley,* 424 U.S. at 66–68.

[89] *McCutcheon*, 134 S. Ct. at 1450 (addressing another tailoring test).

[90] *E.g.*, *N.M. Youth Organized*, 611 F.3d at 677–78. Whether law is an "undue burden," Worley v. Fla. Sec'y of State, 717 F.3d 1238, 1250 (11th Cir. 2013); *see also Yamada,* 786 F.3d at 1195 (quoting *Worley,* 717 F.3d at 1250), is not the test under constitutional scrutiny, *see, e.g.*, *Worley,* 717 F.3d at 1245 (understanding this point); *see infra* note 246.

Center for Individual Freedom, Inc. v. Tennant holds, as a matter of West Virginia statutory law, that an organization is a West Virginia political committee only if its sole purpose is to engage in particular speech; an organization doing anything else is *not* a West Virginia political committee. Ctr. for Individual Freedom, Inc. v. Tennant, 849 F. Supp. 2d 659, 678–79 (S.D. W. Va. 2011). So an organization devoting ninety-nine percent of its spending to contributions or independent expenditures properly understood and one percent to charitable activity—and engaging in more than small-scale speech—would not be a West Virginia political committee. *Id.* Attempts to persuade the district court that this makes no sense were unsuccessful. *Id.* The defendants did not appeal this holding, *see* Ctr. for Individual Freedom, Inc. v. Tennant, 706 F.3d 270, 279 (4th Cir. 2013) (considering other issues), so the Fourth Circuit opinion does not address law triggering Track 1, political-committee burdens.

organization,[91] and when law requires, or in effect requires, a fund or account that is part of the organization to *be* a political-committee-like fund or account.[92]

Even if the major-purpose test were a narrowing gloss for *federal* law—as some circuit-splitting opinions assert in applying other tests to *state* law[93]—the purpose of the test would be to avoid as-applied and facial overbreadth,[94] so the test would still apply as a constitutional principle, not as a narrowing gloss,[95] to state law.[96]

In holding otherwise, *National Organization for Marriage, Inc. v. McKee* believes almost any such law not banning or otherwise limiting speech requires only "disclosure" or "transparency" and is constitutional post-*Citizens United* pages 366–71/914–16.[97] *Yamada v. Snipes* and

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[91] *Barland,* 751 F.3d at 834. The label is irrelevant. Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 875 (8th Cir. 2012) (en banc); *see also* Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 590 (8th Cir. 2013) (quoting *Minn. Citizens Concerned for Life,* 692 F.3d at 875). Government may not abrogate First Amendment rights through clever drafting or revision, and it "cannot foreclose the exercise of constitutional rights by mere labels." NAACP v. Button, 371 U.S. 415, 429 (1963); *see also* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 622 (1996) (quoting *Button,* 371 U.S. at 429).

[92] *See, e.g.*, *Barland*, 751 F.3d at 839–40, 842 (addressing such law); *Minn. Citizens Concerned for Life*, 692 F.3d at 872 (same). Many state laws use no term such as "fund" or "account." Nevertheless, they trigger Track 1 burdens for the organization but require reporting of only *particular* income and spending. Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 137 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015). They do not require reporting *all* income and spending, as federal law does. Citizens United v. FEC, 558 U.S. 310, 338 (2010). The effect of such state law is the same as if it required a fund/account for political speech: The organization in effect reports a fund/account for political speech. *See, e.g.*, *Barland*, 751 F.3d at 825, 839–40 (addressing such law); *Minn. Citizens Concerned for Life*, 692 F.3d at 868–72 (same).

[93] *E.g.*, *Vt. Right to Life*, 758 F.3d at 136.

[94] *See supra* text accompanying note 81.

[95] Unlike in federal-court challenges to *federal* law, *e.g.*, Boumediene v. Bush, 553 U.S. 723, 732, 787 (2008) (quoting INS v. St. Cyr, 533 U.S. 289, 299–300 (2001)) (holding that narrowing glosses apply in federal-court challenges to *federal* law only when they are "fairly possible"), narrowing glosses apply in federal court challenges to *state* law only when they are "reasonable and readily apparent," Colo. Right to Life Comm., Inc. v. Coffman, 498 F.3d 1137, 1154 (10th Cir. 2007) (quoting Stenberg v. Carhart, 530 U.S. 914, 944 (2000)).

[96] *See, e.g.*, *Barland*, 751 F.3d at 811, 842 (applying the test); *Minn. Citizens Concerned for Life*, 692 F.3d at 872 (applying the test and collecting authorities).

[97] *Citizens United,* 558 U.S. at 366–71, 130 S. Ct. at 914–16; Nat'l Org. for Marriage, Inc. v. McKee, 649 F.3d 34, 41, 56–59 (1st Cir. 2011); *see also* Nat'l Org. for Marriage, Inc. v. Fla. Sec'y of State, 477 F. App'x 584, 585 (11th Cir. 2012) (following *McKee*). *McKee* is also followed in *State v. Green Mountain Future*, 2013 VT 87, ¶ 22 n.5, 194 Vt. 625, 86 A.3d 981, and *National Organization for Marriage, Inc. v. Commission on Governmental Ethics and Elections Practices*, 121 A.3d 792, 801 n.10 (Me. 2015).

Vermont Right to Life Committee, Inc. v. Sorrell agree.[98] *Center for Individual Freedom v. Madigan*[99] and *Human Life of Washington, Inc. v. Brumsickle*[100]—though less averse than *McKee, Yamada,* and *Vermont Right to Life* to restraining government power—also contrast bans and other limits while asserting "disclosure" or "transparency" post-*Citizens United* pages 366–71/914–16.[101]

Notwithstanding *McKee, Yamada, Vermont Right to Life, Madigan, Human Life of Washington,* and *Iowa Right to Life Committee, Inc. v. Tooker*,[102] *Citizens United* pages 366–71/914–16 do *not* apply here, because the reporting they address and support is only Track 2, non-political-committee reporting.[103]

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[98] *See* Yamada v. Snipes, 786 F.3d 1182, 1197–98, 1200–01 (9th Cir.) (discussing disclosure, transparency, and information), *cert. denied*, 136 S. Ct. 569 (2015); *Vt. Right to Life*, 758 F.3d at 125 n.5, 132 & n.12, 135–36 (discussing disclosure).

[99] Ctr. for Individual Freedom v. Madigan, 697 F.3d 464 (7th Cir. 2012).

[100] Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990 (9th Cir. 2010).

[101] *Madigan*, 697 F.3d at 476–77, 482, 484, 488–91, 498; *Human Life of Wash.*, 624 F.3d at 994, 1005–13. *Madigan* and *Human Life of Washington* implicitly contemplate the major-purpose test only when limits and source bans on contributions received are present. *Madigan,* 697 F.3d at 488; *Human Life of Wash.*, 624 F.3d at 1013.

[102] Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 589–91 (8th Cir. 2013). Many such opinions seize on the *Citizens United* statement that "disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.' " Citizens United v. FEC, 558 U.S. 310, 366 (2010) (citations omitted); *see also, e.g., Iowa Right to Life*, 717 F.3d at 591 (purporting to follow *Citizens United*); *infra* text accompanying notes 129–31. *See generally supra* note 2 (defining "disclosure"). But law need *not* ban or otherwise limit political speech to be unconstitutional. *See supra* text accompanying note 74; *infra* notes 129–31.

Indeed, "First Amendment rights are all too often sacrificed for the sake of transparency in federal and state elections." Del. Strong Families v. Denn, 136 S. Ct. 2376, 2376 (2016) (Thomas, J., dissenting) (denial of certiorari). Government's "interest in transparency does not always trump First Amendment rights." *Id.*

[103] *E.g.*, *Citizens United*, 558 U.S. at 369 (citing FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 262 (1986)) (recalling that such Track 2 "disclosure is a less restrictive alternative to more comprehensive [Track 1] regulations of speech"); *Mass. Citizens for Life,* 479 U.S. at 262 (citing Buckley v. Valeo, 424 U.S. 1, 79 (1976) (per curiam)) (holding that the "state interest in disclosure . . . can be met in a manner less restrictive than imposing the full panoply of [Track 1] regulations that accompany status as a political committee" and that if an organization's "independent spending bec[a]me so extensive that the organization[] [had the *Buckley*] major purpose . . . , the [organization] would be classified as a political committee"); Indep. Inst. v. Williams, 812 F.3d 787, 795 & n.9 (10th Cir. 2016); Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 824, 836–37, 839, 841 (7th Cir. 2014); Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 875 n.9 (8th Cir. 2012) (en banc); *see also* Del. Strong Families v. Attorney Gen. of Del., 793 F.3d 304, 312–13 n.10 (3d Cir. 2015) (following *Barland* but incorrectly addressing Track 1 law as Track 2 law), *cert. denied*, 136 S. Ct. 2376 (2016) (denial of certiorari after subsequent Third Circuit appeal); *supra* note 72. *See infra* text accompanying notes 125–28.

Independence Institute frames this differently by applying the label "disclosure" not to both Track 1 law and Track 2 law, *contra supra* note 2 (defining "disclosure"), but only to Track 2 law, *Indep. Inst.*, 812 F.3d at 795 & n.9. Either way, *Citizens United* pages 366–

Although the major-purpose test does not apply when state law triggers "only [Track 2, non-political-committee] disclosure obligations,"[104] it does apply—even post-*Citizens United* and notwithstanding *Madigan* and *Human Life of Washington*[105]—when state law triggers "[Track 1, political-committee(-like)] disclosure obligations"—meaning one or some combination of the organizational and administrative burdens of registration, recordkeeping, and extensive and ongoing reporting, even without limits or source bans on contributions received.[106] While the Supreme Court has not applied the major-purpose test to state law,[107] it has not accepted such a case either.

71/914–16 do *not* apply here, because the reporting they address/support is only Track 2, non-political-committee reporting. *Citizens United*, 558 U.S. at 366–71, 130 S. Ct. at 914–16; *Indep. Inst.*, 812 F.3d at 795 & n.9. In other words, the label does not affect the result. Ultimately, the label is irrelevant. *Supra* note 91.

There is a flipside to the mistaken belief that *Citizens United* pages 366–71/914–16, *Citizens United,* 558 U.S. at 366–71, 130 S. Ct. at 914–16, allow government to trigger Track 1 burdens. The flipside is another mistaken belief: that the discussion of Track 1 burdens on *Citizens United* pages 337–40/897–98, *id.* at 337–40, 130 S. Ct. at 897–98; *supra* text accompanying notes 56, 60–70, applies *only* to speech bans and other limits, such as law requiring an organization to *form or have* a separate political committee and let *only* the separate political committee engage in the speech. *E.g.*, *Yamada*, 786 F.3d at 1196 n.7; *Vt. Right to Life*, 758 F.3d at 139. But these *Citizens United* pages apply not only to speech bans and other limits but also to burdens that law triggers for an organization itself when it must *be* a political committee/political-committee-like organization to speak, or when a fund/account that is part of the organization must *be* a political-committee-like fund/account. Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 840 (7th Cir. 2014); Sampson v. Buescher, 625 F.3d 1247, 1255 (10th Cir. 2010).

[104] *Madigan*, 697 F.3d at 488.

[105] Again, *Madigan* and *Human Life of Washington* implicitly contemplate the major-purpose test only when limits and source bans on contributions received are present. *Madigan,* 697 F.3d at 488; *Human Life of Wash.*, 624 F.3d at 1013.

[106] *See, e.g., Barland*, 751 F.3d at 839–40, 842 (applying the test to such law); *Minn. Citizens Concerned for Life*, 692 F.3d at 872 (same); N.M. Youth Organized v. Herrera, 611 F.3d 669, 677–78 (10th Cir. 2010) (same). *But see* King Street Patriots v. Tex. Democratic Party, 459 S.W.3d 631, 648–49 (Tex. Ct. App. 2014) (rejecting a facial challenge—not an as-applied challenge—to law triggering Track 1 burdens beyond *Buckley* and *Sampson*), *review granted,* No. 15-0320 (Tex. Sept. 23, 2016); *see also infra* Part V (discussing *Buckley* and *Sampson*).

When courts address the as-applied or facial overbreadth of law triggering Track 1 burdens, the *Buckley* tests should be either the *primary or only* thought, *supra* note 86, not an *afterthought*, as in *Madigan*, 697 F.3d at 486–91. It was an afterthought for the *Madigan* court and the *Madigan* parties, whose briefs together understandably devoted only six pages to this subject. Brief and Short Appendix of Plaintiff-Appellant Center for Individual Freedom at 39–40, *Madigan*, 697 F.3d 464 (No. 11-3693), 2012 WL 248224, at *39–40; Brief of Defendants-Appellees at 48–50, *Madigan*, 697 F.3d 464 (No. 11-3693); Reply Brief of Center for Individual Freedom at 23–24, *Madigan*, 697 F.3d 464 (No. 11-3693), 2012 WL 1226103, at *23–24. This is perhaps because some wealthy organizations understandably do not especially (have to) care about expensive Track 1 burdens. *Supra* note 73. Also, "[p]laintiffs are masters of their complaints and remain so at the appellate stage of a litigation." Webster v. Reprod. Health Servs., 492 U.S. 490, 512 (1989) (citing Caterpillar Inc. v. Williams, 482 U.S. 386, 398–99 (1987)). Nevertheless, what

Nevertheless, some circuit-splitting opinions hold the major-purpose test does not even apply to state law,[108] replace the major-purpose test with a watered-down version,[109] water it down so that it does not apply to all Track 1 burdens,[110] or otherwise water down the tailoring requirement by articulating it but not applying it to state law.[111]

Were any of these approaches correct, state governments would have more power than the federal government to trigger Track 1

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understandably does not occur to parties can be what courts need before extensively discussing this important circuit-splitting issue. When oral argument raises new issues, or when factors such as word limits prevent courts from having all the information they want or need, courts should ask for supplemental briefing, *see* Citizens United v. FEC, 557 U.S. 932 (2009) (mem.) (requesting such briefing); Plaintiffs-Appellants WRTL and WRTL-SPAC's Supplemental Brief at 14–28, *Barland*, 751 F.3d 804 (Nos. 12-2915, 12-3046, 12-3158), 2013 WL 600718, at *14–28 (providing such briefing), lest mistakes ensue, *see* N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 288 n.5 (4th Cir. 2008) (acknowledging a mistake). Regardless of *Madigan*'s result, *Madigan* would have done well not to engage in its extensive discussion without the information it needed. Without that information, *McCutcheon v. FEC* counsels against overly relying on decisions "written without the benefit of full briefing or argument on the issue." McCutcheon v. FEC, 134 S. Ct. 1434, 1447 (2014) (discussing another part of *Buckley*).

[107] *Madigan*, 697 F.3d at 488 (citing Nat'l Org. for Marriage, Inc. v. McKee, 649 F.3d 34, 59 (1st Cir. 2011)).

[108] *E.g.*, Yamada v. Snipes, 786 F.3d 1182, 1198, 1201 (9th Cir.), *cert. denied*, 136 S. Ct. 569 (2015); Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 136 (2d Cir. 2014), *cert. denied,* 135 S. Ct. 949 (2015).

Some parties and courts overlook the *Buckley* major-purpose test, or treat it as an afterthought, when organizations that might *lack* the *Buckley* major purpose challenge law triggering Track 1 burdens. *See supra* note 106; *infra* notes 154, 156.

[109] *See Human Life of Wash.*, 624 F.3d at 1011 (creating an "a priority"-"incidentally" test). *Human Life of Washington* holds government may trigger Track 1**,** political-committee(-like) burdens for organizations that have "'a' major purpose of political advocacy," but equates this with "a 'primary' purpose of political activity." *Id.* By this, *Human Life of Washington* means organizations that "make political advocacy a priority," yet not organizations "that only incidentally engage in such advocacy." *Id.*; *see also Yamada*, 786 F.3d at 1198–1200 (following *Human Life of Washington*). The *Human Life of Washington*-created "a priority"-"incidentally" test is unconstitutionally vague for two reasons: It is based on "political advocacy," *Human Life of Wash.*, 624 F.3d at 1011, so it is vague under *Buckley v. Valeo*, 424 U.S. 1, 42–43 (1976) (per curiam), and the boundary between "a priority" and "incidentally" is unclear. Another watered-down version—*Utter v. Building Industrial Association of Washington v. Washington*'s "'a' primary purpose test"—is also vague. Utter v. Bldg. Indus. Ass'n of Wash. v. Wash., 341 P.3d 953, 965–67 (Wash.) (equating "primary" with "major," which is incorrect, because what is "primary" can be the plurality rather than the majority), *cert. denied*, 136 S. Ct. 79 (2015). Yet another watered-down version—*Yamada's* "a significant participant in [the] electoral process" test for an organization that "may not make political advocacy a priority"—is also vague. *Yamada,* 786 F.3d at 1200. For another watered-down version—a we'll-know-it-when-we-see-it version—see *infra* note 144.

[110] *See* Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 593–94 (8th Cir. 2013) (not applying the major-purpose test to registration).

[111] *See Madigan*, 697 F.3d at 477–78, 490–91 (articulating the tailoring requirement but applying no tailoring analysis).

burdens. But political speech needs protection from both federal and state governments,[112] and *McDonald v. City of Chicago* rejects "watered-down" standards for state governments under the Bill of Rights.[113] "States have no greater power" than the federal government to "restrain . . . [First Amendment] freedoms."[114] Thus, the First Amendment limits when either state or federal government may trigger Track 1 burdens.

IV. REGISTRATION

Letting organizations terminate Track 1 burdens by deregistering solves nothing when law triggering them is unconstitutional in the first place.[115] Such law is still "onerous" under Supreme Court case law.[116]

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[112] *See* Am. Tradition P'ship v. Bullock, 132 S. Ct. 2490, 2491 (2012) (per curiam) (addressing state law); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778–79 (1978) (same). Supreme Court opinions on the First Amendment apply to state law even when state-government officials disagree with them. *See* Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 1307, 1308 (2012) (mem.) (Ginsburg, J., concurring) (recalling that "lower courts are bound to follow [the Supreme] Court's decision[s] until they are withdrawn or modified").

[113] McDonald v. City of Chicago, 561 U.S. 742, 765, 785–86 (2010) (opinion of Alito, J.).

[114] Wallace v. Jaffree, 472 U.S. 38, 48–49 (1985). Besides, the *anti*-major-purpose-test point about *Citizens United* pages 366–71/914–16, Citizens United v. FEC, 558 U.S. 310, 366–71, 130 S. Ct. 876, 914–16 (2010), pertains not only when the major-purpose test applies to *state* law but also when it applies to *federal* law, *supra* text accompanying notes 97–102. So if the anti-major-purpose-test opinions were right about *Citizens United* pages 366–71/914–16, *Citizens United*, 558 U.S. at 366–71, 130 S. Ct. at 914–16, then the major-purpose test also would not apply to federal law. But it *does* apply to federal law. *Supra* text accompanying notes 84–86.

[115] *See Iowa Right to Life*, 717 F.3d at 599–601 (addressing such law). *But see, e.g.*, Yamada v. Snipes, 786 F.3d 1182, 1199 (9th Cir.) (holding otherwise), *cert. denied*, 136 S. Ct. 569 (2015). *Yamada* compares registration thresholds to determine whether Hawaii law is constitutional and notes that an organization can terminate its Track 1 registration when it "reduces" its political speech to below the registration threshold. *Id.* at 1199–1200 & n.9. How nice. Just reduce your speech, *Yamada* says. *Id. Yamada* thereby contradicts Supreme Court case law, because "[i]t is no answer to say" that organizations can just "chang[e] what they say" to avoid law triggering "onerous" Track 1 burdens. McCutcheon v. FEC, 134 S. Ct. 1434, 1448–49 (2014) (addressing an aggregate-contribution limit and holding that "[i]t is no answer to say that the individual can simply contribute less money to more people"); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 477 n.9 (2007) (opinion of Roberts, C.J.) (addressing a Federal Election Campaign Act electioneering-communication ban and "disagree[ing] with the dissent's view that [organizations] can still speak by changing what they say to avoid mentioning candidates"); *supra* text accompanying notes 66–70 ("onerous").

> That argument is akin to telling Cohen that he cannot wear his jacket because he is free to wear one that says "I disagree with the draft," *cf.* Cohen v. California, 403 U.S. 15 (1971), or telling 44 Liquormart that it can advertise so long as it avoids mentioning prices, *cf.* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996). Such notions run afoul of "the fundamental rule of protection under the First Amendment, that [speakers have] the autonomy to choose the

Iowa Right to Life even holds that registration is not a Track 1 burden to which the major-purpose test necessarily applies.[117] This splits from *Buckley* and *FEC v. Massachusetts Citizens for Life, Inc.*,[118] plus all circuits applying the major-purpose test to state law.[119]

Even circuits applying tests other than the major-purpose test to state law triggering Track 1 burdens[120]—and even the superseded circuit opinion articulating the tailoring requirement but applying no tailoring analysis to law triggering Track 1 burdens[121]—apply their tests to registration.[122]

Iowa Right to Life believes *Citizens United* page 369/915 "uphold[s] a registration requirement."[123] It does not.[124]

Moreover, the reporting that *Citizens United* pages 366–71/914–16 address and support is only Track 2, non-political-committee

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content of [their] own message." Hurley v. Irish-Am[.] Gay, Lesbian [&] Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995).

Wis. Right to Life, 551 U.S. at 477 n.9 (opinion of Roberts, C.J.). "Government may not penalize [them] for 'robustly exercising' [their] First Amendment rights." *McCutcheon*, 134 S. Ct. at 1449 (brackets altered) (quoting Davis v. FEC, 554 U.S. 724, 739 (2008)).

[116] *Supra* text accompanying notes 62–70.

[117] *Iowa Right to Life*, 717 F.3d at 593–94. *Contra Citizens United*, 558 U.S. at 338 (describing registration as a Track 1 burden); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 253 (1986) (opinion of Brennan, J.) (same); Buckley v. Valeo, 424 U.S. 1, 63 (1976) (per curiam) (same).

[118] *Buckley*, 424 U.S. at 63, 79; *Mass. Citizens for Life*, 479 U.S. at 252 & n.6, 262; *see also* McConnell v. FEC, 540 U.S. 93, 170 n.64 (2003) (quoting *Buckley*, 424 U.S. at 79), *overruled on other grounds by Citizens United*, 558 U.S. at 365–66.

[119] *E.g.*, Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 839–40, 842 (7th Cir. 2014); N.M. Youth Organized v. Herrera, 611 F.3d 669, 672–73, 677–78 (10th Cir. 2010); Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 868–69, 869 n.3, 871, 873 & n.8 (8th Cir. 2012) (en banc) (discussing registration); *id.* at 872 (major-purpose test); *id.* at 877 (calling registration statute "most likely unconstitutional").

[120] *See, e.g.*, Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 137–39 (2d Cir. 2014) (applying a weak tailoring analysis without the major-purpose test), *cert. denied*, 135 S. Ct. 949 (2015); Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1011 (9th Cir. 2010) ("a priority"-"incidentally" test); *see also* Yamada v. Snipes, 786 F.3d 1182, 1198–1200 (9th Cir.) (following *Human Life of Washington* and creating an "a significant participant in [the] electoral process" test for an organization that "may not make political advocacy a priority"), *cert. denied*, 136 S. Ct. 569 (2015).

[121] *See* Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 477–78, 490–91 (7th Cir. 2012) (articulating the tailoring requirement but applying no tailoring analysis), *superseded by Barland,* 751 F.3d at 839.

[122] *E.g.*, *id.* at 486; *Yamada*, 786 F.3d at 1186, 1194–95; *Vt. Right to Life*, 758 F.3d at 137.

[123] Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 593 (8th Cir. 2013) (citing Citizens United v. FEC, 558 U.S. 310, 369 (2010)).

[124] *See Citizens United,* 558 U.S. at 366–71 (addressing no registration requirement).

reporting.[125] Track 2 reporting, as upheld for particular speech in *Buckley* and *Citizens United*,[126] includes neither registration, recordkeeping, nor extensive or ongoing reporting: Track 2 reporting occurs only for reporting periods when the particular speech occurs,[127] and the reports are less burdensome than extensive or ongoing reporting.[128]

Even when Track 2, non-political-committee reporting requirements "do not prevent anyone from speaking,"[129] Track 1 burdens are still onerous, especially—but not only[130]—when organizations reasonably

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[125] *Supra* text accompanying note 103. One appellate panel missed this explanation in the briefing. Nat'l Org. for Marriage, Inc. v. Fla. Sec'y of State, 477 F. App'x 584, 585 & n.2 (11th Cir. 2012).

[126] *See supra* text accompanying notes 8–12 (describing Track 2 attributions, disclaimers, and non-political-committee reporting); *cf. supra* text accompanying notes 60–70 (describing Track 1 burdens).

[127] This is what "one-time" and "event-driven" mean. *E.g.*, Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 824, 836, 841 (7th Cir. 2014). It is time to abandon these confusing labels and simply say what one means. It is not clear from these labels what they mean. They do not reveal that "one-time" and "event-driven" mean the same thing.

As for "one-time," some understandably think it means speakers that are not political committees file only one Track 2, non-political-committee report *ever*; others understandably think it means such speakers file one such report every *time* they engage in regulable speech. Neither is right. *See* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 262 (1986) (describing Track 2, non-political-committee reporting); Buckley v. Valeo, 424 U.S. 1, 63–64 (1976) (per curiam) (same).

As for "event-driven," it is not precise, because Track 1 reporting is also driven by events; they are just different events. *See Citizens United*, 558 U.S. at 338 (describing Track 1 burdens); *Buckley*, 424 U.S. at 63 (same).

[128] *See, e.g., Mass. Citizens for Life,* 479 U.S. at 262 ("less . . . than . . . the full panoply of" Track 1 burdens); *Buckley*, 424 U.S. at 63–64 (describing Track 2, *non*-political-committee reporting); 52 U.S.C. § 30104(c), (f)–(g) (Supp. II 2015) (same); *see also supra* text accompanying notes 60–70 (describing Track 1 burdens).

[129] *Citizens United*, 558 U.S. at 366 (quoting McConnell v. FEC, 540 U.S. 93, 201 (2003)); *supra* note 102.

[130] *Supra* text accompanying notes 66–70, 73. *Yamada v. Weaver*, 872 F. Supp. 2d 1023, 1038 (D. Haw. 2012), *aff'd in part and rev'd in part on other grounds sub nom.* Yamada v. Snipes, 786 F.3d 1182, 1187–1201 (9th Cir.), *cert. denied*, 136 S. Ct. 569 (2015), holds that the plaintiff challenging law triggering Track 1 burdens has standing, not because the law chills its speech, *cf. Citizens United,* 558 U.S. at 375 (Roberts, C.J., concurring) (addressing standing), but because it will engage in its speech and comply with the law while seeking an injunction so that compliance is no longer necessary, *see* Davis v. FEC, 554 U.S. 724, 733–35 (2008) (addressing standing). As *Yamada* demonstrates, law triggering Track 1 burdens does not inherently ban or otherwise limit speech. *See Yamada,* 872 F. Supp. 2d at 1038 (understanding this point); *supra* text accompanying notes 57–59. That, however, does not make such law constitutional. *Supra* text accompanying notes 74–77; *supra* note 102. Such law is still unconstitutional when it exceeds First Amendment boundaries for Track 1 law. *Infra* Part V. This is so regardless of whether such law, for example, chills speech (in which case the law *in effect* bans or otherwise limits speech), or whether a speaker will engage in its speech and comply with the law while seeking an injunction so that compliance is no longer necessary (in which case the law does *not* in

conclude that the speech is "simply not worth it."[131] "And who would blame them?"[132] Such "onerous" law[133] "discourages" organizations, especially "small" ones "with limited resources, from engaging in protected political speech."[134]

Such law, however, often does *not* discourage the well-heeled few from engaging in political speech triggering Track 1 burdens, because they can afford to hire professionals to help them comply with the law.[135]

When others cannot afford such help, such law often has the effect of shutting them out of—and leaving the well-heeled few with less competition in—the marketplace of ideas. Indeed, the most insidious aspect of such law is the extent to which it protects big players *at the expense of little players*. Those who advocate or defend such law beyond First Amendment boundaries[136] are in effect protecting the well-heeled few. They are in effect protecting big players at the expense of little players. While big players and little players have the same First Amendment rights,[137] big players have no right—none—to political-speech law protecting them at the expense of little players.

Thus, the First Amendment limits when government may trigger Track 1 burdens.

V. APPLYING *BUCKLEY* AND *SAMPSON*

Determining whether an organization is "under the control of a[ny] candidate[s]"[138] in their capacities as candidates is straightforward.[139]

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effect ban or otherwise limit speech). In other words, the constitutionality of law triggering Track 1 burdens does *not* turn on whether it bans or otherwise limits speech.

[131] *Mass. Citizens for Life*, 479 U.S. at 255 (opinion of Brennan, J.); *see Buckley*, 424 U.S. at 64 (recalling that the Supreme Court has "repeatedly found that compelled disclosure, in itself, can seriously infringe" First Amendment rights); *see also Barland*, 751 F.3d at 840 (quoting *Mass. Citizens for Life*, 479 U.S. at 255 (opinion of Brennan, J.)). *SpeechNow.org v. FEC* contradicts *Buckley*, *Massachusetts Citizens for Life, Wisconsin Right to Life,* and *Citizens United*, *see supra* text accompanying notes 3–12, 60–70, 74–86, by saying Track 1, political-committee burdens are not that much greater than Track 2, *non*-political-committee reporting. SpeechNow.org v. FEC, 599 F.3d 696, 690–92, 697–98 (D.C. Cir. 2010) (en banc) (making this mistake); *see also Yamada*, 796 F.3d at 1195–96 (following *SpeechNow*); Real Truth About Abortion, Inc. v. FEC, 681 F.3d 544, 558 (4th Cir. 2012) (following *SpeechNow*); Free Speech v. FEC, 720 F.3d 788, 797–98 (10th Cir. 2013) (following *Real Truth*).

[132] Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 874 (8th Cir. 2012) (en banc).

[133] *Id.* at 872–73 (quoting Citizens United v. FEC, 558 U.S. 310, 339 (2010)).

[134] *Id.* at 874 (collecting authorities); *see also* Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 589 (8th Cir. 2013) (quoting *Minn. Citizens Concerned for Life,* 692 F.3d at 874).

[135] *Supra* text accompanying note 55; *supra* note 73.

[136] *Infra* Part V.

[137] *Supra* text accompanying notes 66–67; *supra* note 73.

[138] Buckley v. Valeo, 424 U.S. 1, 79 (1976) (per curiam).

Determining whether an organization has "the major purpose" under *Buckley* is also straightforward.[140] The test asks what *the* major purpose of the organization is, not whether something is *a* major purpose.[141] And *major* is the root of *majority*, which means more than half.[142] Thus, an organization can have only one major purpose.[143] Constitutional law provides two non-vague methods[144] to determine whether an organization has the *Buckley* major purpose.[145] Method 1 considers how the organization *articulates* its mission, and Method 2 considers how the organization *carries out* its mission. An organization has the *Buckley* major purpose if the organization (1) articulates this in

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[139] *See, e.g.*, Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 838 (7th Cir. 2014) (applying the test). Without the in-their-capacities-as-candidates part of the inquiry, even a candidate's own household or business may have to be a political committee.

[140] *Buckley*, 424 U.S. at 79.

[141] *E.g.*, N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 287–89, 302–04 (4th Cir. 2008). *But see* Indep. Inst. v. Coffman, 209 P.3d 1130, 1139–40 (Colo. App. 2008) (rejecting a facial challenge—not an as-applied challenge—to "a major purpose"). *Independence Institute* cites an earlier Colorado appellate opinion for another point, *id.* at 1136, but overlooks its significance on the major-purpose test. *See* All. for Colo.'s Families v. Gilbert, 172 P.3d 964, 972–73 (Colo. App. 2007) (citing Colo. Right to Life Comm., Inc. v. Coffman, 498 F.3d 1137, 1154–55 (10th Cir. 2007)) (holding that the *Buckley* major-purpose test applies to state law).

[142] *Majority*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[143] *See* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 252 n.6 (1986) (opinion of Brennan, J.) (referring to "the major purpose" of an organization and "[i]ts central organizational purpose," not purposes).

[144] A "we'll know it when we see it approach," *N.C. Right to Life*, 525 F.3d at 290, such as the Federal Election Commission's major-purpose test, *see* Real Truth About Abortion, Inc. v. FEC, 681 F.3d 544, 556–58 (4th Cir. 2012) (not entirely following *North Carolina Right to Life* as circuit precedent); *see also* Free Speech v. FEC, 720 F.3d 788, 797–98 (10th Cir. 2013) (following *Real Truth* instead of following *Colorado Right to Life* or *New Mexico Youth Organized* as circuit precedent); Corsi v. Ohio Elections Comm'n, 2012-Ohio-4831, 981 N.E.2d 919, ¶ 24 (10th Dist.) (following *Real Truth*), is vague. It gives insufficient direction to regulators and speakers, *N.C. Right to Life,* 525 F.3d at 290, leads to burdensome discovery, FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 468 n.5, 469 (2007) (opinion of Roberts, C.J.), and really is "an administrative nightmare," Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 489 (7th Cir. 2012).

Even if the major-purpose test properly understood were "an administrative nightmare" in any respect, *id.*, that would be "of no moment; 'the First Amendment does not permit the State to sacrifice speech for efficiency.' " Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2824 (2011) (quoting Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988)). Neither the efficiency, convenience, nor usefulness of law "save[s] it if it is contrary to the Constitution." INS v. Chadha, 462 U.S. 919, 944 (1983). Other values are higher. *Id.* at 959. "With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *Id.*

[145] *Buckley*, 424 U.S. at 79.

its organizational documents or in its "public statements"[146] or (2) carries out its mission by devoting the majority of its spending to contributions to,[147] or independent expenditures properly understood for,[148] candidates[149] or ballot measures.[150]

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[146] *Mass. Citizens for Life,* 479 U.S. at 241–42, 252 n.6 (addressing organizational documents); FEC v. GOPAC, Inc., 917 F. Supp. 851, 859 (D.D.C. 1996) (addressing public statements). An organization need not use the exact words "the major purpose" to indicate in its organizational documents or in its public statements that it has the *Buckley* major purpose. As with *Buckley* express advocacy, there are no crucial, magic words. *See Buckley,* 424 U.S. at 44 n.52 (defining *Buckley* express advocacy not with crucial, magic words but with words "such as" the examples given).

[147] Contributions include direct and indirect contributions. *Buckley*, 424 U.S. at 24 n.24, 46–47, 78.

[148] That is, non-coordinated *Buckley* express advocacy. Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 834, 839, 841–42, 844 (7th Cir. 2014) (major purpose of express advocacy); *see supra* note 9; *infra* text accompanying notes 168–71. *Appeal-to-vote-test analysis is unnecessary/improper. Infra* text accompanying notes 172–92.

It can be, though often it is not, constitutional to trigger Track 1 burdens for an organization engaging in only "independent spending." *Mass. Citizens for Life,* 479 U.S. at 262. Yet whatever the importance—even the "heightened importance," Yamada v. Snipes, 786 F.3d 1182, 1201 n.11 (9th Cir.), *cert. denied,* 136 S. Ct. 569 (2015)—of triggering such burdens for organizations engaging in independent spending, it goes to the *government interest* part of constitutional scrutiny. *Id.* at 1196–97; *see id.* at 1200 (addressing the government interest). For such law to be constitutional, it must also survive the *tailoring* part of constitutional scrutiny. *See supra* text accompanying notes 87–89; *infra* text accompanying notes 155–56.

[149] *See* Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 584 (8th Cir. 2013) (quoting Colo. Right to Life Comm., Inc. v. Coffman, 498 F.3d 1137, 1152 (10th Cir. 2007)) (addressing the test); N.M. Youth Organized v. Herrera, 611 F.3d 669, 678 (10th Cir. 2010) (same); *see* N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 289 & n.6 (4th Cir. 2008) (equating primary with major, which is incorrect, because what is primary can be the plurality rather than the majority). Elsewhere, *Iowa Right to Life* incorrectly implies the test inquires after only "express advocacy," not contributions. *Iowa Right to Life,* 717 F.3d at 591. This may be because of Iowa's odd definition including "contribution[s]" in "[e]xpress advocacy." IOWA CODE § 68A.102(14)(a) (2015); *cf. Buckley,* 424 U.S. at 44 & n.52, 80 (defining express advocacy under the Constitution).

Massachusetts Citizens for Life states that "should [an organization's] independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the [organization] would be classified as a political committee." *Mass. Citizens for Life,* 479 U.S. at 262. This statement—including the nebulous "campaign activity" phrase—does not contemplate looking beyond (1) the organization's central organizational purpose, or (2) whether the organization devotes the majority of its spending to contributions or independent expenditures properly understood, to determine whether the organization has the *Buckley* major purpose. *See Colo. Right to Life,* 498 F.3d at 1152 (quoting *Mass. Citizens for Life,* 479 U.S. at 252 n.6, 262) (holding that *Massachusetts Citizens for Life* suggests "two methods to determine an organization's 'major purpose': (1) examination of the organization's central organizational purpose; or (2) comparison of the organization's independent spending with overall spending to determine whether the preponderance of [spending is] for express advocacy or contributions to candidates"); *see also Iowa Right to Life,* 717 F.3d at 584 (following *Colorado Right to Life*); *N.M. Youth Organized,* 611 F.3d at 678 (same).

Some laws trigger Track 1 burdens for an organization partly based on contributions it *receives*. However, notwithstanding *Vermont Right to Life Committee, Inc. v. Sorrell*, 758 F.3d 118, 138 (2d Cir. 2014), *cert. denied,* 135 S. Ct. 949 (2015), the test for constitutionality does not consider contributions an organization *receives*. Makes, yes. Receives, no.

Once it *is* constitutional to trigger Track 1 burdens for an organization, government may—subject to further inquiry, *supra* note 3—require disclosure of *all* income and spending by the organization, *see* Citizens United v. FEC, 558 U.S. 310, 338 (2010) (describing Track 1 burdens); *Buckley,* 424 U.S. at 63 (same), not just, for example, *Buckley* express advocacy or donations earmarked for it under *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995). *Cf. supra* text accompanying notes 8–12 (addressing Track 2 law, which is different). However, in *determining* constitutionality—*i.e.*, whether government may trigger Track 1 burdens for the organization in the first place—one applies the major-purpose test properly understood.

The *McKee/Committee for Justice and Fairness/Green Mountain Future* express-advocacy/issue-advocacy discussion is a strawman that misses these points. Nat'l Org. for Marriage, Inc. v. McKee, 649 F.3d 34, 54–55 (1st Cir. 2011); Comm. for Justice & Fairness v. Ariz. Sec'y of State's Office, 332 P.3d 94, 104–05 (Ariz. Ct. App. 2014), *petition for review denied*, No. CV-14-0250-PR, 2015 Ariz. LEXIS 136 (Ariz. Apr. 21, 2015); State v. Green Mountain Future, 2013 VT 87, ¶ 27, 194 Vt. 625, 86 A.3d 981; *see also* Indep. Inst. v. Williams, 812 F.3d 787, 795 (10th Cir. 2016) (quoting *McKee,* 649 F.3d at 54–55) (addressing Track 2 law, which is different); *cf. supra* note 12 (addressing an express-advocacy strawman under Track 2, which is different).

[150] *Compare Iowa Right to Life*, 717 F.3d at 584 (quoting *Colo. Right to Life*, 498 F.3d at 1152) (applying the test to organizations speaking about candidates), *and N.M. Youth Organized,* 611 F.3d at 678 (same), *with* Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) (quoting *Mass. Citizens for Life,* 479 U.S. at 252–53) (applying the test pre-Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990 (9th Cir. 2010), to an organization engaging in ballot-measure speech).

This is *assuming* it is constitutional to trigger Track 1 burdens based on ballot-measure speech in the first place. *E.g., Cal. Pro-Life Council,* 328 F.3d at 1102–04. *But see, e.g.*, Sampson v. Buescher, 625 F.3d 1247, 1255–61 (10th Cir. 2010) (holding otherwise for small-scale speech). The Supreme Court has not addressed this. *E.g.*, Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 482 (7th Cir. 2012) (not distinguishing Track 1, political-committee(-like) burdens from Track 2, non-political-committee reporting).

An "independent expenditure" for a ballot measure is speech expressly advocating the ballot measure's passage or defeat which is not coordinated with a candidate. *Cf. supra* note 9 (addressing speech about candidates).

A political-committee(-like) definition triggers Track 1 burdens for organizations doing what the definition contemplates. *See* FEC v. GOPAC, Inc., 917 F. Supp. 851, 859 (D.D.C. 1996) (applying such a definition). However, under Method 2, government may not trigger such burdens for organizations making *neither* contributions *nor* independent expenditures, because the numerator in Method 2 is zero. Such organizations present the easiest case under Method 2, *see N.M. Youth Organized,* 611 F.3d at 678 (addressing such facts), and extensive, speech-discouraging discovery is especially unnecessary/improper, *cf.* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 468 n.5, 469 (2007) (opinion of Roberts, C.J.) (addressing discovery burdens). Moreover, an organization presents an easy case—yet not the easiest case—under Method 2 when "[i]ts central organizational purpose is issue advocacy, although it occasionally" makes contributions or independent expenditures. *Mass. Citizens for Life,* 479 U.S. at 252 n.6.

Although the major-purpose test[151] standing alone can yield different results for "small group[s]" with the *Buckley* major purpose than for "mega-group[s]" lacking it,[152] the major-purpose test does *not* stand alone. *Sampson v. Buescher* in effect exemplifies this: The next, supplemental step is to hold it is unconstitutional to trigger Track 1 burdens for organizations with the *Buckley* major purpose[153]—*but only small-scale speech*, objectively and precisely defined.[154]

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[151] Which focuses on the organization's major purpose, *i.e.,* the nature of the speaker, not the speech. *Mass. Citizens for Life*, 479 U.S. at 262 (citing *Buckley,* 424 U.S. at 79).

Meanwhile, Track 2 attributions, disclaimers, and non-political-committee reporting are "based on the communication, not the organization," *i.e.,* the nature of the speech, not the speaker. *N.C. Right to Life*, 525 F.3d at 290.

A speaker's status under statutory or regulatory law, such as the Internal Revenue Code or the Internal Revenue Service regulations, does *not* determine whether Track 1 law or Track 2 law, or other political-speech law, survives a challenge under constitutional law. *See* Del. Strong Families v. Attorney Gen. of Del., 793 F.3d 304, 308–09 (3d Cir. 2015) (incorrectly addressing Track 1 law as Track 2 law), *cert. denied*, 136 S. Ct. 2376 (2016) (denial of certiorari after subsequent Third Circuit appeal); *supra* note 72; *cf. Citizens United*, 558 U.S. at 336–66 (addressing the nature of the speaker and holding that government may not ban or otherwise limit spending for political speech by non-foreign nationals just because speakers are incorporated, or by extension are unions). That would be like the statutory or regulatory tail wagging the constitutional dog.

[152] *Madigan*, 697 F.3d at 489 (quoting *McKee*, 649 F.3d at 59); *see also Yamada,* 786 F.3d at 1200 (citing *Madigan*, 697 F.3d at 489–90); Utter v. Bldg. Indus. Ass'n of Wash., 341 P.3d 953, 966 (Wash.) (quoting *Madigan*, 697 F.3d at 489), *cert. denied,* 136 S. Ct. 79 (2015). *Madigan/McKee/Utter* use "perverse" insultingly here. *Madigan*, 697 F.3d at 488–89 (quoting *McKee*, 649 F.3d at 59); *Utter,* 341 P.3d at 966 (same). At best, this is unfortunate. "People can disagree in good faith . . . , but it similarly does more harm than good to question the openness and candor of those on either side of the debate." Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1639 (2014) (Roberts, C.J., concurring).

[153] *See Sampson,* 625 F.3d at 1251 (addressing such organizations). Perhaps because the *Sampson* plaintiffs have the *Buckley* major purpose and understandably do not press the point, *Sampson* overlooks the major-purpose test, yet it applies under Tenth Circuit precedent. *See supra* note 86.

[154] *See Sampson*, 625 F.3d at 1249, 1261 (addressing such organizations); *see also* Coal. for Secular Gov't v. Williams, 815 F.3d 1267, 1269, 1276–81 (10th Cir.) (addressing an organization engaging in small-scale speech but mistakenly not indicating whether the organization has the *Buckley* major purpose), *cert. denied,* 85 U.S.L.W. 3143 (2016); Justice v. Hosemann, 771 F.3d 285, 295 (5th Cir. 2014) (addressing organizations that have the *Buckley* major purpose and understandably do not press the point), *cert. denied,* 136 S. Ct. 1514 (2016); Worley v. Fla. Sec'y of State, 717 F.3d 1238, 1249 (11th Cir. 2013) (same); *cf. Wis. Right to Life*, 551 U.S. at 477 n.9 (opinion of Roberts, C.J.) (recognizing that political committees "impose well-documented and onerous burdens, particularly on small nonprofits"); *Yamada*, 786 F.3d at 1200 (creating an "a significant participant in [the] electoral process" test for an organization that "may not make political advocacy a priority"); Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 592, 596 (8th Cir. 2013) (quoting Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 874 (8th Cir. 2012) (en banc)) (addressing "smaller businesses and associations"). *But see* Corsi v. Ohio Elections Comm'n, 2012-Ohio-4831, 981 N.E.2d 919, 927, ¶ 22 (10th Dist.) (rejecting a *Sampson* contention).

Unlike the *Sampson, Worley,* and *Justice* plaintiffs, the *Coalition for Secular Government* plaintiff once contended it may lack the *Buckley* major purpose. It did so in the district court, yet not in the court of appeals. *Compare, e.g.*, Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction at 11, Coal. for Secular Gov't v. Gessler, 71 F. Supp. 3d 1176 (D. Colo. 2014) (No. 12-cv-01708-JLK) (stating that "CSG believes, based on the outcome of this case, that it may be in a position where it does not have 'the major purpose' of [nominating or electing candidates or passing or defeating] ballot measures because it does not [make contributions or devote] the preponderance of its [spending to] express advocacy"), http://www.campaignfreedom.org/wp-content/uploads/2012/08/CSG-Mem-in-Support-of-Motion.pdf, *with* Plaintiff-Appellee's Answer Brief at 3 n.1, Coal. for Secular Gov't v. Williams, 815 F.3d 1267 (2016) (No. 14-1469) ("It is undisputed that CSG exists for purposes other than ballot issue advocacy."), http://www.campaignfreedom.org/wp-content/uploads/2015/03/CSG-Answering-Brief-As-Filed.pdf. This may explain why *Coalition for Secular Government* overlooks *Buckley*. *See Coal. for Secular Gov't,* 815 F.3d at 1276–81 (overlooking *Buckley*).

Meanwhile, applying *Sampson* beyond *Sampson*-sized organizations, but not to "mega-groups," further addresses *Madigan/McKee/Utter*. *Supra* text accompanying note 152; *see Coal. for Secular Gov't*, 815 F.3d at 1276–81 (applying *Sampson* beyond *Sampson*-sized organizations).

Anyway, *Sampson* does not apply to mega-groups with small-scale speech, because they lack the *Buckley* major purpose. If organizations—whatever their size—lack the *Buckley* major purpose, *Sampson* analysis is unnecessary/improper. *Supra* note 86. Thus, only little players—not big players—are likely to bring proper *Sampson* small-scale-speech challenges to law triggering Track 1 burdens. *Sampson* protects little players. The Supreme Court could, of course, make *Sampson,* rather than *Buckley,* the threshold inquiry. That is, the Supreme Court could first ask whether *non*-candidate-controlled organizations engage in more than small-scale speech and then, if they do, apply the *Buckley* major-purpose test. However, until the Supreme Court does that, *Buckley* is the threshold inquiry. *Id.*

Besides, the *Madigan/McKee/Utter* point about the major-purpose test leading to different results pertains not only to *state* law but also to *federal* law. *Supra* text accompanying note 152. So if these opinions were right in jettisoning the major-purpose test because it leads to different results, then the major-purpose test would not apply to either state or federal law. But it does apply to federal law, and constitutional principles applying to federal political-speech law must also apply to state political-speech law. *Supra* text accompanying notes 84–86, 112–14; *see* Wallace v. Jaffree, 472 U.S. 38, 48–49 (1985) ("States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.").

So the solution to the different results to which the major-purpose test leads is *not* to jettison the major-purpose test, as some circuits have done. *Supra* text accompanying notes 97–101, 104–06. Instead, part of the solution to these different results is to keep the major-purpose test and take the *supplemental Sampson* step of holding it is unconstitutional to trigger Track 1 burdens for organizations *with* the *Buckley* major purpose but only small-scale speech. *Supra* text accompanying notes 140–54.

Does this ameliorate all of the criticism of the major-purpose test? No. *Infra* text accompanying notes 159–62. Yet constitutional law is about drawing good lines, not perfect lines. *See* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1669 (2015) (drawing the line between judicial candidates' directly soliciting campaign contributions and judicial candidates' sending thank-you notes).

Anyway, law need not "let[] the perfect become the enemy of the good." Wallace v. Kato, 549 U.S. 384, 399 (2007) (Stevens, J., concurring). Imperfect though *Buckley* and *Sampson* are, they present the best—indeed, the only—non-vague *existing* structure protecting organizations from law triggering "onerous," Track 1 burdens. *Supra* text accompanying notes 107–14, 144. *It is incumbent on those who dislike the major-purpose*

Parallel to the *Buckley* tests,[155] this supplemental step goes to the tailoring part of constitutional scrutiny.[156] Again, pounding the table about the *government interest* in regulating political speech is no answer to the *tailoring* part of constitutional scrutiny.

Without this supplemental step, even two children who devote the majority of their lemonade-stand proceeds to contributions to, or

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test to suggest an improvement, as this Article does. Infra text accompanying notes 159–62. Suggesting that *Citizens United* pages 366–71/914–16, 558 U.S. at 366–71, 130 S. Ct. at 914–16, allow all disclosure in the name of transparency will not do. *Supra* text accompanying notes 97–103. Again, "First Amendment rights are all too often sacrificed for the sake of transparency in federal and state elections." Del. Strong Families v. Denn, 136 S. Ct. 2376, 2376 (2016) (Thomas, J., dissenting) (denial of certiorari). Government's "interest in transparency does not always trump First Amendment rights." *Id.*

[155] *Supra* text accompanying notes 87–89.

[156] Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth, 556 F.3d 1021, 1032–34 (9th Cir. 2009). *Contra, e.g., Sampson*, 625 F.3d at 1255–61 (holding that this supplemental step goes to the government-interest part when the speaker is an organization with small-scale ballot-measure speech).

In *Sampson*-like fashion, *Canyon Ferry* strikes down law triggering Track 1, political-committee-like burdens, *Canyon Ferry,* 556 F.3d at 1026–27, as applied to an organization engaging in *one-time de-minimis* ballot-measure speech, *id.* at 1033–34. *Instead,* however, the holding should have been that the organization lacked the *Buckley* major purpose under *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) (quoting *Mass. Citizens for Life,* 479 U.S. at 252–53) (*pre*-Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990 (9th Cir. 2010)), even *if* it is constitutional to trigger such burdens based on ballot-measure speech.

Canyon Ferry, 556 F.3d at 1033–34, is not alone in overlooking the *Buckley* major-purpose test when organizations that might *lack* the *Buckley* major purpose challenge law triggering Track 1 burdens. *See Coal. for Secular Gov't*, 815 F.3d at 1276–81 (overlooking *Buckley*, *see supra* note 154 for additional discussion); *Del. Strong Families*, 793 F.3d at 312–13 n.10 (overlooking *Buckley*, *see supra* note 72 for additional discussion); Joint Heirs Fellowship Church v. Ashley, 45 F. Supp. 3d 597, 626–29 (S.D. Tex. 2014) (overlooking *Buckley*, *see supra* note 71 for additional discussion), *aff'd on other grounds sub nom.* Joint Heirs Fellowship Church v. Akin, 629 F. App'x 627, 629–32 (5th Cir. 2015); Comm. for Justice & Fairness v. Ariz. Sec'y of State's Office, 332 P.3d 94, 104–05 (Ariz. Ct. App. 2014) (overlooking *Buckley*), *review denied*, No. CV-14-0250-PR, 2015 Ariz. LEXIS 136 (Ariz. Apr. 21, 2015); *cf. supra* note 106 (discussing *Buckley* as an afterthought in another opinion).

Meanwhile, when law triggers Track 1 burdens and organizations do *not* challenge it, *Buckley* and *Sampson* rightly do not arise. *See Joint Heirs*, 629 F. App'x at 630 ("The churches did not appeal the district court's determination that they would be deemed a political committee or that the statutory requirements that thereby apply are constitutional."); Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 827 (7th Cir. 2014) (describing two other challenges); Cook v. Tom Brown Ministries, 385 S.W.3d 592, 600–08 (Tex. Ct. App. 2012) (not challenging such law).

Either way, "[p]laintiffs are masters of their complaints and remain so at the appellate stage of a litigation." Webster v. Reprod. Health Servs., 492 U.S. 490, 512 (1989) (citing Caterpillar Inc. v. Williams, 482 U.S. 386, 398–99 (1987)). It does not diminish *Buckley* or *Sampson* when parties or courts overlook *Buckley* or *Sampson*, when parties or courts treat them as an afterthought, or when parties do not challenge applicable law triggering Track 1 burdens. On the contrary, *McCutcheon v. FEC* counsels against overly relying on decisions "written without the benefit of full briefing or argument on the issue." McCutcheon v. FEC, 134 S. Ct. 1434, 1447 (2014) (discussing another part of *Buckley*).

independent expenditures for, candidates or ballot measures would have to bear onerous Track 1 burdens where any contribution or independent expenditure by an organization—no matter how small—triggers Track 1 burdens.[157]

Of course, this supplemental step is unnecessary if an organization lacks the *Buckley* major purpose in the first place.[158]

However, there is still a problem: This supplemental step does not completely address the different results to which the *Buckley* major-purpose test can lead. Even with this supplemental step, an organization that is not controlled by a candidate or candidates in their capacities as candidates could devote a massive amount—albeit less than half—of its spending to contributions or independent expenditures properly understood and avoid bearing Track 1 burdens by avoiding stating, in its organizational documents or public statements, that it has the *Buckley* major purpose.[159] Meanwhile, a small organization that has the *Buckley* major purpose and engages in slightly more than small-scale speech could not avoid bearing Track 1 burdens.[160] One solution to this problem is to supplement the *Buckley* major-purpose test in an additional way on

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[157] *E.g.*, Nat'l Org. for Marriage, Inc. v. Walsh, 714 F.3d 682, 686 (2d Cir. 2013) (addressing a challenge to New York's expansive definition of "political committee"). Saying law reaches only *Buckley* express advocacy, *e.g.*, Klepper v. Christian Coal. of N.Y., 686 N.Y.S.2d 898, 900 (N.Y. App. Div. 1999) (per curiam); *cf. Comm. for Justice & Fairness*, 332 P.3d at 101, 103–05 (holding that particular Track 1 law reaches only express advocacy but defining express advocacy incorrectly by reaching beyond *Buckley*); Indep. Inst. v. Williams, 812 F.3d 787, 793 n.4 (10th Cir. 2016) (similarly misdefining express advocacy in addressing Track 2 law), is no answer when law unconstitutionally triggers Track 1 burdens.

Nevertheless, after an August 2011 Second Circuit oral argument and after the Second Circuit in April 2013 reversed the district court's October 2010 ripeness-based dismissal of the challenge to New York law triggering Track 1, political-committee burdens, *Walsh*, 714 F.3d at 687–93, *vacating and remanding* Nat'l Org. for Marriage, Inc. v. Walsh, No. 10-CV-751A, 2010 WL 4174664, at *3–4 (W.D.N.Y. Oct. 25, 2010), the *Walsh* plaintiff dismissed the challenge, so the New York law remains. *Walsh*, Stip. of Dismissal at 1 (W.D.N.Y. June 8, 2013) ("Plaintiff . . . files this stipulation of dismissal . . . ."). *See generally* Plaintiffs-Appellants' Third Supplemental Authority Notice at 2 n.2, Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118 (2d Cir. 2014) (No. 12-2904-cv) ("Notwithstanding its previous statements, *see* [*Walsh*, 714 F.3d at 686], the *Walsh* plaintiff – having switched to in-house counsel in April 2012 . . . now makes . . . candidate contributions."); Defendants-Appellees-Cross-Appellants' Brief at 3, 5–6, Nat'l Org. for Marriage, Inc. v. McKee, 649 F.3d 34 (1st Cir. 2010) (Nos. 10-2000 & 10-2049), 2010 WL 5621624, at *3, *5–6, 2010 WL 6188638, at *3, *5–6 (explaining that the plaintiff had "stated under oath in its June 25[, 2010,] pleading that . . . it would not run any ad[]s . . . unless the district court declared unconstitutional the Maine laws [it] was challenging . . . , filed its Notice of Appeal on August 20, 2010, and . . . although it had not obtained the relief it was seeking, . . . sent postcards to Maine households in late September 2010 that differed from the ad[]s it submitted as trial evidence and on which [it] based its as-applied claims.").

[158] *Supra* text accompanying note 153.

[159] *Supra* text accompanying note 84.

[160] *Supra* text accompanying note 152.

the opposite end of the spectrum from the small-scale-speech supplemental step: hold that an organization making a massive amount—objectively and precisely defined[161]—of contributions or independent expenditures properly understood has the *Buckley* major purpose, without setting the "massive" threshold so low that it in effect even begins to encroach on the just results to which the *Buckley* major-purpose test leads.[162]

And while some courts uphold laws triggering Track 1 burdens by citing government's interest in preventing circumvention of law,[163] that interest can apply only when the challenged law is valid in the first place.[164] Government's interest in preventing circumvention of valid law neither saves otherwise invalid law nor allows government to prevent circumvention of valid with invalid law,[165] because "there can be no freestanding anti-circumvention interest."[166]

The First Amendment limits when government may trigger Track 1 burdens. Without the *Buckley* and *Sampson* principles, law triggering Track 1 burdens reaches organizations that in no constitutional way are

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[161] The $50,000 in past contributions in an election cycle in *Yamada* were not massive. *Cf.* Yamada v. Snipes, 786 F.3d 1182, 1186, 1199, 1204, 1206 n.18, 1207 (9th Cir.) (incorrectly finding that an organization wanted to make contributions *after* a contribution ban applied and the court upheld the ban, and incorrectly considering such no-longer-desired contributions in determining whether government may trigger Track 1, political-committee-like burdens for the organization), *cert. denied*, 136 S. Ct. 569 (2015).

[162] In *McKee*, 649 F.3d at 49, neither the parties nor the court asserted that an organization making $1.8 million in contributions in an election cycle has the *Buckley* major purpose. Again, *McCutcheon v. FEC* counsels against overly relying on decisions "written without the benefit of full briefing or argument on the issue." McCutcheon v. FEC, 134 S. Ct. 1434, 1447 (2014).

[163] *E.g.*, Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 140 n.20 (2d Cir. 2014), *cert. denied,* 135 S. Ct. 949 (2015).

[164] *Yamada*, 786 F.3d at 1200 (referring to "the circumvention of valid campaign finance laws").

[165] *McCutcheon*, 134 S. Ct. at 1452–53, 1452 n.7, 1454–59.

[166] Republican Party of N.M. v. King, 741 F.3d 1089, 1102 (10th Cir. 2013); *accord* Landell v. Sorrell, 406 F.3d 159, 169 (2d Cir. 2005) (Walker, C.J., dissenting) (citing McConnell v. FEC, 540 U.S. 93, 161 (2003)) ("anti-circumvention is not an independent state interest"), *rev'd on other grounds sub nom.* Randall v. Sorrell, 548 U.S. 230, 246–62 (2006). That "speakers find ways to circumvent campaign finance law" does not allow anyone to prevent circumvention with unconstitutional law. Citizens United v. FEC, 558 U.S. 310, 364 (2010) (citing *McConnell,* 540 U.S. at 176–77). In other words: On the one hand, when law *is* constitutional, one may circumvent it legally yet not illegally. That is the difference between avoiding taxes, which is legal, and evading taxes, which is illegal. *Compare Tax Avoidance*, BLACK'S LAW DICTIONARY (10th ed. 2014), *with Tax Evasion*, BLACK'S LAW DICTIONARY (10th ed. 2014). On the other hand, when law is unconstitutional, and enforcement/prosecution of it is enjoined, one may freely circumvent it.

political committees, political-committee-like organizations, or organizations with political-committee-like funds or accounts.[167]

VI. THE APPEAL-TO-VOTE TEST

Under constitutional law, express advocacy—including independent expenditure—means *Buckley* express advocacy,[168] i.e., "communications that in express terms advocate the election or defeat of a clearly identified candidate"—or the passage or defeat of a ballot measure—using terms "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.' "[169] To be *Buckley* express advocacy, speech need not include the specific *Buckley* words. Synonyms suffice. That is what "such as" means.[170] Nevertheless, *Buckley* express advocacy requires "explicit words of advocacy."[171]

Under constitutional law, the *Wisconsin Right to Life* " 'appeal to vote' test"—once known as "the functional equivalent of express advocacy"[172]—*cannot* be a form of express advocacy. Rather, "as . . . explained in" and "consistent with the lead opinion in" *Wisconsin Right to Life,*[173] the appeal-to-vote test reached beyond *Buckley*'s words and synonyms for them.[174] It applied when there were no explicit words of

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[167] *Supra* text accompanying notes 60, 157. These stand in contrast to other organizations. *See, e.g.,* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2813 (2011) (addressing an organization that does not object to *being* a political committee).

[168] *Supra* notes 9, 150.

[169] Buckley v. Valeo, 424 U.S. 1, 44 & n.52 (1976) (per curiam); *see* Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1102, 1103 n.18, 1104 (9th Cir. 2003) (addressing "express ballot-measure advocacy").

[170] *Buckley*, 424 U.S. at 44 n.52; Elections Bd. v. Wis. Mfrs. & Commerce, 597 N.W.2d 721, 730–31 (Wis. 1999).

[171] *Buckley,* 424 U.S. at 43; *Wis. Mfrs. & Commerce,* 597 N.W.2d at 737 (quoting *Buckley,* 424 U.S. at 43); *accord id.* at 730–31 (citing FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 249–50 (1986); *Buckley*, 424 U.S. at 43–44 & n.52, 80 & n.108).

[172] Citizens United v. FEC, 558 U.S. 310, 335 (2010) (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 470 (2007) (opinion of Roberts, C.J.)). *Citizens United* "re-labels 'the functional equivalent of express advocacy' as the 'appeal to vote' test." Wis. Right to Life, Inc. v. Barland, No. 10–C–0669, at 5 n.23, 2015 WL 658465 (E.D. Wis. Jan. 30, 2015, as amended Feb. 13, 2015) (quoting *Citizens United,* 558 U.S. at 335) (declaratory judgment and permanent injunction following Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 844 (7th Cir. 2014)).

[173] *Barland*, 751 F.3d at 834, 838; *see* State *ex rel.* Two Unnamed Petitioners v. Peterson, 866 N.W.2d 165, 193 (Wis. 2015) (addressing the "functional equivalent, as . . . defined in" *Wisconsin Right to Life*), *cert. denied,* 85 U.S.L.W. 3147 (2016).

[174] *Barland*, 751 F.3d at 820. Thus, *Wisconsin Right to Life* asked not whether speech was "express advocacy" but whether it was "the functional equivalent of express advocacy." *Wis. Right to Life*, 551 U.S. at 469 (opinion of Roberts, C.J.). Indeed, *Wisconsin Right to Life*'s repeatedly referring to "express advocacy" and its "functional equivalent" illustrated that the latter reached beyond the former. *Id.* at 465, 471, 476, 477 n.9, 479, 482 (opinion of Roberts, C.J.).

advocacy and asked whether the *only reasonable interpretation* of Federal Election Campaign Act electioneering communications was as an appeal to vote for or against a clearly identified candidate.[175] This test applied only to Federal Election Campaign Act electioneering communications,[176] which by definition are not express advocacy, because they are not expenditures or independent expenditures.[177] Only expenditures/independent expenditures are express advocacy.[178] Indeed, one point of regulating Federal Election Campaign Act electioneering communications was for Track 2 law to reach beyond express advocacy.[179]

Furthermore, after *Citizens United,* the appeal-to-vote test no longer even affects whether government may ban, otherwise limit, or regulate speech.[180] *Citizens United* thereby "eliminated the context in which the appeal-to-vote test has had any significance" under the Constitution.[181]

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[175] *Wis. Right to Life*, 551 U.S. at 469–70 (opinion of Roberts, C.J.) (holding pre-*Citizens United* that "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"); *Barland*, 751 F.3d at 820.

[176] *E.g.*, *Wis. Right to Life*, 551 U.S. at 474 n.7 (opinion of Roberts, C.J.) (holding that "this test is only triggered if the speech" is a Federal Election Campaign Act electioneering communication "in the first place"); N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 282 (4th Cir. 2008); Colo. Ethics Watch v. Senate Majority Fund, LLC, 269 P.3d 1248, 1257–58 (Colo. 2012); *see also Barland*, 751 F.3d at 819–21, 823 (addressing the appeal-to-vote test).

[177] Del. Strong Families v. Attorney Gen. of Del., 793 F.3d 304, 311 (3d Cir. 2015) (quoting 52 U.S.C. § 30104(f)(3)(B)(ii) (Supp. II 2015)), *cert. denied,* 136 S. Ct. 2376 (2016) (denial of certiorari after subsequent Third Circuit appeal). *But see* Indep. Inst. v. FEC, 816 F.3d 113, 116 (D.C. Cir. 2016) (citing *Citizens United*, 558 U.S. at 368–69) (implicitly and incorrectly believing that Federal Election Campaign Act electioneering communications can be express advocacy).

[178] Buckley v. Valeo, 424 U.S. 1, 44 & n.52, 80 (1976) (per curiam).

[179] McConnell v. FEC, 540 U.S. 93, 189–94 (2003), *overruled on other grounds by Citizens United*, 558 U.S. at 365–66.

[180] *See Citizens* United, 558 U.S. at 324–26, 365–66, 368–69 (holding that government may *not ban or otherwise limit* Federal Election Campaign Act electioneering communications even when they *are* the functional equivalent of express advocacy, and holding that government may *regulate* Federal Election Campaign Act electioneering communications even when they are *not* the functional equivalent of express advocacy); Indep. Inst. v. Williams, 812 F.3d 787, 793 n.4, 794–95 (10th Cir. 2016) (reviewing *Citizens United's* Track 2 holding while mistakenly conflating express advocacy and the appeal-to-vote test); *Del. Strong Families*, 793 F.3d at 308 (quoting *Citizens United*, 558 U.S. at 368) (rejecting the plaintiff's contention that the appeal-to-vote test remains valid post-*Citizens United*); Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 132 (2d Cir. 2014) (quoting *Citizens United*, 558 U.S. at 369) (agreeing with a plaintiff's contention that the appeal-to-vote test is invalid post-*Citizens United*), *cert. denied*, 135 S. Ct. 949 (2015).

[181] Nat'l Org. for Marriage, Inc. v. McKee, 649 F.3d 34, 69 (1st Cir. 2011).

Citizens United holds the appeal-to-vote test does not prevent regulating speech with Track 2 law. *Citizens United*, 558 U.S. at 368–69. However, if anything is beyond what

government should regulate with Track 2 law, then "genuine issue" speech is. *Wis. Right to Life*, 551 U.S. at 470 (opinion of Roberts, C.J.) (addressing a speech ban). Track 2 law regulating genuine-issue speech is not tailored to any government interest in regulating elections, *supra* text accompanying notes 32–37, 87; *cf. supra* note 149 (addressing Track 1 law, which is different), much less "substantial[ly] relat[ed]" to a " 'sufficiently important' government interest," *Citizens United*, 558 U.S. at 366–67 (quoting *Buckley*, 424 U.S. at 64, 66) (addressing Track 2 law). Moreover, genuine-issue speech presents an easy case, because it is at the opposite end of the issue-advocacy spectrum from appeal-to-vote speech, once known as "the functional equivalent of express advocacy." *Id.* at 335 (quoting *Wis. Right to Life*, 551 U.S. at 470 (opinion of Roberts, C.J.)). *See generally supra* notes 2, 25 (defining "regulation," "ban," and "limit"); *McConnell*, 540 U.S. at 206 n.88 (referring to regulation of genuine-issue speech but meaning a ban).

If genuine-issue speech *were* the perfect complement of appeal-to-vote speech, then *Citizens United*'s appeal-to-vote-test holding on Track 2 law would similarly foreclose a genuine-issue-speech test. One would be just the flipside of the other: Saying that speech *is* genuine-issue speech would be the same as saying it is *not* appeal-to-vote speech, and *vice versa*. Then, since the appeal-to-vote test is *not* a boundary between what is and is not regulable with Track 2 law, *Citizens United*, 558 U.S. at 368–69, a genuine-issue-speech test would also not be a boundary.

However, genuine-issue speech is *not* the perfect complement of appeal-to-vote speech. Whatever the appeal-to-vote test may have meant, some speech is neither genuine-issue speech nor appeal-to-vote speech—some speech is in-between. *See Wis. Right to Life*, 551 U.S. at 469–70 (opinion of Roberts, C.J.) (defining the appeal-to-vote test pre-*Citizens United*, and establishing a safe harbor among genuine-issue speech by holding that (1) the "content [of particular ads] is consistent with that of a genuine issue ad" because they "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter" and neither "mention an election, candidacy, political party, or challenger" nor "take a position on a candidate's character, qualifications, or fitness for office" without acknowledging that (2) "urg[ing] the public to contact public officials" is unnecessary for speech to be genuine-issue speech); *see also Indep. Inst.*, 812 F.3d at 793 n.5 (quoting *Wis. Right to Life*, 551 U.S. at 470 (opinion of Roberts, C.J.)). Therefore, *Citizens United* does not foreclose a genuine-issue-speech test.

Meanwhile, the phrases "unambiguously related to the campaign" and "unambiguously campaign related" in *Buckley*, 424 U.S. at 80–81, are *not* a test for constitutionality of Track 2 law. So whether government may regulate speech, including genuine-issue speech, does *not* turn on whether it is unambiguously campaign related. *Indep. Inst.*, 812 F.3d at 796 (incorrectly rejecting a genuine-issue-speech test after correctly declining to define genuine-issue speech in this way). *Contra* N.M. Youth Organized v. Herrera, 611 F.3d 669, 676 (10th Cir. 2010) (citing *Wis. Right to Life*, 551 U.S. at 476 (opinion of Roberts, C.J.)) (creating in *dictum* (because no Track 2 law was at issue) an unambiguously-campaign-related test for constitutionality of Track 2 law); N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 281 (4th Cir. 2008) (quoting *Buckley*, 424 U.S. at 80) (creating an unambiguously-campaign-related test for constitutionality of Track 2 law). "The difficulty of reliably distinguishing between campaign-related speech and non-campaign-related speech is why courts must look only to whether the specific statutory definitions before them are sufficiently tailored to the government's [compelling or sufficiently important] interests." *Indep. Inst.*, 812 F.3d at 796. Besides, these phrases are vague. How is anyone to know whether some bureaucrat, some court, or worse yet some jury would conclude (*after* the fact, mind you) that speech is "unambiguously related to the campaign" or "unambiguously campaign related"? *Buckley*, 424 U.S. at 80–81; *cf. supra* note 84 (rejecting "campaign related" under Track 1).

The word "pejorative" in *Citizens United* would fare no better as a constitutional-law standard even if the word were not dictum. *Citizens United*, 558 U.S. at 320, 368; *see also*

Alternatively, even if *Citizens United* pages 3[68–]69 had appeal-to-vote-test dictum,[182] and the test therefore remained in constitutional law,[183] the test would *still* be unnecessary and improper in the major-purpose test, because it is not a form of express advocacy.[184]

In any event, *Citizens United* pages 368–69 have no appeal-to-vote-test dictum.[185] *Barland* incorrectly concludes that they do by crucially believing *Citizens United* (1) holds, on pages 324–2[6], that *all* the speech at issue—a Federal Election Campaign Act electioneering-communication movie *and Federal Election Campaign Act electioneering-communication ads for it*—is the functional equivalent of express advocacy, i.e., is appeal-to-vote speech,[186] and (2) allows, on pages 3[68–]69, Track 2, non-political-committee reporting of Federal Election Campaign Act electioneering communications even when they are not the functional equivalent of express advocacy, i.e., are not appeal-to-vote speech.[187] Point 2 is correct. If Point 1 were entirely correct, Point 2 would be dictum.[188] But Point 1 is *incorrect*: Only the movie was the functional equivalent of express advocacy, i.e., was appeal-to-vote speech, so Point 2 is not dictum.[189]

Del. Strong Families v. Denn, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting) (denial of certiorari) (quoting *Citizens United*, 558 U.S. at 368). How is anyone to know whether some bureaucrat, some court, or worse yet some jury would conclude (*after* the fact, mind you) that speech is pejorative?

[182] Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 836 (7th Cir. 2014) (saying "the [functional] equivalent of express advocacy," not the appeal-to-vote test).

[183] *Id.* at 838; State *ex rel.* Two Unnamed Petitioners v. Peterson, 866 N.W.2d 165, 192–93, 193 n.23 (Wis. 2015) (holding that the appeal-to-vote test remains valid post-*Citizens United*), *cert. denied,* 85 U.S.L.W. 3147 (2016).

[184] *Supra* text accompanying notes 148, 172. As an aside: Including the appeal-to-vote test in the major-purpose test would *expand* when government may trigger Track 1, political-committee(-like) burdens.

[185] *See Citizens United*, 558 U.S. at 324–26, 365–66, 368–69 (holding that government may *not ban or otherwise limit* Federal Election Campaign Act electioneering communications even when they *are* the functional equivalent of express advocacy, and holding that government may *regulate* Federal Election Campaign Act electioneering communications even when they are *not* the functional equivalent of express advocacy).

[186] *Barland*, 751 F.3d at 823 (discussing *Citizens United,* 558 U.S. at 324–2[6]).

[187] *Id.* at 824–25, 836 (discussing *Citizens United,* 558 U.S. at 3[68–]69).

[188] *Id.* at 836.

[189] Indep. Inst. v. Williams, 812 F.3d 787, 794–95, 795 nn.8–9, 798 n.13 (10th Cir. 2016) (recognizing that the *Wisconsin Right to Life* ads were not the functional equivalent of express advocacy, holding that *Citizens United* has no appeal-to-vote-test dictum without mentioning *Barland,* and addressing Track 2 disclosure while acknowledging the difference between Track 1 and Track 2 disclosure); Indep. Inst. v. FEC, 70 F. Supp. 3d 502, 507–08, 515 (D.D.C. 2014) (recognizing that the *Wisconsin Right to Life* ads were not the functional equivalent of express advocacy, holding that *Citizens United* has no appeal-to-vote-test dictum while disagreeing with *Barland,* and addressing Track 2 disclosure without acknowledging either the difference between Track 1 and Track 2 disclosure or the

correct *Barland* holdings on Track 1 disclosure), *vacated on other grounds*, 816 F.3d 113, 115–17 (D.C. Cir. 2016) (remanding for a three-judge district court).

Barland bases its narrowing gloss, which includes the appeal-to-vote test, on a false premise about *Elections Board v. Wisconsin Manufacturers and Commerce*. The premise is that *Wisconsin Manufacturers and Commerce* understood Wisconsin law to reach "express advocacy and its functional equivalent." *Barland,* 751 F.3d at 833 (citing Elections Bd. v. Wis. Mfrs. & Commerce, 597 N.W.2d 721, 728–31 (Wis. 1999)); *see also* Yamada v. Snipes, 786 F.3d 1182, 1189 (9th Cir.) (following *Barland*), *cert. denied*, 136 S. Ct. 569 (2015); State *ex rel.* Two Unnamed Petitioners v. Peterson, 866 N.W.2d 165, 192 (Wis. 2015) (same), *cert. denied,* 85 U.S.L.W. 3147 (2016).

However, the Wisconsin Supreme Court decided *Wisconsin Manufacturers and Commerce* in 1999. The "functional equivalent of express advocacy" first arose in Supreme Court case law four years later, McConnell v. FEC, 540 U.S. 93, 206 (2003), *overruled on other grounds by Citizens United*, 558 U.S. at 365–66, and the Court defined it four years after that, FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469–70, 474 n.7 (2007) (opinion of Roberts, C.J.).

Barland cites *Wisconsin Manufacturers and Commerce* here. *Barland*, 751 F.3d at 833 (citing *Wis. Mfrs. & Commerce*, 597 N.W.2d at 728–31). In so doing, *Barland* appears to confuse "such as" in *Buckley*—which *Wisconsin Manufacturers and Commerce*, 597 N.W.2d at 730–31, correctly explains—with the appeal-to-vote test. They are *not* the same. *Supra* text accompanying notes 168–79. The root of the confusion may be that Wisconsin law itself:

- used "functional equivalents" without defining it before it meant the appeal-to-vote test in Supreme Court case law, *Barland*, 751 F.3d at 821–22 (quoting EL BD § 1.28(2) (2001)); and
- carried "functional equivalents" forward afterward, while separately including (an imperfect version of) the appeal-to-vote test. *Id.* at 826 (quoting WIS. ADMIN. CODE GAB § 1.28(3)(a)–(b) (2010)).

Notwithstanding *Barland,* EL BD 1.28(2) could not have understood "functional equivalent" in the *Wisconsin Right to Life* sense of the words, *Barland*, 751 F.3d at 822, because EL BD 1.28 was promulgated in 2001, and *Wisconsin Right to Life* was decided in 2007.

At most, *Wisconsin Manufacturers and Commerce* elsewhere quotes language similar to part of the appeal-to-vote test—language that the Ninth Circuit incorrectly used to expand *Buckley* express advocacy beyond explicit words of advocacy, *Wis. Mfrs. & Commerce*, 597 N.W.2d at 733 (quoting FEC v. Furgatch, 807 F.2d 857, 864 (9th Cir. 1987)) ("no other reasonable interpretation but as an exhortation to vote for or against a specific candidate")—and then provides counterpoints, *see id.* at 733–34 (providing counterpoints). Consistent with the counterpoints, the Ninth Circuit has abandoned this *Furgatch* language and held that express advocacy requires "explicit *words* of advocacy." Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1098 (9th Cir. 2003) (citing *Furgatch*, 807 F.2d at 864).

Yamada in effect and incorrectly runs *Furgatch* and the appeal-to-vote test together. *See Yamada*, 786 F.3d at 1189 (making this mistake). However, being the *earlier* Ninth Circuit panel opinion, *California Pro-Life Council* controls. *See* Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1013 (9th Cir. 2010) (establishing when earlier panel opinions control).

Meanwhile, other courts incorrectly run *Buckley* express advocacy and the appeal-to-vote test together. *Indep. Inst.*, 812 F.3d at 793 n.4 (quoting *Citizens United*, 558 U.S. at 324–25); Comm. for Justice & Fairness v. Ariz. Sec'y of State's Office, 332 P.3d 94, 101, 103–05 (Ariz. Ct. App. 2014), *review denied*, No. CV-14-0250-PR, 2015 Ariz. LEXIS 136 (Ariz. Apr. 21, 2015).

Moreover, under *Wisconsin Right to Life*, the appeal-to-vote test is vague as to speech other than Federal Election Campaign Act electioneering communications.[190] Elsewhere the test "might . . . create an unwieldy standard that would be difficult to apply" and unconstitutionally chill political speech.[191] And after *Citizens United,* what remains from *Wisconsin Right to Life* regarding the test is the conclusion that the test is unconstitutionally vague, even vis-à-vis Federal Election Campaign Act electioneering communications.[192]

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[190] *See Wis. Right to Life*, 551 U.S. at 474 n.7 (opinion of Roberts, C.J.) (answering a charge that "our test" is impermissibly vague partly by saying "this test is only triggered if the speech" is a Federal Election Campaign Act electioneering communication "in the first place"). Notwithstanding *Yamada*, the *Wisconsin Right to Life* plaintiff presented not a vagueness challenge, *Yamada*, 786 F.3d at 1189, but an as-applied overbreadth challenge, *Wis. Right to Life*, 551 U.S. at 456 (opinion of Roberts, C.J.). Nevertheless, *Wisconsin Right to Life* addresses vagueness. *Id.* at 474 n.7 (opinion of Roberts, C.J.).

[191] Colo. Ethics Watch v. Senate Majority Fund, LLC, 269 P.3d 1248, 1258 (Colo. 2012) (citing *Wis. Right to Life*, 551 U.S. at 468–69 (opinion of Roberts, C.J.)). Please recall that the appeal-to-vote test applied only to Federal Election Campaign Act electioneering communications, *supra* text accompanying note 176, one part of the definition of which is that speech—other than speech about presidential or vice-presidential candidates—must be "targeted to the relevant electorate," *supra* note 10, meaning it can be received by a certain number of people, *McConnell*, 540 U.S. at 190. When speech is broadcast—which Federal Election Campaign Act electioneering communications are, *supra* note 10—government knows with precision how many people can receive it, because government licenses broadcasters for particular signal strength. Government cannot know this for non-broadcast speech. *See The Electioneering Communications Database*, FED. COMMC'NS COMM'N (Feb. 28, 2016), http://apps.fcc.gov/ecd (addressing broadcast speech). Hence the Federal Election Campaign Act electioneering-communication definition is vague as to non-broadcast speech.

It may be tempting to resolve this vagueness as to non-broadcast speech by removing the targeted-to-the-relevant-electorate requirement. But then the law would be overbroad, as applied and facially: When spending for political speech is *not* for *Buckley* express advocacy or for speech that is targeted to the relevant *electorate*, Track 2 law regulating the speech is not tailored to any government interest in regulating *elections*, *supra* text accompanying notes 32–37, 87; *cf. supra* note 149 (addressing Track 1 law, which is different), much less "substantial[ly] relat[ed]" to a " 'sufficiently important' government interest," *Citizens United*, 558 U.S. at 366–67 (quoting Buckley v. Valeo, 424 U.S. 1, 64, 66 (1976) (per curiam)) (addressing Track 2 law).

[192] *Wis. Right to Life*, 551 U.S. at 492–94 (Scalia, J., concurring). *Barland's* main mistake is believing that government may use the appeal-to-vote test to regulate speech post-*Citizens United*. *Supra* text accompanying notes 186–92. However, in amending Wisconsin law post-*Barland*, the Wisconsin legislature—recognizing that it did not also have to make this mistake—correctly rejected longstanding support of the appeal-to-vote test, *e.g.*, *Barland*, 751 F.3d at 827 (describing two other challenges), and followed the only suggestion to abandon the appeal-to-vote test, *compare* WIS. STAT. § 11.0101(11) (2016) (correctly defining "[e]xpress advocacy" post-*Barland* by deleting references to the appeal-to-vote test from the bill), *with Joint Committees on Campaigns and Elections*, at 650:00–660:30 & 673:10–687:00, WIS. EYE (Oct. 13, 2015, 9:00 AM), http://www.wiseye.org/video-Archive/Event-Detail/evhdid/10175 (a video recording of the testimony of the author explaining Track 1 law and Track 2 law, including, inter alia, why the appeal-to-vote test is not a form of express advocacy and is unconstitutionally vague).

How was anyone to know whether some bureaucrat, some court, or worse yet some jury would conclude (*after* the fact, mind you) that speech has no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate?

Multiple responses would be incorrect.

First, *Real Truth About Abortion, Inc. v. FEC* does not address the foregoing reasons that the appeal-to-vote test is vague.[193] *Center for Individual Freedom, Inc. v. Tennant* compounds this error by following *Real Truth*.[194] Neither follows *North Carolina Right to Life, Inc. v. Leake*, which recognizes that the test never applied beyond Federal Election Campaign Act electioneering communications.[195] This *North Carolina Right to Life* holding controls, because it is the earlier Fourth Circuit panel opinion.[196] Saying *North Carolina Right to Life* is different, because it limits the appeal-to-vote test to Federal Election Campaign Act electioneering communications,[197] just misses the point that the test never applied beyond Federal Election Campaign Act electioneering communications.[198]

Second, the appeal-to-vote test was objective.[199] But objective is not the opposite of vague. A test can "be both objective and vague."[200] For example, a standard asking whether a reasonable person would conclude that speech " 'advocat[es] the election or defeat' of a candidate" or is "for the purpose of influencing" elections would be both objective and vague.[201] In other words, objective/subjective and clear/vague are independent variables.

Third, even if law enforcers or prosecutors said whether speech has a reasonable interpretation other than as an appeal to vote for or against

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[193] Real Truth About Abortion, Inc. v. FEC, 681 F.3d 544, 552–55 (4th Cir. 2012); *see also* Free Speech v. FEC, 720 F.3d 788, 795–96 (10th Cir. 2013) (following *Real Truth*); *Yamada*, 786 F.3d at 1191 (following *Free Speech*). This may be because the *Real Truth* parties did not raise the reasons that the appeal-to-vote test is vague. *See Real Truth*, 681 F.3d at 552–55 (addressing other assertions). Again, *McCutcheon v. FEC* counsels against overly relying on decisions "written without the benefit of full briefing or argument on the issue." McCutcheon v. FEC, 134 S. Ct. 1434, 1447 (2014).

[194] *See* Ctr. for Individual Freedom, Inc. v. Tennant, 706 F.3d 270, 280–81 (4th Cir. 2013) (making this mistake); *see also Yamada*, 786 F.3d at 1191 (following *Tennant*).

[195] N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 282 (4th Cir. 2008).

[196] *See* McMellon v. United States, 387 F.3d 329, 332–34 (4th Cir. 2004) (en banc) (establishing when earlier panel opinions control).

[197] *Tennant*, 706 F.3d at 281.

[198] *E.g.*, *N.C. Right to Life*, 525 F.3d at 282.

[199] Citizens United v. FEC, 558 U.S. 310, 324, 335 (2010) (citing FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469–70 (2007) (opinion of Roberts, C.J.)).

[200] Nat'l Org. for Marriage, Inc. v. McKee, 669 F.3d 34, 47 (1st Cir. 2012).

[201] Buckley v. Valeo, 424 U.S. 1, 42–43, 77 (1976) (per curiam) (ellipsis omitted); *see Wis. Right to Life*, 551 U.S. at 470 (opinion of Roberts, C.J.) (addressing a test that is objective, because it turns on what is reasonable).

a clearly identified candidate,[202] speakers cannot know what future law enforcers or prosecutors will say about other speech, including future materially similar speech.[203]

In any event, the test asked whether the only reasonable interpretation of Federal Election Campaign Act electioneering communications was as an appeal to vote for or against a clearly identified candidate.[204] The test did not include the seven *National Organization for Marriage, Inc. v. Roberts* factors,[205] which help prove the test is vague. How was anyone to know whether some bureaucrat, some court, or worse yet some jury would conclude (after the fact) that the only reasonable interpretation of speech is as an appeal to vote for or against a clearly identified candidate just because it (1) takes place just before an election, (2) has a clearly identified candidate, (3) is targeted to the relevant electorate, (4) "state[s] the candidate's view on the issue" at hand, (5) "laud[s] or condemn[s] the view," (6) "state[s] whether the

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[202] Nat'l Org. for Marriage, Inc. v. Roberts, 753 F. Supp. 2d 1217, 1220–21 (N.D. Fla. 2010).

[203] *See* Va. Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379, 388 (4th Cir. 2001) (citing Chamber of Commerce v. FEC, 69 F.3d 600, 603 (D.C. Cir. 1995)) (addressing standing).

"Political speakers . . . can't rely on [government's] unofficial expression of intent to refrain from enforcing its [law]." Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 828–29 (7th Cir. 2014). Government's assurance that it will not enforce, or prosecute violations of, challenged law does not deprive those challenging the law of standing. Citizens for Responsible Gov't State PAC v. Davidson, 236 F.3d 1174, 1192–93 (10th Cir. 2000); Vt. Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 383–84 (2d Cir. 2000); N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 711 (4th Cir. 1999). Nor does it render their claims unripe. Nat'l Org. for Marriage, Inc. v. Walsh, 714 F.3d 682, 691 (2d Cir. 2013). Holding otherwise would place "First Amendment rights 'at the sufferance of " government. *Vt. Right to Life*, 221 F.3d at 383 (quoting *N.C. Right to Life*, 168 F.3d at 711).

Incorrectly denying political-speech law applies also does not negate justiciability. *See* Wis. Right to Life State PAC v. Barland, 664 F.3d 139, 147 (7th Cir. 2011) (addressing standing). Government need not say such law applies for claims to be justiciable. *See Walsh*, 714 F.3d at 691 & n.8 (addressing ripeness).

Nor do such assurances or such denials deprive those challenging law of irreparable harm. Otherwise, the *Barland* panels, *Citizens for Responsible Government State PAC, Vermont Right to Life, North Carolina Right to Life,* and *Walsh* would have denied injunctions, because irreparable harm is a prerequisite for both preliminary injunctions, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008), and permanent injunctions, United Fuel Gas Co. v. R.R. Comm'n of Ky., 278 U.S. 300, 310 (1929). Such assurances or such denials do not diminish, much less eliminate, irreparable harm, because they do not bind government officials. Government officials are free to change their minds, and the law does not require trusting them, especially after *United States v. Stevens* holds "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." United States v. Stevens, 559 U.S. 460, 480 (2010) (citing Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001)).

[204] *Supra* text accompanying notes 175–76.

[205] *Roberts*, 753 F. Supp. 2d at 1220–21.

candidate is 'good' or 'bad' for [residents]," and (7) "then exhort[s] [them] to action by telling them to call the candidate"?[206] Factors 1, 2, and 3 extend beyond the Federal Election Campaign Act electioneering-communication definition,[207] and therefore beyond where the test applied.[208] Factors 4, 5, 6, and 7—either individually or taken together—do not mean the only reasonable interpretation of speech is as an appeal to vote for or against the clearly identified candidate.[209]

Yamada also helps prove the test is vague. How was anyone to know that someone else would conclude (after the fact) that the *Yamada* newspaper ads[210] were appeal-to-vote speech just because the ads "ran shortly before an election and criticized candidates by name as persons who did not, for example, 'listen to the people' "?[211] The ads were obviously not broadcast, so they extended beyond Federal Election Campaign Act electioneering communications[212] and therefore beyond where the appeal-to-vote test applied.[213] Besides, even *if* the appeal-to-vote test remained in constitutional law or applied beyond Federal Election Campaign Act electioneering communications, the *Yamada* newspaper ads[214] would *not* have been appeal-to-vote speech, because they were not meaningfully different from the *Wisconsin Right to Life* radio ads,[215] which were not appeal-to-vote speech.[216]

Fourth, saying that *Citizens United* applied the appeal-to-vote test would not acknowledge what follows from *Citizens United*.[217]

Fifth, in applying a *Wisconsin Right to Life* appeal-to-vote-test narrowing gloss to vague law, *McKee* merely replaces vague law with a vague narrowing gloss.[218] In so doing, *McKee* misses the point. The point is not that the "basis for *Citizens United's* holding . . . had [any]thing to

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[206] *Id.*

[207] *Supra* note 10.

[208] *Supra* text accompanying notes 175–76.

[209] *Cf.* Citizens United v. FEC, 558 U.S. 310, 324–26 (2010) (addressing the appeal-to-vote test); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469–70 (2007) (opinion of Roberts, C.J.) (same).

[210] Yamada v. Snipes, 786 F.3d 1182, 1185–86 (9th Cir.), *cert. denied*, 136 S. Ct. 569 (2015).

[211] *Id.* at 1203.

[212] *Supra* note 10.

[213] *Supra* text accompanying notes 175–76.

[214] *Yamada*, 786 F.3d at 1203.

[215] FEC v. Wis. Right to Life, Inc., 551 U.S. at 458, 459 & nn.2–3 (2007) (opinion of Roberts, C.J.).

[216] *Id.* at 469–70 (opinion of Roberts, C.J.).

[217] *Compare* Citizens United v. FEC, 558 U.S. 310, 324–26 (2010), *with supra* text accompanying notes 180–81, 190–92.

[218] *See* Nat'l Org. for Marriage, Inc. v. McKee, 649 F.3d 34, 66–67 (1st Cir. 2011) (making this mistake); *see also Yamada*, 786 F.3d at 1189 (following *McKee*).

do with the appeal-to-vote test or the divide between express and issue advocacy."[219] Nor is the *Citizens United* holding itself the point. Instead, the point is what follows from the holding.

Notwithstanding *McKee,*[220] the appeal-to-vote test never was a form of express advocacy;[221] the appeal-to-vote test never was a "divide between express and issue advocacy" or a way of "distinguishing between express and issue advocacy."[222] Because the appeal-to-vote test was not a form of express advocacy, it was also not a factor in determining whether speech is an independent expenditure properly understood,[223] so the appeal-to-vote test had no bearing on the major-purpose test and had no other bearing on whether government may trigger Track 1, political-committee(-like) burdens.[224]

McKee further says the appeal-to-vote test was *not* a "constitutional limit on government power."[225] This misunderstands *Wisconsin Right to Life,* under which the *First Amendment* permitted the challenged law to reach only those Federal Election Campaign Act electioneering communications whose only reasonable interpretation was as an appeal to vote for or against a clearly identified candidate.[226]

Besides, how can *McKee* acknowledge that "*Citizens United* eliminated the context in which the appeal-to-vote test has had any significance" and then say the test was *not* a "constitutional limit on government power"?[227] The test was significant, because it *was* a constitutional limit on government power.[228] That government may regulate issue advocacy in some ways does not mean the test was something other than a "constitutional limit on government power."[229]

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[219] *McKee*, 649 F.3d at 69; *see also Yamada*, 786 F.3d at 1191 (quoting *McKee,* 649 F.3d at 69).

[220] *McKee*, 649 F.3d at 69 & n.48; *accord* Real Truth About Abortion, Inc. v. FEC, 681 F.3d 544, 551 (4th Cir. 2012); *see also Yamada*, 786 F.3d at 1189 (following *Real Truth*); Free Speech v. FEC, 720 F.3d 788, 795 (10th Cir. 2013) (same); Ctr. for Individual Freedom, Inc. v. Tennant, 706 F.3d 270, 280–81 (4th Cir. 2013) (same); Comm. for Justice & Fairness v. Ariz. Sec'y of State's Office, 332 P.3d 94, 105 (Ariz. Ct. App. 2014) (same), *review denied*, No. CV-14-0250-PR, 2015 Ariz. LEXIS 136 (Ariz. Apr. 21, 2015).

[221] *Supra* text accompanying notes 173–79.

[222] *Contra McKee*, 649 F.3d at 69 & n.48. Instead, the divide between—and the way of distinguishing—express and issue advocacy remains whether speech expressly advocates. *Supra* text accompanying notes 168–71.

[223] *Supra* notes 9, 150.

[224] *Supra* note 148.

[225] *McKee*, 649 F.3d at 69 n.48.

[226] *Supra* text accompanying note 175–76.

[227] *McKee*, 649 F.3d at 69 & n.48.

[228] *Supra* text accompanying note 175–76.

[229] *Contra McKee*, 649 F.3d at 69 n.48.

In sum: After *Citizens United,* the appeal-to-vote test—once known as the "functional equivalent of express advocacy"[230]—no longer affects whether government may ban, otherwise limit, or regulate speech, and the appeal-to-vote test is vague. It has no place in law.[231]

VII. THE SCRUTINY LEVEL AND THE DEFINITIONS

The First Amendment limits when government may trigger Track 1, political-committee(-like) burdens. Law triggering such burdens beyond *Buckley* and *Sampson* is unconstitutional, regardless of the scrutiny level[232] and regardless of whether one assesses political-committee(-like) definitions,[233] or alternatively, the Track 1 burdens themselves.[234] Nevertheless, *strict* scrutiny applies, and the proper challenge is to the *definitions.*[235]

First, when it *is* constitutional to trigger Track 1 burdens for an organization—i.e., when it is constitutional to make an organization itself *be* a political committee or a political-committee-like organization to speak, or make or in effect make a fund/account that is part of the organization *be* a political-committee-like fund/account to speak—in the first place, and the organization *then* challenges Track 1 disclosure law, substantial-relation *exacting* scrutiny[236] applies.[237]

However, when the challenge is to whether government may trigger Track 1 burdens for an organization itself in the first place, *strict*

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[230] Citizens United v. FEC, 558 U.S. 310, 335 (2010) (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 470 (2007) (opinion of Roberts, C.J.)).

[231] *Supra* text accompanying notes 180–81, 190–92.

[232] *See* Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 840 (7th Cir. 2014) (understanding this point); Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 875 (8th Cir. 2012) (en banc) (same).

[233] *Infra* text accompanying notes 257–71.

[234] *See* Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 588 (8th Cir. 2013) (stating that a court can "consider each challenged disclosure requirement in isolation").

[235] *Infra* text accompanying notes 236–71.

[236] This is not closely-drawn exacting scrutiny. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387–88 (2000) (quoting Buckley v. Valeo, 424 U.S. 1, 16, 25 (1976) (per curiam)).

[237] Davis v. FEC, 554 U.S. 724, 744 (2008) (quoting *Buckley*, 424 U.S. at 64). *Vermont Right to Life Committee, Inc. v. Sorrell* does not acknowledge that limits and sources bans on contributions that political committees receive apply only when it is constitutional to make an organization *be* a political committee in the first place. *See* Vt. Right to Life Comm., Inc. v. Sorrell, 875 F. Supp. 2d 376, 393 n.15 (D. Vt. 2012) (making this mistake), *aff'd on other grounds*, 758 F.3d 118, 135–38 (2d Cir. 2014), *cert. denied,* 135 S. Ct. 949 (2015). Notwithstanding *Vermont Right to Life*, the scrutiny level that applies to limits and source bans on contributions received is no reason not to apply *another* scrutiny level in assessing whether government may trigger Track 1 burdens for the organization in the first place. *Vermont Right to Life* itself, while asserting that closely-drawn exacting scrutiny applies to contribution limits, *id.*, holds that substantial-relation exacting scrutiny applies to law triggering Track 1, political-committee(-like) burdens, *id.* at 396.

scrutiny applies.[238] This is because political-committee or political-committee-like status substantially burdens speech[239] with onerous Track 1 requirements that *Buckley, Massachusetts Citizens for Life, Wisconsin Right to Life,* and *Citizens United* describe[240] and which extend beyond Track 2, non-political-committee reporting.[241]

In other words, strict scrutiny applies not only when law bans an organization's spending for political speech and allows speech only by a (separate) political committee that the organization *forms or has,*[242] but also when law does *not* ban speech,[243] but instead requires that for an organization to speak (1) the organization itself must *be* a political committee or a political-committee-like organization, or (2) a fund or account that is part of the organization[244] must *be* or must in effect *be* a political-committee-like fund or account.[245] Alternatively, substantial-relation exacting scrutiny[246] applies in these two latter circumstances.[247]

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[238] *Infra* text accompanying notes 239–47.

[239] *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2817 (2011) (quoting Citizens United v. FEC, 558 U.S. 310, 340 (2010)) (applying strict scrutiny to burden, not a ban, on speech in Arizona law); *id.* at 2824 (quoting *Davis,* 554 U.S. at 740) (referring to both a "substantial burden" and a "compelling state interest"). In addressing burdens, not bans, *Arizona Free Enterprise Club's Freedom Club PAC,* 131 S. Ct. at 2817, 2824, and *Davis,* 554 U.S. at 740, rely on *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 256 (1986), which addresses a speech ban.

[240] *Supra* text accompanying notes 3–12, 60–70, 74–86, 131; *see also* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2664 (2011) (comparing burdens and bans); *see* quote *supra* note 77.

[241] *Supra* text accompanying notes 63–65, 125–28.

[242] *See Citizens United,* 558 U.S. at 337–40 (applying strict scrutiny to a speech ban and noting the burdens of *forming/having* a political committee that engages in the same speech); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658 (1990) (holding a state requirement that an organization *form or have* a separate segregated fund "must be justified by a compelling state interest"), *overruled on other grounds by Citizens United,* 558 U.S. at 365; *Mass. Citizens for Life,* 479 U.S. at 252 (opinion of Brennan, J.) (considering whether a compelling state interest justifies an independent-expenditure ban and noting the burdens of *forming/having* a separate segregated fund that engages in the same speech).

[243] Sindicato Puertorriqueño de Trabajadores v. Fortuño, 699 F.3d 1, 5, 12–15 (1st Cir. 2012) (holding "substantial burdens," not a ban, on unions' and an associated organization's political speech fail strict scrutiny under *Citizens United,* 558 U.S. at 337–40).

Fortuño is reconcilable with First Circuit precedent only by incorrectly believing the *McKee* Track 1 burdens are "simple." Nat'l Org. for Marriage, Inc. v. McKee, 649 F.3d 34, 56 (1st Cir. 2011); *see also* Yamada v. Snipes, 786 F.3d 1182, 1196 n.7 (9th Cir.) (quoting *McKee,* 649 F.3d at 56), *cert. denied,* 136 S. Ct. 569 (2015); State v. Green Mountain Future, 2013 VT 87, ¶ 22 n.5, 194 Vt. 625, 86 A.3d 981 (same).

[244] *E.g.,* Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 868–72 (8th Cir. 2012) (en banc) (describing such a fund/account).

[245] Colo. Right to Life Comm., Inc. v. Coffman, 498 F.3d 1137, 1146 (10th Cir. 2007) (applying strict scrutiny to an entire challenge, including a state requirement that organizations themselves be political committees); Cal. Pro-Life Council, Inc. v. Getman,

Although the scrutiny level itself does not affect the result, because the tailoring[248] analysis is the same under either scrutiny level,[249] strict scrutiny buttons down the holding more tightly,[250] and post-*Citizens United* circuits applying substantial-relation exacting scrutiny reach circuit-splitting results.[251]

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328 F.3d 1088, 1101 & n.16 (9th Cir. 2003) (applying strict scrutiny pre-Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990 (9th Cir. 2010)); *see* N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 290 (4th Cir. 2008) (addressing "narrower means" than a state requirement that organizations themselves be political committees).

[246] Which does *not* ask whether law is reasonable, *contra* Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 489 (7th Cir. 2012), poses an "undue burden" on speech, *contra* Worley v. Fla. Sec'y of State, 717 F.3d 1238, 1250 (11th Cir. 2013), or is "unduly burdensome," *contra Yamada,* 786 F.3d at 1195.

[247] *Minn. Citizens Concerned for Life*, 692 F.3d at 875 (explaining that strict scrutiny *should* apply and holding for the plaintiffs under substantial-relation exacting scrutiny); *cf.* Del. Strong Families v. Denn, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting) (citing *Citizens United*, 558 U.S. at 366–67; Buckley v. Valeo, 424 U.S. 1, 64–65 (1976) (per curiam)) (denial of certiorari) (asserting that substantial-relation exacting scrutiny applies, perhaps without appreciating that the parties and the court of appeals addressed Track 1 law as Track 2 law); *supra* note 72; *see also* Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 589–91 (8th Cir. 2013) (following *Minnesota Citizens Concerned for Life*). Substantial-relation "exacting scrutiny is more than a rubber stamp." *Minn. Citizens Concerned for Life*, 692 F.3d at 876 (citing *Buckley,* 424 U.S. at 64, 66). It "is not a loose form of judicial review." *Barland*, 751 F.3d at 840. Although not strict scrutiny, it is a "strict test" and a "strict standard." *Buckley*, 424 U.S. at 66, 75.

Coalition for Secular Government v. Williams, 815 F.3d 1267, 1275 (10th Cir.), *cert. denied,* 85 U.S.L.W. 3143 (2016), cites *Doe v. Reed*, 561 U.S. 186, 196 (2010), while *New Mexico Youth Organized v. Herrera,* 611 F.3d 669, 676 (10th Cir. 2010), cites *Buckley,* 424 U.S. at 64, and *Reed,* 561 U.S. at 196, for substantial-relation exacting scrutiny, yet since *Buckley*, the Supreme Court has separated strict scrutiny from exacting scrutiny. *See Iowa Right to Life*, 717 F.3d at 590–91 (understanding this point). Meanwhile, *Reed* addresses ballot-access law, not political-speech law, much less political-speech law triggering Track 1, political-committee(-like) burdens. *Accord* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 186–87 (1999) (addressing, *inter alia*, ballot-access law). Anyway, *Colorado Right to Life*, 498 F.3d at 1146, is the earlier Tenth Circuit panel opinion, so it trumps *Coalition for Secular Government* and *New Mexico Youth Organized*. *Supra* note 86.

Madigan holds substantial-relation exacting scrutiny applies, *Madigan,* 697 F.3d at 477, 490, after incorrectly lumping into one disclosure discussion challenges by (1) multiple organizations that *can* object, under *Buckley* or *Sampson,* to *being* a political committee, *id.* at 470 & n.1 (collecting authorities), and (2) organizations that *cannot* raise *Buckley* and at least *do* not raise (perhaps because they feel they *cannot* raise) a *Sampson*-like contention, *id.* (citing Family PAC v. McKenna, 685 F.3d 800, 811 (9th Cir. 2012); SpeechNow.org v. FEC, 599 F.3d 686, 696–98 (D.C. Cir. 2010) (en banc)) (making this mistake).

Yamada does the same. *Yamada,* 786 F.3d at 1194 (citing *Family PAC,* 685 F.3d at 805–06; *Human Life of Wash.,* 624 F.3d at 1005).

[248] *Supra* text accompanying notes 87–89, 155–56.

[249] *Minn. Citizens Concerned for Life*, 692 F.3d at 872, 875.

[250] *See Human Life of Wash.*, 624 F.3d at 1004–05, 1010 (discussing strict scrutiny and substantial-relation exacting scrutiny); *cf. id.* at 1013 (mistakenly referring to the "standard of review" rather than the scrutiny level).

[251] *E.g., infra* text accompanying notes 252–56.

When post-*Citizens United* circuits do *not* make the mistake of believing *Citizens United* pages 366–71/914–16 allow Track 1 burdens,[252] the circuits strike down law triggering Track 1 burdens when appropriate,[253] especially after *McCutcheon*'s strengthening closely-drawn exacting scrutiny.[254]

By contrast, when circuits make this mistake regarding *Citizens United*, they erroneously uphold such law.[255] This mistake—like the mistake of not applying the major-purpose test to state law[256]—is at the epicenter of the circuit splits.

Second, the proper challenge is to political-committee and political-committee-like *definitions,*[257] not the Track 1 burdens themselves.[258]

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[252] *Supra* text accompanying notes 103, 125–28. These *Citizens United* pages apply substantial-relation exacting scrutiny only to Track 2 law, not Track 1 law. *See Citizens United*, 558 U.S. at 366–67 (quoting *Buckley*, 424 U.S. at 64, 66) (applying substantial-relation exacting scrutiny to Track 2 law).

[253] *See, e.g.*, *Minn. Citizens Concerned for Life*, 692 F.3d at 875 & n.9 (applying substantial-relation exacting scrutiny); Sampson v. Buescher, 625 F.3d 1247, 1255 (10th Cir. 2010) (same); *see also* Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 589–91, 596–601 (8th Cir. 2013) (applying substantial-relation exacting scrutiny and later striking down *some* law); *cf.* SpeechNow.org v. FEC, 599 F.3d 686, 696–98 (D.C. Cir. 2010) (applying substantial-relation exacting scrutiny, while upholding such law when the plaintiff concedes it has the *Buckley* major purpose as to candidates); Complaint for Declaratory and Injunctive Relief at paras. 7, 47, SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010) (No. 1:08-cv-00248-JR), 2008 WL 8050924, at *3, 12 (plaintiff conceding that it has the *Buckley* major purpose).

[254] Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 840–42 (7th Cir. 2014) (quoting McCutcheon v. FEC, 134 S. Ct. 1434, 1445–46 (2014)).

[255] *E.g.*, Yamada v. Snipes, 786 F.3d 1182, 1194 (9th Cir.) (applying substantial-relation exacting scrutiny), *cert. denied,* 136 S. Ct. 569 (2015); Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 125 n.5, 136–37 (2d Cir. 2014) (same), *cert. denied,* 135 S. Ct. 949 (2015); *Iowa Right to Life,* 717 F.3d at 589–91, 593–96 (applying substantial-relation exacting scrutiny and later upholding *some* law); *accord* Justice v. Hosemann, 771 F.3d 285, 292–97, 300 n.13 (5th Cir. 2014) (holding that substantial-relation exacting scrutiny applies but later declining to decide whether to apply substantial-relation exacting scrutiny or "wholly without merit," while incorrectly finding plaintiffs had insufficiently pleaded *Sampson*-like facts), *cert. denied,* 136 S. Ct. 1514 (2016); Worley v. Fla. Sec'y of State, 717 F.3d 1238, 1242–45 & n.2, 1250, 1252 & n.7 (11th Cir. 2013) (applying substantial-relation exacting scrutiny, while upholding such law in a *facial* challenge, but reaching beyond the record and considering whether the *plaintiffs*—who as an organization have the *Buckley* major purpose, *if* it is constitutional to trigger Track 1, political-committee(-like) burdens based on ballot-measure speech—*expressly contemplate* going beyond small-scale speech).

[256] *Supra* text accompanying notes 108–11.

[257] Thus, it is unnecessary to convert, as some circuits do, political-committee(-like)-definition challenges into political-committee(-like)-burdens challenges. *See, e.g.*, *Yamada,* 786 F.3d at 1186, 1194–96 (making this mistake); Nat'l Org. for Marriage, Inc. v. McKee, 649 F.3d 34, 55–59 (1st Cir. 2011) (same); Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 997–98, 1008–09, 1011–12 (9th Cir. 2010) (same).

The court-of-appeals opinions in *Yamada* and *Human Life of Washington* incorrectly say the plaintiffs challenged the Track 1 burdens themselves at the district-court level. Instead, they challenged the definitions. Yamada v. Weaver, 872 F. Supp. 2d 1023, 1029,

Dismissing the propriety of challenging political-committee and political-committee-like definitions by calling them "drafting tool[s],"[259] or saying they lack significance apart from the Track 1 burdens,[260] misses the point that courts often assess definitions.[261] Parallel to *McConnell v. FEC*[262] and *Buckley*,[263] the proper challenge is to what triggers "the full panoply" of Track 1 burdens.[264] The definitions trigger the burdens.[265]

Besides, it is simpler if a Track 1, political-committee or political-committee-like definition—not every Track 1 burden[266]—has the *Buckley* tests, and excludes organizations with only small-scale speech.[267] Otherwise, the law would be unwieldy.[268]

1032–33 (D. Haw. 2012), *aff'd in part and rev'd on other grounds sub nom. Yamada v. Snipes*, 786 F.3d 1182, 1194–1201 (9th Cir.), *cert. denied,* 136 S. Ct. 569 (2015); Verified Complaint for Declaratory & Injunctive Relief at 10–12, Human Life of Wash., Inc. v. Brumsickle (No. C08-0590-JCC), 2009 WL 62144 (W.D. Wash. Apr. 16, 2008).

However, once the court of appeals "addressed"/"passed upon" the burdens, they were also challengeable in the Supreme Court. *Citizens United*, 558 U.S. at 323, 330 (quoting Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379 (1995)).

[258] *E.g.*, FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 262 (1986) ("classified as a political committee"); Buckley v. Valeo, 424 U.S. 1, 79 (1976) (per curiam) (addressing how " 'political committee' is defined" and holding what "the words 'political committee' . . . need only encompass" to be constitutional); *see also* McConnell v. FEC, 540 U.S. 93, 170 n.64 (2003) (quoting *Buckley*, 424 U.S. at 79), *overruled on other grounds by Citizens United*, 558 U.S. at 365–66.

[259] Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 137 (2d Cir. 2014), *cert. denied,* 135 S. Ct. 949 (2015).

[260] *See* Nat'l Org. for Marriage, Inc. v. McKee, 649 F.3d 34, 56, 58 (1st Cir. 2011) (raising this contention); *see also* Corsi v. Ohio Elections Comm'n, 2012-Ohio-4831, 981 N.E.2d 919, ¶ 15 (10th Dist.) (following *McKee*); State v. Green Mountain Future, 2013 VT 87, ¶ 32, 194 Vt. 625, 86 A.3d 981 (same).

[261] *E.g.*, *McConnell*, 540 U.S. at 189–94 (addressing an electioneering-communication definition); *Buckley,* 424 U.S. at 77–80 (addressing contribution, expenditure, and political-committee definitions).

[262] *McConnell*, 540 U.S. at 189–94 (addressing an electioneering-communication definition).

[263] *Buckley*, 424 U.S. at 77–80 (addressing contribution, expenditure, and political-committee definitions).

[264] FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 262 (1986); *accord Buckley,* 424 U.S. at 63.

[265] Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 812, 815, 818, 822, 826–27, 832 & n.20, 834, 837, 840 (7th Cir. 2014); Colo. Right to Life Comm., Inc. v. Coffman, 498 F.3d 1137, 1144, 1153–54 (10th Cir. 2007). Thus, the tests for constitutionality focus on when government may trigger Track 1 burdens. Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 584 (8th Cir. 2013); Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 872 (8th Cir. 2012) (en banc); *Colo. Right to Life,* 498 F.3d at 1153.

[266] *E.g.*, *supra* text accompanying notes 63–65.

[267] *See supra* Part V.

[268] Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 137 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015).

Political-committee(-like) definitions and other such law have disclosure thresholds. However, a challenge *under the major-purpose test* (or a watered-down counterpart) to law

triggering Track 1 burdens *cannot* be a *disclosure-threshold* challenge, because the major-purpose test (or a watered-down counterpart) *cannot* be a disclosure-threshold test, *see* N.M. Youth Organized v. Herrera, 611 F.3d 669, 678–79 (10th Cir. 2010) (understanding this point); *Colo. Right to Life,* 498 F.3d at 1153–54 (same); *supra* text accompanying notes 144–50 (defining the major-purpose test), except for organizations making a massive amount of contributions or independent expenditures properly understood, *supra* text accompanying notes 160–62.

So notwithstanding *Vermont Right to Life*, 758 F.3d at 137–38, and *Yamada v. Snipes*, 786 F.3d 1182, 1199–1200 (9th Cir.), *cert. denied*, 136 S. Ct. 569 (2015), comparing political-committee(-like)-registration thresholds *cannot* be a test for the constitutionality of law triggering Track 1 burdens as applied to organizations *lacking* the *Buckley* major purpose. *See Iowa Right to Life,* 717 F.3d at 589 (understanding this point).

Nevertheless, there are three possible disclosure-threshold-challenge categories. A disclosure-threshold challenge *can*—although it *need* not—arise in Category 1, *i.e.*, when:

(1) Under Track 1, an organization objects to law triggering Track 1 burdens, and the challenge addresses *small-scale speech*. *Compare, e.g.*, Coal. for Secular Gov't v. Williams, 815 F.3d 1267, 1279–80 (10th Cir.) (addressing a disclosure threshold as part of the analysis), *cert. denied*, 85 U.S.L.W. 3143 (2016), Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth, 556 F.3d 1021, 1033–34 (9th Cir. 2009) (incorrectly addressing a disclosure threshold instead of the *Buckley* major-purpose test), *and supra* note 156, *with* Sampson v. Buescher, 625 F.3d 1247, 1255–61 (10th Cir. 2010) (not addressing a disclosure threshold).

A disclosure-threshold challenge *need* not arise in Category 1, because an organization objecting to law triggering Track 1 burdens, can—and should—instead challenge the political-committee(-like) *definition*. *Supra* text accompanying notes 257–68. By contrast, a disclosure-threshold challenge *does* arise in Categories 2 and 3, i.e., when:

(2) Under Track 1, it *is* constitutional to trigger Track 1 burdens for an organization in the first place, and the organization *then* objects to the low level at which such burdens begin. *E.g.*, Family PAC v. McKenna, 685 F.3d 800, 809, 810 & n.10, 811 (9th Cir. 2012); Daggett v. Comm'n on Gov't'l Ethics & Elections Practices, 205 F.3d 445, 466 (1st Cir. 2000) (quoting Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 32 (1st Cir. 1993)); *see also* ProtectMarriage.com–Yes on 8 v. Bowen, 752 F.3d 827, 831 (9th Cir. 2014) (citing *Family PAC*, 685 F.3d at 809–11); or

(3) Under Track 2, non-political-committee reporting *is* constitutional—or at least is adjudged constitutional—in the first place, and a speaker *then* objects to the low level at which such reporting begins. *E.g.*, Del. Strong Families v. Attorney Gen. of Del., 793 F.3d 304, 310–11 (3d Cir. 2015) (incorrectly addressing Track 1 law as Track 2 law), *cert. denied*, 136 S. Ct. 2376 (2016) (denial of certiorari after subsequent Third Circuit appeal); *supra* note 72.

In Category 1 of these three disclosure-threshold-challenge categories, strict scrutiny, or alternatively, substantial-relation exacting scrutiny, is the scrutiny level, because the organization challenges law triggering Track 1 burdens in the first place. *Supra* text accompanying notes 236–56; *see, e.g.*, *Sampson*, 625 F.3d at 1255 (applying substantial-relation exacting scrutiny); *see also Coal. for Secular Gov't,* 815 F.3d at 1275 (applying substantial-relation exacting scrutiny and rejecting "wholly without rationality" as a scrutiny level).

In Categories 2 and 3, there is no challenge to law triggering Track 1 burdens in the first place, and substantial-relation exacting scrutiny is the scrutiny level. *E.g.*, *Family PAC,* 685 F.3d at 809–11 (addressing Category 2); *ProtectMarriage,* 752 F.3d at 832 (addressing Category 2 and clarifying *Family PAC*). Applying such scrutiny in Category 2 is consistent with applying such scrutiny when government may trigger Track 1 burdens

for an organization itself in the first place and the organization *then* challenges Track 1 disclosure law. Davis v. FEC, 554 U.S. 724, 744 (2008) (quoting *Buckley,* 424 U.S. at 64). And applying such scrutiny in Category 3 is consistent with applying such scrutiny to Track 2 law. Citizens United v. FEC, 558 U.S. 310, 366–67 (2010) (quoting *Buckley,* 424 U.S. at 64, 66).

By contrast, the *Buckley* "wholly without rationality" language, which sounds like something even less than the rational-basis test, *Buckley*, 424 U.S. at 83, is simply not a scrutiny level. *See Coal. for Secular Gov't,* 815 F.3d at 1275 (addressing Category 1). After all, many Supreme Court political-speech opinions recognize that scrutiny levels all have both a government-interest element and a tailoring element. *See, e.g.*, *Citizens United*, 558 U.S. at 366–67 (quoting *Buckley,* 424 U.S. at 64, 66) (applying substantial-relation exacting scrutiny); *Davis,* 554 U.S. at 744 (quoting *Buckley,* 424 U.S. at 64) (same). Although *Buckley* mentions government interests and tailoring, the *Buckley* "wholly without rationality" language itself neither has, nor is part of, a government-interest element or a tailoring element. *Buckley,* 424 U.S. at 83.

Besides, disclosure-threshold challenges in Categories 1, 2, and 3 address small-scale speech. And lowering the scrutiny level—especially to something even less than the rational-basis test—makes disclosure thresholds more likely to survive scrutiny. So to the extent that disclosure of small-scale speech is affordable for big players and not for little players, lowering the scrutiny level in this way can in effect hurt little players more than big players. Under the First Amendment, that cannot be right. *Supra* note 73; *supra* text accompanying note 137.

There are two additional and related reasons that "wholly without rationality" cannot be right *in Category 1*.

First, please recall that only little players—not big players—are likely to bring proper *Sampson*(-like) small-scale-speech challenges to law triggering Track 1, political-committee(-like) burdens. *Supra* note 154. If such a challenge is a disclosure-threshold challenge in Category 1, and if "wholly without rationality" were a scrutiny level, *contra Coal. for Secular Gov't*, 815 F.3d at 1275 (quoting *Buckley*, 424 U.S. at 83), then little players bringing such a challenge to law triggering such burdens would prevail only if the challenged law were wholly without rationality. Yet other players—including big players—bringing *another* challenge to law triggering such burdens would enjoy strict scrutiny or, alternatively, substantial-relation exacting scrutiny. *Supra* text accompanying notes 236–56. But again, the First Amendment applies to big players and little players. *Supra* note 73. Big players have no right—none—to political-speech law protecting them at the expense of little players.

Second, when an organization challenges law triggering Track 1 burdens, no one should be able to convert a political-committee(-like)-definition challenge or, alternatively, a political-committee(-like)-burdens challenge, *supra* text accompanying notes 257–68, into a disclosure-threshold challenge and thereby *lower* the scrutiny level from strict scrutiny or, alternatively, substantial-relation exacting scrutiny, *supra* text accompanying notes 236–56, to "wholly without rationality," *Buckley*, 424 U.S. at 83. That would make the label on the challenge relevant. But the label is irrelevant. *Supra* note 91.

By nevertheless saying—in disclosure-threshold-challenge Category 1, 2, or 3, respectively—that the *Buckley* "wholly without rationality" language, *Buckley,* 424 U.S. at 83, is the scrutiny level:

(1) *Canyon Ferry* contradicts other case law, *supra* text accompanying notes 236–56, including *Sampson* and *Coalition for Secular Government*, under Track 1;
(2) *Daggett* and *Vote Choice* contradict *Davis*, *Family PAC*, and *ProtectMarriage*, under Track 1; and
(3) *Delaware Strong Families* contradicts *Citizens United*, under Track 2.

McKee disagrees, yet its fundamental disagreement—and its fundamental error—is not over these points. Rather, *McKee* disagrees with Supreme Court holdings that such burdens are "onerous," and then, like *Yamada*[269] and *Vermont Right to Life*,[270] rejects the major-purpose test for state law.[271]

CONCLUSION: "ENOUGH IS ENOUGH."

The First Amendment limits when government may trigger Track 1, political-committee(-like) burdens.

The First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh circuits have addressed state law triggering Track 1 burdens.[272] No circuit's holding coincides with any other circuit's holding,[273] and the circuit splits on these issues have become ever more complex circuit chasms. The problem is especially acute given the circuit splits over whether *Citizens United* pages 366–71/914–16[274] allow state governments to trigger Track 1 burdens.[275]

To borrow a phrase, "Enough is enough."[276] Constitutional law on political speech can unite people from across the political spectrum.[277]

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[269] Yamada v. Snipes, 786 F.3d 1182, 1198, 1201 (9th Cir.), *cert. denied*, 136 S. Ct. 569 (2015).

[270] Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 136 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015).

[271] Nat'l Org. for Marriage, Inc. v. McKee, 649 F.3d 34, 56, 58–59 (1st Cir. 2011); *cf.* Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1011 (9th Cir. 2010) (replacing the major-purpose test with an "a priority"-"incidentally" test); *id.* at 1013–14 ("[Washington's] political committee disclosure requirements are not unconstitutionally burdensome relative to the government's informational interest. . . . These disclosure requirements are not unduly onerous . . . . [T]he Disclosure Law's somewhat modest political committee disclosure requirements are substantially related to the government's interest in informing the electorate . . . ."); *see also Yamada*, 786 F.3d at 1195, 1196 n.7, 1198 (quoting and following *Human Life of Wash.*, 624 F.3d at 1010–11, 1013–14); *id.* at 1200 (creating an "a significant participant in [the] electoral process" test for an organization that "may not make political advocacy a priority"); State v. Green Mountain Future, 2013 VT 87, ¶ 22 n.5, 194 Vt. 625, 86 A.3d 981 (following *McKee*).

[272] *See, e.g., supra* notes 245–71.

[273] *See, e.g., supra* notes 90–111.

[274] Citizens United v. FEC, 558 U.S. 310, 366–71, 130 S. Ct. at 876, 914–16 (2010).

[275] The highest courts of Vermont, Ohio, Arizona, and Washington are also part of the "circuit" splits. SUP. CT. R. 10 (establishing factors in granting certiorari petitions); *see, e.g., supra* notes 97 (Vermont), 144 (Ohio), 149 (Vermont and Arizona), 152 (Washington), 154 (Ohio and Washington), 156–57 (Arizona). The Third and Sixth circuits have issued no opinions on Track 1 law, and the District of Columbia Circuit has addressed only federal law. *Supra* note 72 (discussing a Third Circuit opinion that incorrectly addresses Track 1 law as Track 2 law).

[276] FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 478 (2007) (opinion of Roberts, C.J.).

[277] *See id.* at 481 (opinion of Roberts, C.J.) ("These cases are about political speech. The importance of the cases to speech and debate on public policy issues is reflected in the

Courts in general, and the Supreme Court in particular,[278] can solve the problem by holding that—regardless of the scrutiny level and regardless of whether the challenge is to the political-committee(-like) definitions or burdens—government may trigger Track 1 burdens only for organizations that are "under the control of a candidate" or candidates in their capacities as candidates or for organizations having "the major purpose" under *Buckley*.[279] And even if government clears the *Buckley* hurdle, it must still clear the *Sampson* hurdle: Government may not trigger Track 1 burdens for organizations having the *Buckley* major purpose but engaging in only small-scale speech.[280]

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number of diverse organizations that have joined in supporting WRTL before this Court . . . .").

[278] *See, e.g.*, Randy Elf, *Speech law benefits politicians, rich,* OBSERVER (July 3, 2016) (previewing this Article), http://observertoday.com/page/content.detail/id/639563/Speech-law-benefits-politicians--rich.html.

[279] Buckley v. Valeo, 424 U.S. 1, 63, 79 (1976) (per curiam); *see also* McConnell v. FEC, 540 U.S. 93, 170 n.64 (2003) (quoting *Buckley*, 424 U.S. at 79), *overruled on other grounds by Citizens United,* 558 U.S. at 365–66; FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 252 n.6, 262 (1986) (following *Buckley*).

[280] *E.g.*, Sampson v. Buescher, 625 F.3d 1247, 1249, 1251, 1261 (10th Cir. 2010).

SEDITIOUS ACTS OF FAITH: GOD, GOVERNMENT, CONSCIENCE, AND BOILING FROGS

Stacy A. Scaldo[*]

INTRODUCTION

So, what *is* the best way to boil a frog? The exercise, often used as a metaphor for apathy or as a parable teaching the importance of vigilance, suggests that the best way to do so is to place the frog in a pot of comfortable, room temperature water and then to heat the pot gradually until it starts boiling. As the water slowly warms, his body adjusts to the change and he remains comfortable. The frog will not notice he is being boiled until it is too late. This method, apparently, is much preferred to placing the frog in a pot of already boiling water. In the latter case, the frog will recognize the sudden change of environment and attempt to escape, leaving the boiler without a frog to boil.[1]

The legend of the boiling frog, in reality, is not true. Placing a frog in boiling water would have dire consequences for the frog—probably preventing it from making it out of the pot alive or, at the very least, unscathed. Likewise, the frog would most likely catch on to the slow-boil method and make attempts to flee while it still had a chance. That being said, and without concluding that frogs are more intelligent than people, the myth makes for a good illustration and is easily relatable to human activity.

In his private papers, Justice William O. Douglas makes a similar observation:

> As nightfall does not come all at once, neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged. And it is in such twilight that we all must be most aware of change in the air—however slight—lest we become unwitting victims of the darkness.[2]

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[*] Associate Professor, Florida Coastal School of Law. J.D., *summa cum laude*, Nova Southeastern University, Shepard Broad Law Center, 2001. I would like to thank Dean Lynn Marie Kohm and the Regent University School of Law for inviting me to present this paper at the Religiously Affiliated Law Schools Conference on September 30, 2016. I am also most appreciative of the editors of the Regent University Law Review, particularly Noah J. DiPasquale, Alexandra M. McPhee, Lauren Stroyeck, Robin D. Bland, Sharla M. Mylar, and Victoria L. Rice for the diligence, insight, and dedication they displayed in bringing this article to publication.

[1] Henna Inam, *Leadership and the Boiling Frog Experiment*, FORBES (Aug. 28, 2013, 5:25 AM), http://www.forbes.com/sites/hennainam/2013/08/28/leadership-and-the-boiling-frog-experiment/#5f7c6be21831.

[2] Letter from Justice William O. Douglas to The Young Lawyers Section of the Wash. State Bar Ass'n (Sept. 10, 1976), *in* THE DOUGLAS LETTERS: SELECTIONS FROM THE

Using the approach of nightfall as his change component, Justice Douglas notes that while the slow-moving progression through dusk provides a seemingly comfortable constant, there is nothing consistent about what approaches. Dark and light are polar opposites, and the inability or refusal to acknowledge what lies between the two is exactly what renders one incapable of combatting the dark when it finally does arrive.[3]

Justice Douglas's quote, or the fallacious frog-boiling exercise, can describe any number of slow-moving surreptitious transgressions, including the use by members of the legislative and executive branches of government, as well as the popular elite, to separate the population of religious faithful from their faith. How the judicial branch responds to such an attempt is critical. It is the subject of a controversy that occupied the courts and captured the public's attention throughout the course of Barrack Obama's presidency—the Affordable Care Act, the subsequent contraceptive mandate imposed by the U.S. Department of Health and Human Services ("HHS Mandate" or "Mandate"), the conscience exceptions, and the response of the various religious communities. With over one hundred HHS Mandate lawsuits filed and litigated to various stages, the religious and legal communities—as well as the rest of the nation—awaited the outcome of this highly contested issue. Well, at least some did. The question this article addresses is why. Why is it acceptable to choose whose beliefs are worthy of protection and respect? And, why do some who would be expected to care seem ambivalent to the approaching darkness? Something about this situation suggests the answer lies in the metaphorical boiling of frogs.

In its application, the response to this question no doubt has implications regarding the court's handling of future issues of freedom of religion, how the public responds to the court's categorization of religious beliefs, and how parishioners practice their faith. This Article focuses on the HHS Mandate cases and highlights the all too often implied refusal to accept the sincerity of the collective plaintiffs' religious beliefs as worthy of judicial recognition. Part I of this Article reviews the pertinent provisions of the Affordable Care Act along with the comments filed in response to the Administration's multiple rule changes. It explains the different treatment between religious institutions, religiously-affiliated non-profit organizations and for-profit companies and demonstrates, through the various regulations, the constant struggle with compliance forced upon these religious institutions. Part II highlights the decisions wherein the lower courts denied the plaintiffs' requests for preliminary

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PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS 162 (Melvin I. Urofsky ed., 1987) [hereinafter THE DOUGLAS LETTERS].

[3] *Id.* ("[I]n such twilight . . . we all must be most aware of change in the air . . . lest we become unwitting victims of the darkness.").

or temporary relief pending review as well as the resulting Supreme Court opinions in the two paramount cases—*Burwell v. Hobby Lobby Stores, Inc.*[4] and *Zubik v. Burwell*.[5] Part III demonstrates how some of the particular judges' findings in these cases that the HHS Mandate did not pose a substantial burden on the practice of the plaintiffs' respective religions were essentially a determination that the plaintiffs' religious beliefs, although sincere, were so outside the norm as to not be worthy of legal protection. Possible reasons for the judges' findings will be explored, including examples of political, popular and societal message mixing. Part IV concludes that although the question of the sincerity of one's religious belief may appear at first to be an ancillary non-issue, silent acceptance of an improper judging of that belief could ultimately render religious freedom protections meaningless.

I. THE PATIENT PROTECTION AND AFFORDABLE HEALTH CARE ACT

Shortly after one year in office, President Barack Obama signed the Patient Protection and Affordable Health Care Act ("Act") into law.[6] The Act states in relevant part:

> (a) In general
> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements . . . .
> . . .
> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.[7]

The Act does not define "preventive care and screenings," and the U.S. Department of Health and Human Services ("HHS") issued an interim final rule on July 19, 2010, which deferred until August 1, 2011, an explanation of what was to be included as "preventive care and screenings."[8] Just a few days earlier, however, on July 14, Secretary of HHS Kathleen Sebelius joined Michelle Obama and Jill Biden to discuss the new preventive health benefits.[9] Only hours later, Planned

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4 134 S. Ct. 2751 (2014).

5 136 S. Ct. 1557 (2016) (per curiam).

6 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 42 U.S.C.) (2010).

7 42 U.S.C. § 300gg-13(a)(4) (2012).

8 Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,728 (July 19, 2010) (to be codified at 45 C.F.R. pt. 147).

9 *Preventive Health Care Coverage Under Health Reform*, WHITE HOUSE (July 14, 2010), https://www.whitehouse.gov/photos-and-video/video/preventive-health-care-coverage-under-health-reform#transcript.

Parenthood released a statement in support of the regulations, but urged the Administration to include additional policies regarding contraceptive coverage.[10] The statement warned that it would be "organizing a national effort to make sure that these additional guidelines meet the needs of women by ensuring those women's annual visits and all forms of FDA-approved prescription contraception are also covered under the new health care reform law with no co-pays or out-of-pocket expenses."[11] According to the statement, "more than 300 Planned Parenthood activists from across the country" would be arriving on Capitol Hill that week to lobby inclusion of "family planning, including women's annual visits and FDA-approved prescription birth control."[12]

Two of the organizations that submitted comments on the July 2010 Interim Final Rules were the United States Conference of Catholic Bishops (USCCB) and Planned Parenthood.[13] The USCCB made both medical and moral arguments. It noted that pregnancy is not a disease and thus including contraceptives and abortifacients as preventive services under the Act would be a misnomer.[14] Further, the USCCB argued that because "contraceptives and sterilization are morally problematic for many stakeholders," insurers should not be mandated to provide them for their employees.[15] In addressing the moral implications of requiring employers to provide such coverage, the USCCB stressed that this was, indeed, an issue of conscience:

> Because any mandate for contraception and sterilization coverage under the rubric of "preventive services" would apply to a wide array of group health plans and health insurance issuers, it would pose an unprecedented threat to rights of conscience for religious employers

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[10] *Planned Parenthood Supports Initial White House Regulations on Preventive Care; Highlights Need for New Guidelines on Women's Preventive Health to Include Family Planning*, PLANNED PARENTHOOD (May 14, 2014), https://www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-supports-initial-white-house-regulations-preventive-care-highlights-need-new-33140.htm.

[11] *Id.*

[12] *Id.*

[13] Letter from U.S. Conference of Catholic Bishops to Office of Consumer Info. & Ins. Oversight, Dep't of Health & Human Servs. 1 (Sept. 17, 2010), http://brendans-island.com/blogsource/2012_06_ConscienceFFF/Update/comments-to-hhs-on-preventive-services-2010-09.pdf [hereinafter USCCB Comments]; Letter from Planned Parenthood Fed'n of America, Inc. to Office of Consumer Info. & Ins. Oversight, Dep't of Health & Human Servs. (Sept. 17, 2010), http://savingmatters.dol.gov/ebsa/pdf/1210-AB44-0229.pdf [hereinafter Planned Parenthood Comments].

[14] USCCB Comments, *supra* note 13, at 3. The USCCB also argued that "most pregnancies, including unintended pregnancies, end in live birth rather than abortion, so it would be arbitrary to claim that preventing such pregnancies primarily prevents abortion rather than live birth." *Id.* Furthermore, the USCCB also said that the rate of abortions for unintended pregnancies is higher if the woman became pregnant during the use of a contraceptive. *Id.*

[15] *Id.* at 1.

> and others who have moral or religious objections to these procedures. In this regard, the Administration's promise that Americans who like their current coverage will be able to keep it under health care reform would be a hollow pledge. Currently, such employers, as well as insurance issuers with moral and religious convictions on these matters, are completely free under federal law to purchase and offer health coverage that excludes these procedures. They would lose this freedom of conscience under a mandate for all plans to offer contraception and sterilization coverage.[16]

The USCCB concluded that this mandate would be a complete reversal of existing insurance practices within the marketplace.[17]

Planned Parenthood's comments on the July 2010 Interim Final Rules focused primarily on access and costs.[18] The organization requested that HHS not only include all contraceptives approved by the Federal Food and Drug Administration ("FDA"), but also that it prohibit insurers from making health care providers pay for the elimination of cost-sharing and that it implement oversight mechanisms over the insurers.[19] Although Planned Parenthood acknowledged the balance HHS appeared to be attempting to strike, it made no mention of religious conscience or its validity. Instead, it suggested that health plans—assumedly those that were religiously based or affiliated—would use the Act in an effort to limit coverage and deny women access to healthcare.[20]

On August 3, 2011, HHS released a new set of Interim Final Rules requiring most health insurance plans to cover the cost of preventive services for women.[21] The Health Resources and Services Administration

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[16] *Id.* at 5.

[17] *Id.* at 6. The USCCB explained:

> No federal law has yet been construed to require private health plans to provide coverage of contraception and sterilization. Instead, federal law has thus far left insurance issuers, employers and enrollees to negotiate such coverage in accord with their personal preferences and their moral and religious commitments. The federal government has no reason now to take away this freedom.

Id.

[18] *See* Planned Parenthood Comments, *supra* note 13 (arguing to expand coverage of preventive services under the ACA).

[19] *Id.*

[20] *See id.* (arguing that "[w]hile we understand the Secretary's effort to strike the right balance between coverage requirements and giving health plans and issuers some flexibility in the design of their benefit plans, we are concerned about how health plans may use this flexibility to limit coverage.").

[21] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,622–23 (Aug. 3, 2011) [hereinafter Group Health Plans] (to be codified at 45 C.F.R. pt. 147). These services were recommended by the Institute of Medicine ("IOM"). Press Release, Nat'l Acads. of Sci., Eng'g, & Med., IOM Report Recommends Eight Additional Preventive Health Servs. to Promote Women's Health (July 19, 2011),

("HRSA"), a sub-body of HHS, defined "preventive care and screenings" to mean "[a]ll [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[22] In the August 2011 Interim Final Rules, HHS addressed the comments received regarding the religious objection to the Mandate.[23] In what could only be viewed as an effort to combat the suggestion of the USCCB, it was clear to note that "[m]ost commenters, including some religious organizations, recommended that HRSA Guidelines include contraceptive services for all women and that this requirement be binding on all group health plans and health insurance issuers with no religious exemption."[24] Nevertheless, it did agree "to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions[,]" and gave HRSA additional authority to exempt religious employers from the preventive services guidelines for contraceptive coverage.[25] The now famous exemption defines a religious employer as one that: "(1) [h]as the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization."[26]

The USCCB's comments to this new round of Interim Final Rules reiterated much of what was contained in its comments the previous year.[27] It expanded on its earlier concern that the Mandate was

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http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=13181. The IOM explained:

> To reduce the rate of unintended pregnancies, which accounted for almost half of pregnancies in the U.S. in 2001, the report urges that HHS consider adding the full range of Food and Drug Administration-approved contraceptive methods as well as patient education and counseling for all women with reproductive capacity. Women with unintended pregnancies are more likely to receive delayed or no prenatal care and to smoke, consume alcohol, be depressed, and experience domestic violence during pregnancy. Unintended pregnancy also increases the risk of babies being born preterm or at a low birth weight, both of which raise their chances of health and developmental problems.

Id.

[22] *Women's Preventive Services Guidelines: Affordable Care Act Expands Prevention Coverage for Women's Health and Well-Being*, HEALTH RES. & SERVS. ADMIN., http://www.hrsa.gov/womensguidelines/ (last visited Oct. 19, 2016). If a group health plan does not provide this care to women, the insurer is required to pay a penalty tax of $100 per day per employee that does not receive this coverage. 26 U.S.C. §§ 4980D(a)–(b) (2012).

[23] Group Health Plans, *supra* note 21, at 46,623.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *See* Letter from U.S. Conference of Catholic Bishops to Ctrs. for Medicare & Medicaid Servs., Dep't of Health & Human Servs. 1 (Aug. 31, 2011),

"unprecedented in federal law and more radical than any state contraceptive mandate enacted to date."[28] It also argued that both the mandate and the exemption worked to discriminate against people and organizations based upon their faith.[29] Regarding the mandate, it stated it was "a 'religious gerrymander' that targets Catholicism for special disfavor *sub silentio*" and prevented insurers, employers and employees the freedom to choose whether and how to cover contraceptives and sterilization.[30] As the USCCB argued, the mandate would force a minority of objectors into participating in contraceptive coverage:

> [T]he class that suffers under the mandate is defined precisely by their beliefs in objecting to these "services." Moral opposition to all artificial contraception and sterilization is a minority and unpopular belief, and its virtually exclusive association with the Catholic Church is no secret. Thus, although the mandate does not expressly target Catholicism, it does so implicitly by imposing burdens on conscience that are well known to fall almost entirely on observant Catholics—whether employees, employers, or insurers.[31]

With regard to the proposed exemption, the USCCB noted that because of the wording and to whom the exemption was intended to apply, both secular organizations with a religious or moral objection and religious organizations that do not meet the very narrow definition of "religious employer" under the language of the exemption would be forced to provide or pay for contraceptive services against the tenets of their faith.[32] In more elaborate terms, the USCCB stated:

> The HHS exemption, applicable nationwide, forces all church institutions with an outreach-oriented mission to provide health coverage for items that the institutions themselves hold and teach to be immoral, in violation of their institutional identity and sincerely held beliefs. The HHS exemption would penalize church organizations that engage in public ministry or service, by forbidding them to practice what they preach. This represents an unprecedented intrusion by the federal government into the precincts of religion that, if unchecked here, will support ever more expansive and corrosive intrusion in the future.[33]

The criteria to qualify for the exemption was so narrow, argued the USCCB, that "Jesus and the early Christian Church would not qualify"

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http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08-2.pdf (arguing that the services covered under the Mandate "are not 'health' services, and they do not 'prevent' illness or disease.").

[28] *Id.* at 1–2.

[29] *See id.* at 8 (explaining that the Mandate takes away the religious objectors' option of not providing coverage for contraceptives).

[30] *Id.*

[31] *Id.*

[32] *Id.* at 18–19.

[33] *Id.* at 19.

because their ministry was not confined to those who were already members of the Church.[34] Finally, it noted that maintaining such a narrow view of "religious employer" would pressure religiously-affiliated institutions to drop coverage instead of violating conscience.[35]

Not surprisingly, Planned Parenthood's comments were in stark contrast to those of the USCCB.[36] It disagreed completely with the suggested exemption and even scolded HHS by stating it was "disappointed" in HHS's decision to exempt certain employers from having to provide coverage.[37] It requested that HHS not allow employers or insurers to refuse to provide insurance coverage for contraceptives or, at the very least, make the refusal as narrow as possible.[38] Planned Parenthood's reasoning seemed to stem from the reality that there are many individuals who work for religious employers who do not share their employers' religious views about contraception.[39] It even noted that a 2010 Hart Research Survey showed "77% of Catholic women voters, support the benefit that health plans cover prescription birth control at no cost"—the implication being that HHS should follow the consciences of those that do not follow their faith instead of those that do.[40]

The religious objectors' concerns appeared to have fallen on deaf ears. A January 20, 2012 statement by Secretary Sebelius confirmed that "[w]omen will not have to forego [free access to all FDA-approved forms of contraception] because of expensive co-pays or deductibles, or

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[34] *Id.* The USCCB further explained that "the exemption is directly at odds with the parable of the Good Samaritan, in which Jesus teaches concern and assistance for those in need, regardless of faith differences." *Id.*

[35] *Id.* at 19–20 (noting that such organizations would include "social service agencies, hospitals, colleges and universities" and it would also affect the student health plans at these "religiously-affiliated colleges and universities"). It lamented that it would "not be lost upon impressionable students that their religiously-affiliated school says one thing about the moral status of contraception and sterilization but practices quite another in providing coverage for those very [few] items." *Id.* at 20 n.36.

[36] *See Planned Parenthood Applauds HHS for Ensuring Access to Affordable Birth Control*, PLANNED PARENTHOOD (Jan. 20, 2012), http://www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-applauds-hhs-ensuring-access-affordable-birth-control (agreeing with HHS' decision to expand coverage and not expand the "refusal provision" under the ACA).

[37] *Victory for Women's Health: HHS Announces That Birth Control Will Be Covered with No Co-Pays*, PLANNED PARENTHOOD (Aug. 1, 2011), https://www.plannedparenthood.org/planned-parenthood-northern-new-england/newsroom/press-releases/hhs-announces-birth-control-will-be-covred-no-co-pays.

[38] *See Planned Parenthood Applauds HHS for Ensuring Access to Affordable Birth Control*, *supra* note 36 (stating that Planned Parenthood opposed the provision granting a one year waiver, specifically opposing the current provision of waiving religious employers from the requirement to provide contraception to their employees).

[39] *See id.* (arguing that the religious convictions of an employer should not impose on their employees' own religious convictions about the use of contraceptives).

[40] *Id.*

because an insurance plan doesn't include contraceptive services."[41] The August 2011 Interim Final Rule remained the same with the exception of one change—nonprofit employers who, based upon their religious beliefs, did not at the time provide coverage were given one year to come into compliance with the new law.[42] She concluded:

> This decision was made after very careful consideration, including the important concerns some have raised about religious liberty. I believe this proposal strikes the appropriate balance between respecting religious freedom and increasing access to important preventive services. The administration remains fully committed to its partnerships with faith-based organizations, which promote healthy communities and serve the common good. And this final rule will have no impact on the protections that existing conscience laws and regulations give to health care providers.[43]

Approximately twelve days later, a White House staffer attempted to summarize and clarify Secretary Sebelius's statements.[44] She reported that abortion inducing drugs, like RU486, would not be covered by the Mandate.[45] This is an important intentional falsehood. Included within the approved methods of contraception under the FDA are diaphragms, oral contraceptive pills, emergency contraceptives like Plan B and ulipristal (the morning after and week after pill) and intrauterine devices.[46] Further, the Administration once again chose the actions of Catholics not following their faith over the consistent and unchanged tenets of the faith itself as the standard by which to base its decision that no significant harm would be done by requiring that these services be covered.[47] The staffer's statement bolstered the Administration's position requiring religious employers to provide contraceptive services by citing a study by the Guttmacher Institute, a group that has been

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[41] Press Release, Kathleen Sebelius, Sec'y, Dep't of Health & Human Servs., A Statement by U.S. Dep't of Health & Human Servs. Sec'y Kathleen Sebelius (Jan. 20, 2012), http://www.fiercehealthcare.com/payer/a-statement-by-u-s-department-health-and-human-services-secretary-kathleen-sebelius.

[42] *Id.*

[43] *Id.*

[44] *See* Cecilia Muñoz, *Health Reform, Preventive Servs., and Religious Insts.*, WHITE HOUSE (Feb. 1, 2012, 6:35 PM), https://www.whitehouse.gov/blog/2012/02/01/health-reform-preventive-services-and-religious-institutions (listing groups exempted from the mandate, such as churches, health care providers, and individuals who do not want contraception).

[45] *Id.*

[46] *Birth Control Chart,* U.S. FOOD & DRUG ADMIN., http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm522453.htm (last updated Oct. 5, 2016).

[47] Johnathan V. Last, *Obamacare vs. The Catholics: The Administration's Breach of Faith*, WEEKLY STANDARD (Feb. 13, 2012), http://www.weeklystandard.com/obamacare-vs.-the-catholics/article/620946 (commenting that some of the abortion-inducing procedures listed by the FDA are contrary to the Catholic faith).

referred to as the research wing of Planned Parenthood,[48] which found "most women, including [ninety-eight] percent of Catholic women, have used contraception."[49] After reiterating that religious employers not subject to the exemption would have one year to fall in line, the statement suggested this mandate was a way of working with those who held conscience-based objections—particularly Catholics—by stating:

> The Obama Administration is committed to both respecting the religious beliefs and increasing access to important preventive services. And as we move forward, our strong partnerships with religious organizations will continue. The Administration has provided substantial resources to Catholic organizations over the past three years, in addition to numerous non-financial partnerships to promote healthy communities and serve the common good. This work includes partnerships with Catholic social service agencies on local responsible fatherhood programs and international anti-hunger/food assistance programs. We look forward to continuing this important work.[50]

In sum, the Administration's idea of respecting religious beliefs included affording the religious one year to come to terms with violating their conscience.

Due in no small part to the continued outcry of these non-exempt organizations, the Administration tried again.[51] On March 21, 2012, HHS released the advance notice of proposed rulemaking ("March 2012 ANPR") on preventive services.[52] The March 2012 ANPR provided that an accommodation would be made for "non-exempt[ed], non-profit religious organizations with religious objections" to the mandate.[53] Rather than force objecting religious organizations to provide employees with contraceptive coverage without cost sharing, an independent plan would do so.[54] According to HHS, this "would effectively exempt the religious organization from the requirement to cover contraceptive services."[55]

The accommodation offered by HHS drew criticism from the USCCB, among others. On May 15, 2012, the USCCB specified that the accommodation would be problematic for both outside-insured and self-

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[48] Carole Novielli, *How 'Independent' is Guttmacher from Planned Parenthood?*, LIVEACTIONNEWS (Mar. 17, 2016, 3:49 PM), http://liveactionnews.org/how-independent-is-guttmacher-from-planned-parenthood/.

[49] Muñoz, *supra* note 44.

[50] *Id.*

[51] *See* Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 (proposed Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147) (amending the prior regulations and broadening the exemption for religious based organizations).

[52] *Id.*

[53] *Id.* at 16,503.

[54] *Id.*

[55] *Id.*

insured plans.[56] As for the outside-insured plans, the USCCB argued that "[c]onscientiously-objecting non-exempt 'religious organizations' [would] still be required to provide plans that channel contraceptives and sterilization procedures to their employees."[57] As such, premiums would still be used to pay for the services, resulting in no real change or accommodation at all.[58] For self-insured plans, the USCCB found the accommodation to be equally problematic as the plan itself would either serve as a source of funding for or enable access to the very services the religious employer finds religiously objectionable.[59]

Over the following three years, the HHS mandate language continued through a series of alterations.[60] Despite the multiple cases filed against the mandate challenging the refusal to accommodate the religious practices and beliefs of certain for-profit organizations,[61] the Administration would not budge until forced by the Supreme Court.[62] As such, without Supreme Court rulings, employers would have had to fit into one of three categories. First, the mandate would not apply if the healthcare plan was in existence on March 23, 2010.[63] Second, certain types of religious employers would be excluded.[64] Third, some non-profit

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[56] *See* Letter from U.S. Conference of Catholic Bishops to Ctrs. for Medicare & Medicaid Servs., Dep't of Health & Human Servs. 3 (May 15, 2012), http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf.

[57] *Id.* at 10.

[58] *Id.*

[59] *Id.* at 12–13.

[60] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456 (proposed Feb. 6, 2013) (to be codified 45 C.F.R. pts. 147, 148, 156); Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092 (Aug. 27, 2014) (to be codified 45 C.F.R. pt. 147); Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318 (July 14, 2015) (to be codified 45 C.F.R. pt. 147) [hereinafter Final Rules].

[61] Press Release, The Becket Fund, U.S. Supreme Court to Hear Landmark *Hobby Lobby* Case (Nov. 26, 2013), www.becketfund.org/scotustakeshobbylobby.

[62] *See Hobby Lobby*, 134 S. Ct. at 2785 (holding that the contraceptive mandate violates RFRA).

[63] *See* Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under, 75 Fed. Reg. 34,538, 34,540–41 (June 17, 2010) (to be codified at 45 C.F.R. 147) (discussing current health insurance coverage and the grandfathered health plans).

[64] Group Health Plans, *supra* note 21, at 46,626. The relevant sections state:

> (B) . . . a "religious employer" is an organization that meets all of the following criteria:
>
> (1) The inculcation of religious values is the purpose of the organization.
>
> (2) The organization primarily employs persons who share the religious tenets of the organization.
>
> (3) The organization serves primarily persons who share the religious tenets of the organization.

organizations not otherwise qualifying for any other exemption, and otherwise meeting the requirements of the mandate, would be exempted if they had religious objections to the coverage of contraceptives in their health plans.[65] Nothing in the Act or its accompanying regulations would have relieved a for-profit organization from providing these "preventive care and screenings" for women.

In light of *Burwell v. Hobby Lobby Stores, Inc.*,[66] the Administration was forced to revisit the treatment of for-profit organizations. On the heels of the decision, on August 27, 2014, the Administration released both the Proposed Rules and the Interim Final Rules on Coverage of Certain Preventive Services Under the Affordable Care Act.[67] The August 2014 Rules amended the definition of eligible organization to include closely held for-profit entities with religious objections "to providing coverage for some or all of the contraceptive services otherwise required to be covered" by the HHS Mandate.[68] In essence, the 2014 Rules extended to closely-held for-profit organizations, the very same accommodation offered to non-profit religious institutions.[69] In addition to repeating many of its arguments regarding the exemption and the accommodation, the USCCB noted that the new 2014 Rules would make matters worse for closely-held for-profit corporations who have a religious objection to covering contraception, as the *Hobby Lobby* ruling resulted in exempting them from the Mandate.[70] The 2014 Rules would subject them to the Mandate once again, this time in the form of the accommodation.[71]

> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

Id.

[65] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012) (to be codified at 45 C.F.R pt. 147).

[66] *See* 134 S. Ct. at 2785 (holding the contraceptive Mandate a violation of RFRA).

[67] Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,118 (proposed Aug. 27, 2014) (to be codified 45 C.F.R. 147) (proposed rules); Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092 (Aug. 27, 2014) (to be codified 45 C.F.R. 147) (interim final rules).

[68] Coverage of Certain Preventive Services Under the Affordable Care Act, *supra* note 67, at 51,121.

[69] *Id.*

[70] *See* Letter from U.S. Conference of Catholic Bishops to Ctrs. For Medicare & Medicaid Servs., Dep't of Health & Human Servs. 2–4 (Oct. 8, 2014), http://www.usccb.org/about/general-counsel/rulemaking/upload/2014-hhs-comments-on-proposed-rule-on-for-profits-10-8.pdf (explaining that for-profit organizations with religious objections are exempt under RFRA and the new proposed rules would "subject them to the mandate by means of the 'accommodation.'").

[71] *Id.*

Planned Parenthood and other organizations signed on to a letter lamenting the *Hobby Lobby* decision, but made an effort to ensure that as many religiously-affiliated employers as possible would still be forced to provide contraceptives they found to be objectionable.[72] It argued that any for-profit entity wanting to qualify for the accommodation should prove, among other things, that all of its "equity holders" have a "shared religious purpose" and unanimously agree to operate the entity in conformity with their religious beliefs.[73] It then urged the Administration to require such an entity to follow a two-step process in order to receive the accommodation.[74] While one of the steps would consist of a corporation taking the required steps to assert the accommodation, the far more onerous step would mandate that each equity holder in the organization "certify—under penalty of perjury—that . . . [he or she has a] religious objection to the entity covering contraception in its employer-sponsored plan."[75] Planned Parenthood explained that "[c]ertification from each equity holder articulating religious objection to covering contraception is necessary to ensure that any corporate action to exclude contraceptive coverage is based on the shared, sincere religious beliefs [of] all equity holders."[76]

On July 14, 2015, the Administration issued its Final Rules on Coverage of Certain Preventive Services Under the Affordable Care Act.[77] It clarified the definition of those for-profit organizations that would qualify for the accommodation.[78] The accommodation requirements with regard to the non-profit religious institutions

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[72] *See* Letter from Planned Parenthood Federation of America, et al., to Marilyn Tavenner, Administrator, Ctrs. for Medicare & Medicaid Servs., 2–3 (Oct. 21, 2014), https://www.washingtonpost.com/blogs/wonkblog/files/2014/10/Womens-Heath-comments.pdf [hereinafter Letter to Tavenner] (stating that HHS would work to ensure the accommodation would only be extended to companies that meet the *Hobby Lobby* standard of closely held companies).

[73] *Id.* at 5. Such a requirement would effectively limit the types of qualifying companies to those that are owned by a small number of individuals. *See Help & Resources, Entities*, IRS.GOV, https://www.irs.gov/help-resources/tools-faqs/faqs-for-individuals/frequently-asked-tax-questions-answers/small-business-self-employed-other-business/entities/entities-5 (providing a definition of closely-held corporations) (last updated Jan. 1, 2016).

[74] Letter to Tavenner, *supra* note 72, at 8.

[75] *Id.*

[76] *Id.*

[77] Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,318 (July 14, 2015) (to be codified at 45 C.F.R. pt. 147).

[78] *Id.* at 41,324. *See also* Dep't of Health & Human Servs. Final Rule, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013) (to be codified at 45 C.F.R. pt. 147) (providing a four-element test, including nonprofit status, for determining which entities are religious employers).

remained unchanged.[79] Consequently, after approximately five years of proposed and interim rules, comments of interested parties and over one-hundred filed causes of action, the majority of organizations and institutions who expressed that paying for or providing contraceptive coverage would violate their sincerely held religious beliefs, would still be forced to violate their conscience. This is all the more troubling in light of a long list of companies and entities that are exempt from the Mandate for what appears to be no religious reason whatsoever.[80]

One final point should be noted before continuing. While this Article addresses what seems to be a two-party fight between the Administration and Planned Parenthood on one side and the Catholic Church on the other, there are several additional faith denominations and numerous religious and non-religious alike who have supported the arguments made by the USCCB throughout this controversy.[81] This Article focuses on the Catholic Church because, as has been evidenced thus far in the government press releases, notices, and rule-making procedures, the Obama Administration and Planned Parenthood specifically called the Catholic faith out by name and either intentionally misrepresented its tenets and parishioners or latched on to practices of those not following the faith.[82] That being noted, the Catholic Church and practicing Catholics around the country and world have been appreciative of the support received from those who believe the government has neither the right nor the authority to dictate whether and how one exercises his conscience.[83]

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[79] The July 2015 Final Rules finalized the August 2014 interim final regulations objected to by the USCCB. Coverage of Certain Preventive Services Under the Affordable Care Act, *supra* note 77, at 41,318–19.

[80] Press Release, The Becket Fund, Breaking: Little Sister Gives Landmark Statement Following SCOTUS Hearing (Mar. 23, 2016), http://www.becketfund.org/mother-loraine-supreme-court-statement; Matt Hadro, *Visa, Chevron, and Pepsi are Exempt from the HHS Mandate—But the Little Sisters Aren't*, CATHOLIC NEWS AGENCY (Feb. 18, 2016), http://www.catholicnewsagency.com/news/visa-chevron-and-pepsi-are-exempt-from-the-hhs-mandate-but-not-the-little-sisters-38414 (last visited Oct. 14, 2016) (noting that one-third of Americans are exempt, including Exxon, Pepsi Bottling, Chevron, Visa, New York City, and the United States Military because their health plans are grandfathered in). *See also* 42 U.S.C. § 18011 (permitting group health plans with individuals enrolled as of March 23, 2010 to not change their plans, though subject to some code provisions).

[81] *See, e.g.*, Ben Johnson, *Evangelicals Respond to Catholic Lawsuits: "We Are All Catholic Now,"* LIFESITENEWS (May 22, 2012, 4:09 PM), https://www.lifesitenews.com/news/evangelicals-respond-to-catholic-lawsuits-we-are-all-catholic-now (quoting Concerned Women for America president who stated in solidarity, "We are all Catholic now.").

[82] *See supra* notes 17, 27–40, 47–50 and accompanying text.

[83] *See* Johnson, *supra* note 81 (stating that faith-based organizations from various denominations of Christianity have condemned the HHS Mandate for its hindrance to religious liberties); *see also* Keith Fournier, *Catholic Resistance Must Be the Response to the*

II. DETERMINING SUBSTANTIAL BURDENS, DISREGARDING SINCERE BELIEFS

The first case challenging the HHS Mandate came soon after the August 2011 Interim Final Rules.[84] Belmont Abbey College sued to prevent the Administration from forcing it to provide against its conscience contraceptives contained within the government's list of preventive services.[85] Others followed suit and sought preliminary injunctions to prevent the Administration from forcing them to comply with the Mandate while the cases made their way through the courts.[86] As such, many of the cases reported in the district and circuit courts are analyses of the plaintiff's entitlement to such injunctions.[87] After the standard for obtaining a preliminary injunction[88] rendered many of the plaintiffs unsuccessful,[89] the Supreme Court's *Hobby Lobby* decision highlighted the entanglement of sincerity and substantiality that had plagued the lower courts.[90] While *Hobby Lobby* presented itself as a win for the religious employers and paved the way for the *Zubik* compromise, the Zubik Court implicated a growing intolerance for sincere religious

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Unjust HHS Edict to Violate Conscience, CATHOLIC ONLINE (Feb. 7, 2012), http://www.catholic.org/news/national/story.php?id=44578 (discussing the Pope Benedict XVI's recent comments on the new HHS Mandate).

84 Belmont Abbey Coll. v. Sebelius, 878 F. Supp. 2d 25, 32 (D.D.C. 2012); Press Release, The Becket Fund, Belmont Abbey Coll. Sues the Fed. Gov't Over New Obamacare Mandate (Nov. 10, 2011), http://www.becketfund.org/belmont-abbey-college/.

85 *Belmont Abbey*, 878 F. Supp. at 32.

86 *See, e.g.*, Grace Schs. v. Burwell, 801 F.3d 788, 824 (7th Cir. 2015) (granting plaintiff's motion for preliminary injunction), *vacated*, 136 S. Ct. 2011 (2016); Christian & Missionary All. Found., Inc. v. Burwell, No. 2:14-cv-580-FtM-29CM, 2015 WL 437631, *9 (M.D. Fla. Feb. 3, 2015) (granting in part and denying in part plaintiff's motion for preliminary injunction). *See generally HHS Mandate Information Central*, BECKET FUND, http://www.becketfund.org/hhsinformationcentral (last visited Sept. 28, 2016) (listing cases filed in response to the HHS Mandate).

87 *See, e.g.*, Ave Maria Univ. v. Burwell, 63 F. Supp. 3d 1363, 1368 (M.D. Fla. 2014) (granting injunction to prevent Mandate from being enforced on the date the appellant's insurance plan year began); Colo. Christian Univ. v. Sebelius, 51 F. Supp. 3d 1052, 1063–64 (D. Colo. 2014) (demonstrating CCU's substantial likelihood of success on the merits of its RFRA claim) .

88 To receive a grant for a preliminary injunction, the moving party must show the following: "(1) a likelihood of success on the merits; (2) a likely threat of irreparable harm to the movant; (3) the harm alleged by the movant outweighs any harm to the non-moving party; and (4) an injunction is in the public interest." Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1128 (10th Cir. 2013) (en banc).

89 *See, e.g.*, Conestoga Wood Specialties Corp. v. Sebelius, 724 F.3d 377, 389 (3d Cir. 2013) (holding that plaintiff failed to show a likelihood of success on the merits of its RFRA and Free Exercise Clause claims because corporations cannot exercise religion).

90 *See Hobby Lobby*, 134 S. Ct. at 2777–78 (noting that HHS's argument improperly focuses on whether a religious claim under RFRA is reasonable rather than whether the HHS mandate is a burden on those beliefs, a "question that the federal courts have no business addressing . . . .").

beliefs as a threshold matter in Religious Freedom Restoration Act ("RFRA") cases.[91]

Over eighty cases were filed in the lead up to the *Hobby Lobby* Supreme Court decision.[92] Approximately fifty of these cases involved plaintiffs who were for-profit corporations or individuals who owned a majority interest in such organizations.[93] Most were denied preliminary injunctions that would have allowed the companies to avoid complying with the mandate while each respective case continued through the legal process.[94] The religions of the named plaintiffs in these cases include both Catholics and Christians of other denominations whose religious beliefs were in contradiction to the use of various contraceptives, abortifacients, and sterilization procedures.[95]

Plaintiffs claimed discrimination under the First Amendment and RFRA.[96] The Tenth Circuit was the first appellate court to weigh in, affirming the district court ruling which denied Hobby Lobby Stores, Inc. a preliminary injunction because, according to the court, it could not demonstrate a substantial likelihood of success on the merits.[97] The 2013 *Hobby Lobby* decision was relied upon by the other courts in denying relief.[98] Therefore, the focus of the propriety of the lower courts' decisions

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[91] In *Zubik*, the Court refused to make a finding on whether there was a substantial burden, instead remanding the case with instructions to find a compromise between religious exercise and federal contraceptive coverage requirements. *Zubik*, 136 S. Ct. at 1560. *See also Hobby Lobby*, 134 S. Ct. at 2774 (finding that Congress presumed the courts would not have trouble deciding the sincerity of asserted religious beliefs).

[92] Press Release, The Becket Fund, U.S. Supreme Court to Hear Landmark *Hobby Lobby* Case (Nov. 26, 2013) www.becketfund.org/scotustakeshobbylobby (asserting that there were eighty-four lawsuits against the HHS Mandate).

[93] *See, e.g.*, Korte v. Sebelius, 735 F.3d 654, 682 (7th Cir. 2013) (for-profit corporation); Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013) (same). *See generally HHS Mandate Information Central*, THE BECKET FUND, http://www.becketfund.org/hhsinformationcentral#tab3 (listing lawsuits filed by for-profit entities in response to the HHS Mandate) (last visited Oct. 18, 2016).

[94] *See supra*, note 88–89 and accompanying text.

[95] *See, e.g.*, *Eden Foods*, 2013 WL 1190001, at *2 ("[Plaintiff] asserts he cannot compartmentalize his conscience or his religious beliefs from his daily work and actions as Chairman, President, and sole shareholder of Eden Foods. Plaintiffs share a common mission of conducting their business operations with integrity and consistent with the teachings, mission, and values of the Catholic Church.") (internal citations omitted).

[96] *See, e.g.*, Gilardi v. Sebelius, 926 F. Supp. 2d 273, 276 (D.D.C. 2013) (stating that compliance with the Mandate would require violation of sincere religious beliefs); *Eden Foods*, 2013 WL 1190001, at *2 (claiming that plaintiff cannot separate his faith from his work as President of his company).

[97] *See* Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012) (holding that there was no substantial likelihood that court would extend RFRA to include conduct by third party healthcare providers as a substantial burden on plaintiff's religious beliefs).

[98] *See supra* notes 88–89 and accompanying text.

will derive, in large part, from the Western District of Oklahoma's *Hobby Lobby* ruling.

The plaintiffs in *Hobby Lobby* were two companies (Hobby Lobby Stores, Inc. and Mardel), owned by the Green family (the "Greens").[99] The Greens sued on their own behalf and as the owners of Hobby Lobby Stores, Inc. and Mardel.[100] The two issues before the court were whether the preventive services provision was constitutional and not violative of the Free Exercise Clause of the First Amendment and whether the provision violated RFRA.[101] The court addressed these issues as applied to both the corporation and the individual plaintiffs and denied the injunction sought because plaintiffs failed to prove a substantial likelihood of success on the merits.[102]

With regard to the companies, the court found they "do not have constitutional free exercise rights as corporations and . . . therefore cannot show a likelihood of success as to any constitutional claims . . . ."[103] The determination under RFRA was slightly more difficult for the court as the statutory scheme's definition of person had not been thoroughly vetted by the courts.[104] Finding that the corporations were not persons under RFRA, the court stated:

> General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors. Religious exercise is, by its nature, one of those "purely personal" matters . . . which is not the province of a general business corporation.[105]

The individual plaintiffs' claims were a more difficult determination by the court. Noting that the Greens were clearly persons within the context of both the First Amendment and RFRA, the court nevertheless found the Greens could not prove the likelihood of success on the merits of either claim with regard to the Free Exercise claim.[106] The Court concluded that the regulations were neutral and of general applicability,

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[99] Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1284 (W.D. Okla. 2012).

[100] *Id.* at 1283.

[101] *Id.* at 1283, 1285.

[102] *Id.* at 1296.

[103] *Id.* at 1288.

[104] *See id.* at 1291–92 (holding that cases establishing that companies are persons who can exercise religion were limited to secular business corporations).

[105] *Id.* at 1291 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 1416 (1978)).

[106] *Id.* at 1296.

and with regard to the RFRA claim, the regulations did not pose a substantial burden on their practice of religion.[107]

RFRA states that the government may "not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[108] There is one exception to this general rule: The government must demonstrate that the burden imposed "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[109]

In order to establish a prima facie claim under RFRA, a plaintiff must prove "(1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion."[110] Upon establishment of these three elements by the plaintiff, "the burden shifts to the government to demonstrate that 'application of the burden' to the claimant 'is in furtherance of a compelling governmental interest' and 'is the least restrictive means of furthering that compelling governmental interest.'"[111] Acknowledging that the second and the third elements were not at issue in the case, the district court stressed:

> [I]t is not the province of the court to tell the plaintiffs what their religious beliefs are, i.e. whether their beliefs about abortion should be understood to extend to how they run their corporations or the like, or to decide whether such beliefs are fundamental to their belief system or peripheral to it.[112]

Nevertheless, the court reaffirmed that "RFRA's provisions do not apply to *any* burden on religious exercise, but rather to a 'substantial' burden on that exercise."[113] It then went on to define "'substantial burden' on religious exercise" as "one that bears in some relatively direct manner on" that exercise, that in some circumstances, it may "be based on compulsion that is indirect," but that "the degree to which the challenged government action operates directly and primarily on the individual's religious exercise is a significant factor to be evaluated in determining whether a 'substantial burden' is present."[114]

Having set forth what appears to be a fair and thorough analytical framework for determining substantial burdens on the exercise of religion, and having just determined that corporations lack standing to

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[107] *Id.*

[108] 42 U.S.C. § 2000bb-1(a) (2012).

[109] *Id.* at § 2000bb-1(b).

[110] *Hobby Lobby*, 870 F. Supp. 2d at 1292 (quoting Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001)).

[111] *Id.* (quoting *Kikumura*, 242 F.3d at 961–62).

[112] *Id.* at 1293.

[113] *Id.*

[114] *Id.* at 1294.

complain about the regulations, the court then foreclosed the Greens from ever succeeding on an individual basis by reassigning the burden to the very corporations it had just discarded.[115] In essence, the court found the Greens lacked the ability to satisfy the "directness" requirement because the regulation did not mandate that they, as individuals, do anything at all:

> The mandate in question applies only to Hobby Lobby and Mardel, not to its officers or owners. Further, the particular "burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [Hobby Lobby's] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiff's religion." Such an indirect and attenuated relationship appears unlikely to establish the necessary "substantial burden."[116]

To further explain the substantiality requirement as it applied to cases like *Hobby Lobby*, the court noted: "[W]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[117]

On appeal, the Tenth Circuit, sitting en banc, reversed the district court's ruling that the HHS Mandate did not pose a substantial burden on the Green's exercise of religion under RFRA.[118] The court discussed the connection between one's sincerely held religious beliefs and whether complying with the government's order would create a substantial burden on the exercise of those beliefs.[119] It disagreed with the Administration's proposition that "one does not have a RFRA claim if the act of [the] alleged government coercion somehow depends on the independent actions of third parties," and instead found:

> This position is fundamentally flawed because it advances an understanding of "substantial burden" that presumes "substantial" requires an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs. In isolation, the term "substantial burden" could encompass either definition, but for the reasons

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[115] *Id.*

[116] *Id.* (quoting O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012)) (citations omitted).

[117] *Id.* at 1295. The court went on to state that "Hobby Lobby and Mardel employ over 13,500 people and 'welcome[] employees of all faiths or no faith.' Many of those employees are likely to have different religious views. Moreover, the employees' rights being affected are of constitutional dimension—related to matters of procreation, marriage, contraception, and abortion." at 1296 (citations omitted).

[118] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1121–22 (10th Cir. 2013) (en banc).

[119] *Id.* at 1137.

> explained below, the latter interpretation prevails. Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief.[120]

According to the court, "the burden analysis does not turn on whether the government mandate operates directly or indirectly, but on the coercion the claimant feels to violate his beliefs."[121] The court continued that it had no reason to question the sincerity of Hobby Lobby and Mardel's religious beliefs.[122] It then found that because the Mandate placed "substantial pressure" on them to violate their sincere religious beliefs, their exercise of religion was substantially burdened under RFRA.[123] The Administration appealed.[124]

The *Hobby Lobby* decision at the Supreme Court level highlights the tension between the differing ideological approaches to how the entanglement of sincerity and substantiality is to be adjudicated. While both the majority and the dissent appear to agree on the framework for analyzing such claims,[125] not only do they differ greatly on the appropriate result of such analysis, but both suggest the other has not used the agreed upon framework correctly.[126] The issue statements of the majority and the dissent are clear indications of this difference. Writing for the majority, Justice Alito framed the issue as whether RFRA permits HHS to "demand that . . . closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners."[127] Justice Ginsburg, writing for the dissent, believed the ruling of the Court to be based entirely—and erroneously—on the determination that the

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[120] *Id.*

[121] *Id.* at 1139 (citing United States v. Lee, 455 U.S. 252, 256–57 (1982)).

[122] *Id.* at 1140, 1140 n.15 (reasoning that the belief "that life begins at conception" and the idea of "[m]oral culpability for enabling a third party's supposedly immoral act" are assertions "familiar in modern religious discourse.").

[123] *Id.* (stating that the corporations would incur a $100 fine per day per employee whose plan does not cover the required contraceptives).

[124] Petition for Writ of Certiorari, Sebelius v. Hobby Lobby Stores, Inc., 2013 WL 5290575 (2013) (No. 13-354).

[125] *See* Hobby Lobby, 134 S. Ct. at 2767 (stating that RFRA protects persons from government action that substantially burdens their free exercise of religion unless the government can show that its action is the least burdensome way to promote a compelling government interest); *accord id.* at 2793 (Ginsburg, J., dissenting).

[126] *Compare id.* at 2759–60 (majority opinion) (holding that RFRA protects religiously dissenting for-profit corporations from the HHS Mandate), *with id.* at 2793 (Ginsburg, J., dissenting) (averring that the majority erred in assuming that corporations were persons).

[127] *Id.* at 2759 (majority opinion). The majority takes more effort to describe the plaintiffs and their circumstances, conveying a more sympathetic view than the dissent. *But see id.* at 2793 (Ginsburg, J., dissenting) (describing plaintiffs only as "for-profit corporations").

companies' religious beliefs were sincerely held. Justice Ginsburg wrote, "[i]n a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs."[128] The importance placed upon the question of sincerity by each opinion is representative of the respect afforded to the religious belief, and, in turn, whether the burden placed upon the corporation would be justifiably substantial. Justice Alito uses sincerity as a starting point, Justice Ginsburg uses it as an end point.

The contrast between the framing of the issue statements required both the majority and the dissent to explain their respective understandings of substantiality and how it operates within the RFRA analysis.[129] Despite a spirited and somewhat scathing disagreement with the majority's determination that the petitioners were, in fact, "persons" within the meaning of RFRA and were therefore able to hold sincere religious beliefs,[130] the dissent launched a two-fold attack upon its substantial burden analysis. Justice Ginsburg explicitly stated she "agree[d] with the Court that the Green and Hahn families' religious convictions regarding contraception are sincerely held."[131] However, with

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[128] *Id.* at 2787 (Ginsburg, J., dissenting).

[129] *See id.* at 2775–77 (majority opinion) (holding that the monetary penalties for non-compliance with the mandate constituted a substantial burden on the companies' exercise of religion); *see also id.* at 2797–99 (Ginsburg, J., dissenting) (arguing that the attenuated connection between the plaintiffs' sincerely held beliefs and the HHS mandate extends RFRA's substantial burden analysis beyond Congress' original intent).

[130] *Id.* at 2768. The majority and dissent disagreed regarding whether a for-profit corporation could sincerely hold a religious belief. Justice Alito noted the erroneous nature of HHS's "conten[tion] that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere 'beliefs' of a corporation." *Id.* at 2774. While it may be more difficult to invoke a religious identity upon a large, publicly traded corporation, the entities before the Court were closely held corporations whose disputes, even if based upon a difference of opinion regarding religious doctrine, could be determined by the applicable state corporate law. *Id.* at 2774–75. Justice Alito offered an example of a potential religious dispute—one where the owners of a company might differ as to whether to close the store on the Sabbath. State corporate laws, he wrote, provide a ready means for resolving such conflicts. *Id.* at 2775. The dissent, however, believed a for-profit corporation should not be considered a "person" and therefore could not be capable of exercising religion. *Id.* at 2794–97 (Ginsburg, J., dissenting). Justice Ginsburg wrote that while "religious organizations exist to foster the interests of persons subscribing to the same religious faith" and "exist to serve a community of believers, for-profit corporations do neither." *Id.* at 2795–96. Furthermore, according to Justice Ginsburg, allowing for-profit corporations to mount successful RFRA claims will have an exponentially deleterious effect on the validity of the process itself, which will "invite[] for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith." *Id.* at 2797.

[131] *Id.* at 2798 (Ginsburg, J., dissenting). In contrast, Justice Alito stated the following:

regard to whether the HHS Mandate placed a substantial burden upon the exercise of that sincerely held religious belief, Justice Ginsburg argued that (1) the majority had not engaged in the proper analysis to determine the issue, and (2) if it had, it should have determined that the Mandate was not a substantial burden.[132]

Turning to her first observation, Justice Ginsburg argued that the Court based its finding of a substantial burden almost entirely on the Greens' and the Hahns' belief that providing coverage for the stated contraceptives was immoral.[133] This, she continued, was an improper analysis because:

> [T]hose beliefs, however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between "factual allegations that plaintiffs' beliefs are sincere and of a religious nature," which a court must accept as true, and the "legal conclusion . . . that plaintiffs' religious exercise is substantially burdened," an inquiry the court must undertake.[134]

Determining that the Court had not undertaken the necessary inquiry in the present case, Justice Ginsburg concluded the "decision elides entirely the distinction between the sincerity of a challenger's religious belief and the substantiality of the burden placed on the challenger."[135]

Finding the Court's majority opinion lacking in any substantial burden analysis, Justice Ginsburg then explained how she would have ruled on the issue. She found "the connection between the families' religious objections and the contraceptive coverage requirement [] too attenuated to rank as substantial. The requirement carrie[d] no command that [the companies] purchase or provide the contraceptives they find objectionable."[136] The company subject to the Mandate is required only to "direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans," and the

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> As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.

Id. at 2775 (majority opinion) (internal citations omitted).

[132] *Id.* at 2799 (Ginsburg, J., dissenting).

[133] *See id.* at 2798 (claiming the majority relied heavily on the corporation owners' sincere religious belief that providing contraceptive coverage would mean engaging in the destruction of embryos, while barely considering whether the HHS Mandate was substantially burdensome).

[134] *Id.* (quoting Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C Cir. 2008)) (first alteration added).

[135] *Id.* at 2799.

[136] *Id.*

decision as to whether to use the contraceptives in question is made by the employee.[137] Therefore, it seems the employer need not be offended by whether those services are used, how they are used, or how often their plans are paying for services they find morally questionable. Inherent within that analysis is the implicit determination that the belief—although sincere—is just not important enough to protect. Justice Ginsburg's suggestion, on its face, demonstrates her view that she is in a position to tell people whether and to what extent they should accept a faith teaching. In other words, paying for someone else's contraception should not be a burden—let alone a substantial one—because believing contraception is immoral is just plain silly. As such, she alone gets to determine whether violating one's faith is acceptable or not.

Not surprisingly, Justice Ginsburg's characterization of the majority opinion is inaccurate. While Justice Alito connected the substantial burden suffered by the Hahns and the Greens to their stated sincerely held religious beliefs, the Court found a substantial burden based on the economic consequences at stake:

> It is true that the plaintiffs could avoid . . . assessments by dropping insurance coverage altogether and thus forc[e] their employees to obtain health insurance on one of the exchanges established under [the] ACA. But if at least one of their full-time employees were to qualify for a subsidy on one of the government-run exchanges . . . . [the] penalties would amount to roughly $26 million for Hobby Lobby, $1.8 million for Conestoga, and $800,000 for Mardel.[138]

In analyzing the arguments made by HHS and adopted by the dissent, Justice Alito acknowledged that the want of connection between "provid[ing] health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg" and the eventual "destruction of an embryo" was based less on a genuine concern regarding the so-called attenuated circumstance and more so on the lack of buy-in that this type of sincere religious belief could be reasonable.[139] Rather than engage in a substantial burden analysis, "the principal dissent in effect [told] the plaintiffs that their beliefs [were] flawed."[140]

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[137] *Id.*

[138] *Id.* at 2775–76 (majority opinion).

[139] *Id.* at 2776.

[140] *Id.* at 2778. As an example of the Court's long-standing tradition of avoiding reasonableness inquiries, Justice Alito explained the Court's decision in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981). *Burwell*, 134 S. Ct. at 2778. In *Thomas*, a Jehovah's Witness who objected on religious grounds to participating in the manufacture of turrets for tanks was fired. *Thomas*, 450 U.S. at 710. While he had previously worked for the company making sheet steel for a variety of industrial uses, he believed helping to manufacture steel used to make weapons was fundamentally different

Justice Alito affirmed that it was not for the Court "to say that [a] religious belief[] [is] mistaken or insubstantial."[141] Instead, the Court was faced with the "narrow function" of determining whether that belief is sincere.[142] As such, the substantial burden requirement to any RFRA claim cannot be used by the Court as a backdoor attempt to judge the sincerity of one's religious belief.[143]

Approximately two years after the *Hobby Lobby* decision, the Supreme Court decided *Zubik v. Burwell*.[144] It was a short decision vacating the decisions of the lower courts in light of the supplemental briefs submitted by the parties agreeing to work out a compromise.[145] The Court had requested the parties brief whether contraceptive coverage could be provided to employees through the existing insurance company without notice from the employers.[146] Both parties agreed this would be feasible.[147] Content with the compromise, the Court stated that it expressed no view as to the merits of the case, particularly "whether [the employers'] religious exercises ha[d] been substantially burdened, whether the Government ha[d] a compelling interest, or whether the current regulations [were] the least restrictive means of serving that interest."[148]

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from helping to make the weapons themselves. *Id.* Affirming the worker's right to exercise that belief, the Court found it was "not for us to say that the line he drew was an unreasonable one." *Id.* at 715.

[141] *Burwell*, 134 S. Ct. at 2779.

[142] *Id.* ("[O]ur 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction.'" (quoting *Thomas*, 450 U.S. at 716)).

[143] The unspoken determination that the Hahns' and Greens' religious belief is flawed is evident in other areas of HHS's arguments. In explaining why the mandate was not the least restrictive means of achieving the government's interest, Justice Alito suggested that HHS would never, on its own, accept its standards as being too burdensome under any scenario:

> It is HHS's apparent belief that no insurance-coverage mandate would violate RFRA—no matter how significantly it impinges on the religious liberties of employers—that would lead to intolerable consequences. Under HHS's view, RFRA would permit the Government to require all employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide. The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the Nation. RFRA was enacted to prevent such an outcome.

Id. at 2783.

[144] 136 S. Ct. at 1560.

[145] *Id.*

[146] *Id.* at 1559–60.

[147] *Id.*

[148] *Id.* at 1560.

Despite what appeared to be a unanimous decision deciding nothing, Justice Sotomayor felt compelled to write a separate concurring opinion in which Justice Ginsburg joined.[149] In it, she made very clear that:

> The opinion does not . . . endorse the [employers'] position that the existing regulations substantially burden their religious exercise or that contraceptive coverage must be provided through a "separate policy with a separate enrollment process." Such separate contraceptive-only policies do not currently exist, and the Government has laid out a number of legal and practical obstacles to their creation. Requiring standalone contraceptive-only coverage would leave in limbo all of the women now guaranteed seamless preventive-care coverage under the Affordable Care Act. And requiring that women affirmatively opt into such coverage would "impose precisely the kind of barrier to the delivery of preventive services that Congress sought to eliminate."[150]

In other words, Justice Sotomayor was not in agreement with the compromise and would rather have denied the employers the ability to exercise their conscience. Because the Court is currently riding a 4-4 split on these issues,[151] Justice Sotomayor cut her losses and decided that it would be best to fight this fight if and when she has more ammunition.

The accuracy of the Court's substantial burden analysis has been the subject of particular discussion since the *Hobby Lobby* decision was released.[152] It has been argued that Justice Alito attacked the

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[149] *Id.* at 1561 (Sotomayor, J., concurring).

[150] *Id.* (internal citations omitted).

[151] Adam Liptak, *Justices, Seeking Compromise, Return Contraception Case to Lower Courts*, N.Y. TIMES (May 16, 2016), http://www.nytimes.com/2016/05/17/us/supreme-court-contraception-religious-groups.html?_r=0.

[152] *See* Richard A. Epstein, *The Defeat of the Contraceptive Mandate in* Hobby Lobby*: Right Results, Wrong Reasons*, 2014 CATO SUP. CT. REV. 35, 46 (2014) (asserting that the Court in *Hobby Lobby* should have focused on the cost of compliance with the burden under RFRA, not on the cost of noncompliance); Michael A. Helfand, *Identifying Substantial Burdens*, 85 GEO. WASH. L. REV. (forthcoming 2017) (manuscript at 5), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2728952 (discussing the substantial burden arguments being made by non-profit organizations even after the ruling in *Hobby Lobby*, and that closely held for-profit organizations are making the substantial burden argument as well); Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. (forthcoming Jan. 2017) (manuscript at 5–7, 9) (arguing that the Court's RFRA analysis improperly precludes inquiry into whether the challenged action substantially burdens the claimant's religious exercise); Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL'Y REV. 161, 177–78 (2015) (discussing the mistakes of *Hobby Lobby* case and the application of strict scrutiny).

substantial burden problem from the wrong position.[153] Justice Alito found the cost of noncompliance, which would manifest itself in steep monetary fines, to be a substantial burden. Others have argued that the correct analysis does not focus on the cost of noncompliance but, instead, on the cost of compliance.[154] This would be consistent with the Tenth Circuit's reasoning that the focus is "on the coercion the claimant feels to violate his beliefs."[155] Noncompliance does not require a compromise in beliefs. It may cost something steep, but it does not leave the claimant feeling as though he has betrayed his faith. Compliance, on the other hand, does just that.

These criticisms are important points to be proffered and considered in future RFRA cases where the substantial burden analysis is necessary. However, determining which way to analyze the burden does not address the problem that there are a growing number of lawmakers and judicial officers who appear to believe they have the ability to determine a burden is not substantial because they don't agree with the complainant's sincere religious belief.[156] It is the very fact that the sincere belief is considered insignificant that gives them the ability to find no substantial burden exists. The substantial burden question must be divorced from the issue of whether a sincere religious belief exists. The following sections explore why that may not be likely to happen again.

III. THE ENTANGLEMENT OF SINCERITY AND SUBSTANTIALITY—THE NEED TO RESPECT CONSCIENCE AND WHY IT MAY SEEM SILLY

One could argue that the substantiality of the burden on the exercise of religion is tied to, and possibly dependent upon, the sincerity of the plaintiff's beliefs with regard to that religion or religious practice. "The test has never required claimants to prove their religious beliefs are true, only that they are religious in nature and sincerely held."[157] Furthermore, judges are not to "question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants'

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[153] *See* Epstein, *supra* note 152, at 46 (asserting the need for courts to weigh the burden of compliance with noncompliance, in addition to the purpose served by the regulation).

[154] *Id.*

[155] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1139 (10th Cir. 2013).

[156] *See supra* Part II.

[157] Andy G. Olree, *The Continuing Threshold Test for Free Exercise Claims*, 17 WM. & MARY BILL RTS. J. 103, 108 (2008).

interpretations of [a particular denomination's] creeds."[158] The plaintiff must, however, demonstrate that the beliefs are in fact sincere.[159]

In *Hobby Lobby*, *Zubik*, and the other Mandate cases, the opinion writers were careful to note that it was not a question of the sincerity of the plaintiffs' beliefs.[160] This was not the case with the lower court decisions in these cases.[161] In *Hobby Lobby*, for instance, the district court found that the HHS mandate did not substantially burden the Greens' religious exercise.[162] In doing so, it made a value judgment on the sincerity of the plaintiffs' beliefs. That the district court found against the Greens, especially in light of the fact that these beliefs and practices are centuries-old, well-documented tenets and principles of the Catholic and Christian faiths,[163] speaks volumes about the importance of religion in everyday life and the value that secular society, and even those that claim to be religious, place on the practice of their respective faiths.

One could posit any number of reasons why a judge might believe that forcing an organization to provide birth control and abortifacients against its faith would not substantially burden the exercise of one's religious beliefs. What appears to be happening with greater frequency is that certain members of the courts have based their determination of a lack of substantiality on their conclusions that plaintiffs lack sincerity with regard to their beliefs.[164] While this is not a stated reason, and it may not even be a conscious determination on the part of those reviewing these claims, a lack of clarity as to the sincerity of the Catholic-Christian belief regarding contraceptives, abortifacients, and even abortion, has led to this misapplication of the substantiality

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[158] *Id.* (alteration in original).

[159] *See, e.g.*, Sample v. Lappin, 479 F. Supp. 2d 120, 124 (D.D.C. 2007) (finding the plaintiff's evidence sufficient because the prisoner had a sincere religious belief that a denial of his request for wine during certain prayers and observances, contrary to his Jewish faith, violated RFRA); United States. v. Quaintance, 608 F.3d 717, 722, 724 (10th Cir. 2010) (determining that the evidence was insufficient to establish that the defendants had a sincere religious belief that marijuana was a deity and sacrament and that therefore, their prosecution for conspiracy and possession with intent to distribute marijuana was not a violation of RFRA).

[160] *See, e.g.*, *Zubik*, 136 S. Ct. at 1557, 1560 (holding that the Court's decision did not extend to considering the sincerity of the petitioners' belief); *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2751, 2774 (explaining that sincerity of respondent's beliefs was not a factor because it was not in dispute).

[161] *See, e.g.*, Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 441–42 (3d Cir. 2015); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1293–96 (W.D. Okla. 2012).

[162] *Hobby Lobby*, 870 F. Supp. 2d at 1296.

[163] *The Pill*, PUB. BROAD. SERV., http://www.pbs.org/wgbh/amex/pill/peopleevets/e_church.html (last visited Sept. 21, 2016).

[164] *Sample*, 479 F. Supp. 2d at 123.

requirement. To demonstrate this confusion, one only need look to the inconsistencies between the time-honored traditions and teachings of the Catholic Church and the actions of many popular, high-ranking politicians and influential celebrities. The more numerous than acceptable examples of the latter group's misunderstanding and misrepresentation of the Catholic faith is present and readily available.[165] What has become perpetual access to consistent misinformation has, in turn, led to almost justifiable doubt on the part of the judiciary with regard to whether one's sincere beliefs are worthy of legal protection.

However, while the judicial branch is charged with objectivity and impartiality in its decisionmaking, it would be naïve to assume that its opinions were based purely on a blind ignorance of faith principles. The truth is easily attainable. Whether one wants to attain it is an entirely different question.

The Catechism of the Catholic Church is unwavering on the issue of abortion and contraception. With regard to abortion, the Catechism provides that "[h]uman life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life."[166] Further, it states that "the Church has affirmed the moral evil of every procured abortion" since the first century, and that abortion, "willed either as an ends or a means, is gravely contrary to the moral law."[167] The penalty attached to formal cooperation in an abortion—a "grave offense" and a "crime against human life"—is excommunication.[168] The Catechism makes clear that "[t]he inalienable right to life of every innocent human individual is a constitutive element of a civil society and its legislation . . . ."[169] Finally, it emphasizes the vital duty to protect unborn life as fully human life: "[s]ince it must be treated from conception as a person, the embryo must be defended in its integrity, cared for, and healed, as far as possible, like any other human being."[170]

On matters of contraception, the Catechism states: "'[E]very action which, whether in anticipation of the conjugal act, or in its

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[165] *See infra* notes 174–211 and accompanying text.

[166] LIBERIA EDITRICE VATICANA, CATECHISM OF THE CATHOLIC CHURCH § 2270, at 547 (2d ed. 2016).

[167] *Id.* at § 2271, at 547–48.

[168] *Id.* at § 2272, at 548. "The Church does not thereby intend to restrict the scope of mercy. Rather, she makes clear the gravity of the crime committed, the irreparable harm done to the innocent who is put to death, as well as to the parents and the whole of society." *Id.*

[169] *Id.* at § 2273, at 548 (emphasis omitted).

[170] *Id.* at § 2274, at 549.

accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible' is intrinsically evil[.]"[171] Furthermore, "[t]he regulation of births represents one of the aspects of responsible fatherhood and motherhood. Legitimate intentions on the part of the spouses do not justify recourse to morally unacceptable means (for example, direct sterilization or contraception)."[172]

Despite the clear, specific teachings of the Catholic Church, some very prominent Catholics promote a different message. One need only to look to the latest two presidential election cycles to see multiple examples of inconsistency between Catholic teaching and Catholic behavior. On September 5, 2012, Sister Simone Campbell was a featured speaker at the Democratic National Convention.[173] Sister Simone is the organizer of the "Nuns on the Bus" tour that was developed to protest the federal budget proposal by Paul Ryan.[174] Speaking specifically about the Affordable Care Act, Sister Simone stated that "[w]e all share responsibility to ensure that this vital health care reform law is properly implemented and that all governors expand Medicaid coverage so no more [women] die from lack of care. This is part of my pro-life stance and the right thing to do."[175] Despite touting her pro-life stance, Sister Simone mentioned nothing about the HHS mandate or how, as proposed at the time of her speech, it would require religious institutions to provide birth control and abortifacients. She did not mention anything about abortion, which the Democratic Party endorsed in its platform earlier in the week. And, she made no note of the fact that pro-life democrats had a right to be acknowledged in the party platform (the Party refused to expand the platform to acknowledge Democrats for Life in America). Recently, at the 2016 Democratic National Convention, Sister Simone suggested abortion is sometimes the right choice but, again, made no mention of the Catholic Church's teaching on the act.[176]

The 2012 vice-presidential candidates had their share of misrepresentative moments during the campaign as well. Both republican Paul Ryan and democrat Joe Biden publicly acknowledge the

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[171] *Id.* at § 2370, at 570.

[172] *Id.* at § 2399, at 576.

[173] *See*, Interview with Sister Simone, Democratic Nat'l Convention, in Phila., Pa. (July 29, 2016), http://www.democracynow.org/2016/7/29/nuns_on_the_bus_at_the.

[174] *Id.*

[175] *Id.*; Interview with Sister Simone, Exec. Dir., Roman Catholic Soc. Justice Org., Nuns on the Bus at the DNC: Sister Simone Campbell on Abortion Rights, Wealth Gap, Kaine in Honduras (July, 29, 2016), http://www.democracynow.org/2016/7/29/nuns_on_the_bus_at_the.

[176] *See*, Interview with Sister Simone, *supra* note 173.

importance of and adherence to their Catholic faith in not only their personal lives but also in their political decision-making.[177] Neither, however, accurately conveyed Church teaching on the subject of abortion and contraception.

In the vice-presidential debate and on the campaign trail, Paul Ryan stated that as a Catholic he believes in life as a principle and that life begins at conception.[178] However, at that same debate, he acknowledged that he signed on to a presidential ticket with a candidate and political ideology inconsistent with Catholic teaching.[179] When pressured on the inconsistency between the principle of life and the ticket's platform on abortion, he had no answer other than to reiterate what would be the policy of the Romney Administration.[180] It was, to say the least, a rather squirm-worthy moment for Ryan.

One week before the general election, Vice President Joe Biden said the following in a campaign ad targeting Catholic voters:

> As a practicing Catholic like many of you, I was raised in a household where there was absolutely no distinction between the values my mom and dad drilled into us and what I learned from the nuns and priests who educated me. We call it Catholic social doctrine: "Whatever you do to the least of these, you do for me."[181]

He said that President Obama "shares those values."[182] But the Vice President said nothing about the HHS mandate and the fact that it, at the time of the ad, required Catholic institutions to fund contraceptives and abortifacients. He said nothing about his "abortion on demand" political stance and voting record. At the end of the ad, the Vice-President alerted viewers to a campaign website which was created to demonstrate the President's allegiance with the Catholic voice and voter.[183] Not only was the ad inconsistent with the Vice-President's interpretation of Catholicism, his misrepresentation of Catholic doctrine was so egregious that the bishop of Colorado Springs called for Biden to not receive Communion in the Catholic Church.[184] Biden has since been

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[177] Deborah Charles, *Catholics Ryan, Biden Disagree Over Abortion Rights*, REUTERS (Oct. 12, 2012, 9:04 AM), http://news.trust.org/item/20121012052500-h3esg.

[178] *October 11, 2012 Debate Transcript*, COMM'N ON PRESIDENTIAL DEBATES, http://www.debates.org/index.php?page=october-11-2012-the-biden-romney-vice-presidential-debate (last visited Oct. 22, 2016).

[179] *See supra* notes 166–72 and accompanying text.

[180] *See October 11, 2012 Debate Transcript*, *supra* note 178.

[181] BarackObama.com, *Vice President Joe Biden: Catholics for Obama*, at 0:00–00:18, YOUTUBE (Oct. 29, 2012), https://www.youtube.com/watch?v=qP5H64VYBpc.

[182] *Id.* at 00:18–00:22.

[183] *Id.* at 1:56–2:18.

[184] R. Cort Kirkwood, *Bishop to Biden: No Communion in Colorado Springs Diocese*, NEW AM. (Oct. 15, 2012), http://www.thenewamerican.com/culture/faith-and-morals/item/13207-bishop-to-biden-no-communion-in-colorado-springs-diocese.

prohibited from speaking in Catholic schools or receiving Communion in both the Dioceses of Colorado Springs and Wilmington.[185]

In February 2012, Secretary Sebelius, who identifies as Catholic, testified before the House Energy and Commerce Committee.[186] While explaining the HHS Mandate, Secretary Sebelius stated that "[t]he reduction in a number of pregnancies compensates for the cost of contraception."[187] So, to interpret that testimony, by not having as many babies born, health care costs would go down. In other words, it is cheaper to pay for contraception and abortifacients than to pay healthcare costs for babies and, as they age, adults.[188]

Tim Kaine, the 2016 Democratic vice-presidential nominee and a Catholic, has stated that he personally opposes abortion but supports it politically.[189] He didnot indicate any conflict with his role as Hillary Clinton's running mate.

Probably the most injurious display of the misapplication of the Catholic faith by a "practicing Catholic" is Melinda Gates and her quest to provide birth control to the world. In July of 2012, Gates launched a 4.6 billion dollar initiative to provide contraceptives and "family planning services" to women around the world.[190] Gates, who is Catholic, has said that this initiative is consistent with her commitment to

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[185] *Id.*; Brian Lilley, *You Gotta Have Faith: Joe Biden's Nomination as Barack Obama's Running Mate Casts a Shadow Over the Democrat's Campaign*, MERCATORNET (Aug. 27, 2008), http://www.mercatornet.com/articles/view/you_gotta_have_faith/3664.

[186] U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.hhs.gov/asl/testify/2012/testimony.html#February (last visited Oct. 24, 2015); Julia Duin, *Sebelius in Trouble with Catholic Church*, WASH. TIMES (Mar. 24, 2009), http://www.washingtontimes.com/news/2009/mar/24/catholic-church-to-pressure-hhs-nominee-on-abortio/.

[187] Andrew Bair, *Sebelius: Fewer Babies Born Will Save Health Care Costs*, LIFENEWS.COM (Mar. 1, 2012, 8:04 PM), http://www.lifenews.com/2012/03/01/sebelius-fewer-babies-born-will-save-health-care-costs/.

[188] Sarah Ditum, *Contraception Is Cheap Compared to the Cost of an Unplanned Pregnancy*, GUARDIAN (Sept. 11, 2012, 2:08 PM), http://www.businessinsider.com/contraception-is-cheap-compared-to-the-cost-of-an-unplanned-pregnancy-2012-9. This is troubling because "[a]s a means of cutting costs under [the Affordable Care Act], the Secretary of HHS has the authority to mandate coverage of anything he or she adds to a 'preventive services' list." Contraception has been added to the list. Bair, *supra* note 187. Thus, "[b]ecause the list is fluid and left solely to the whim of the Administration," abortion could ostensibly be added—forcing employers to pay for abortions as well. *Id.* How that squares with the Hyde Amendment is yet to be determined. *See generally* Hyde Amendment, Pub. L. No. 103–112, § 509, 107 Stat. 1082, 1113 (1993) (prohibiting federally funded abortion in cases other than incest, rape, or when it is necessary to save the mother's life).

[189] *Tim Kaine, a Catholic VP? Bishops Voice Their Concern*, CATHOLIC NEWS AGENCY (July 26, 2016, 4:36 PM), http://www.catholicnewsagency.com/news/tim-kaine-a-catholic-vp-bishops-voice-their-concerns-76280/.

[190] Joanna Moorhead, *Melinda Gates Challenges Vatican by Vowing to Improve Contraception*, at 00:03, GUARDIAN (July 11, 2012, 7:59 PM), https://www.theguardian.com/world/2012/jul/11/melinda-gates-challenges-vatican-contraception.

Catholicism and that she hopes her efforts will change the Catholic Church's stance on contraception, and inevitably on abortion.[191] She also noted that she believes her initiative is consistent with Catholic Social Justice teaching, stating, "What I am trying to emphasize is the social justice piece of our mission, and that's really where my roots come from."[192] When asked about the controversy among Catholics, she replied that "I believe in not letting women die. To me, that's more important than arguing about [the proper] method of contraceptive. So, yes I wrestle with it."[193] She said that she and her husband had originally focused on family planning when the Gates Foundation was first established eighteen years prior.[194] However, after learning that childhood mortality was the primary issue and that women would need to be sure their children would survive childhood before choosing to have fewer children, they shifted their priority to providing vaccines.[195] She noted, however, that once she and her husband saw "that was happening, [they] could take family planning back on."[196]

The focus was on sub-Saharan Africa and South Asia where infant mortality rates are high and contraception use is low:

> Africa's the one place really in the world, for the most part, that contraceptives haven't been available and it's really been a crime. . . . If you see what's happened in other countries that have had contraceptives, they use them first of all and the birth rates go down. The question is could it have come down even more quickly?[197]

Gates has claimed: "This [initiative] will be my lifetime's work at the foundation."[198]

Reading this misrepresentation of the Catholic faith could render one speechless. Obianuju Ekeocha, Nigerian biomedical scientist and practicing Catholic who has been living and working in Canterbury, England for years, provides insight into the ignorance of Gates's statements and mission.[199] Dr. Ekeocha wrote, in an open letter to Gates:

> Growing up in a remote town in Africa, I have always known that a new life is welcomed with much mirth and joy. In fact we have a

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[191] *Id.* at 4:32–4:44.

[192] *Id.* at 2:34–2:50.

[193] *Id.* at 3:29–3:47.

[194] *Id.* (accompanying article).

[195] *Id.*

[196] *Id.*

[197] Stephanie Smith, *Melinda Gates Responds to Contraception Program Controversy*, CNN (July 6, 2012, 5:33 PM), http://www.cnn.com/2012/07/06/health/melinda-gates-contraception/.

[198] *Id.*

[199] Obianuju Ekeocha, *Nigerian Woman Writes to Melinda Gates: We Don't Need Your Contraception*, CATHOLIC ONLINE (Aug. 20, 2012), http://www.catholic.org/news/national/story.php?id=47264.

> special "clarion" call (or song) in our village reserved for births and another special one for marriages.
>
> The first day of every baby's life is celebrated by the entire village with dancing (real dancing!) and clapping and singing—a sort of "Gloria in excelsis Deo."
>
> All I can say with certainty is that we, as a society, LOVE and welcome babies.
>
> With all the challenges and difficulties of Africa, people complain and lament their problems openly. I have grown up in this environment and I have heard women (just as much as men) complain about all sorts of things. But I have NEVER heard a woman complain about her baby (born or unborn).[200]

The culture has changed dramatically over the last generation. The mixed messages from self-proclaimed "practicing Catholics" are echoed by many within the Church who believe they are "practicing" their faith in an appropriate manner as well.[201] There is no doubt that continued misrepresentation has had a detrimental effect on what people believe sound Church doctrine to be.

A recent American Values Survey sheds light on the deep cultural schism that exists with regard to what people inside and outside of the Catholic Church know about the principles of the Catholic faith.[202] According the survey, 60% of Catholics identify mainly as "social justice" Catholics while 31% of Catholics identify mainly as "right to life" Catholics.[203] Among Catholics who attend church weekly, 51% believe the church should focus more on social justice and helping the poor, while only 36% believe the church should focus more on abortion and right to life issues.[204] When choosing a candidate for political office, social justice Catholics were more likely to vote for a candidate with a pro-abortion record and platform (60% vs. 37%); Right to life Catholics were more likely to vote for a candidate with a pro-life record and platform (67% vs. 27%).[205] On the influence of Church teaching, 81% of Catholics feel that dissent from Church teaching on sex, contraception and reproduction is not incompatible with being a "Good Catholic."[206] This belief is held by 76% of church-

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[200] *Id.*

[201] *See* Trent Horn, *The Inconsistency of "Personally Opposed but Still Pro-Choice,"* CATHOLIC ANSWERS (July 25, 2016).

[202] Robert P. Jones et. al., *The 2012 American Values Survey: How Catholics and the Religiously Unaffiliated Will Shape the 2012 Election and Beyond*, PUB. RELIGION RESEARCH INST. (Oct. 23, 2012), http://www.prri.org/wp-content/uploads/2012/10/AVS-2012-Pre-election-Report-for-Web.compressed.pdf.

[203] *Id.* at 54.

[204] *Id.*

[205] *Id.* at 26 (referring to percentage more likely to vote for Governor Mitt Romney or President Barack Obama, respectively).

[206] *Id.*

goers and 93% of non-frequent church-goers.[207] Despite these high numbers on the acceptance of dissent regarding Church teachings, 63% agree the Church influences their beliefs about right and wrong on these topics.[208] That number is 79% for frequent church-goers and 47% of non-frequent church-goers.[209] Finally, when it comes to abortion and the use of emergency contraception, 10% of church-going Catholic women report having had an abortion while 8% have used emergency contraception.[210] These numbers are larger among younger women.[211]

The problem is threefold and it is represented by three distinct groups of people. There are those that know the tenets of their faith and fight the public deterioration of it. Others are uninformed and presume that what they are being told is true, no matter the source. The third, most dangerous group exists to misrepresent the truth for their own purposes. They have, over time, massaged into the culture falsehoods regarding what it means to live out one's faith. If those that claim to practice their faith are not adhering to its principles, and still others make it their goal to intentionally destroy the truth, it becomes easy to understand how slow-moving changes can go unnoticed. Without a consistent understanding of religious doctrines, others, including legislators and judges, could be convinced to not take seriously the argument that a particular government mandate could substantially burden someone's sincere religious belief. After all, if so many who claim to hold to that particular faith tradition do not believe it is worthy of preserving, how important to the overall religion must it be? The result is that the belief, while sincere, is considered a small and insignificant fringe aspect of the faith. Once the belief is viewed as de minimus, it is easy to find insubstantial any burden that would be placed upon a person for violating it. This inability to see the gravity of the burden is compounded when the decision maker sees that sincere belief as silly. The more out of the norm it appears, the sillier it becomes. But religion at its core has never been about norms—and it shouldn't start being so now.

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[207] Mary Rice Hasson & Michele M. Hill, *What Catholic Women Think About Faith, Conscience, and Contraception* 14 WOMEN FAITH AND CULTURE PROJECT (2012), http://whatcatholicwomenthink.com/What_Catholic_Women_Think_Contraception-Aug_2012.pdf (asserting that one-third of church-going Catholic women say using artificial birth control methods, also known as contraceptives, is "morally acceptable").

[208] *Id.* at 3.

[209] *Id.* at 12.

[210] *Id.* at 13.

[211] *Id.*

CONCLUSION

This Article began with a discussion of boiling frogs and approaching darkness. It is a serious matter and the stakes couldn't be higher. While the HHS Mandate cases may be trickling out of the nation's consciousness, another government requirement will arise soon enough. The sincerity of the plaintiff's belief in his, her, or its religion or religious practices will continue to be an ever-changing, ever-intertwined component of the substantial burden placed on the exercise of that religion or religious practice. What the judges determine in future cases will be a reflection of this country's changing attitudes on the importance of practicing and recognizing the practice of religion. The courts' decisions are in the people's hands. There will always be someone ready, willing, and able to turn that pot of water on. It is up to us, therefore, to decide whether we want to boil.

REPAIRING OUR FOUNDATION THROUGH CHRISTIAN SCHOLARSHIP

*Glen A. Huff**

INTRODUCTION

In the minutes allotted to me today, I wish to develop three brief points: (1) Christian scholarship has generally been credited as the foundation for today's western civilization, (2) during my lifetime I have witnessed rampant deterioration of that foundation, and (3) you and I are called to repair that foundation, employing Christian scholarship to lead our nation back to its founding fundamentals.

I. CHRISTIAN SCHOLARSHIP HAS GENERALLY BEEN CREDITED AS THE FOUNDATION OF WESTERN CIVILIZATION

To us who are students of the law, this fact is self-evident. Black-letter principles of law were handed down from God to Moses at the Mount Sinai School of Law many centuries ago.[1] Those principles made their way into Anglo-American common law and into statutes by which we govern society today.[2] Commentators often focus on the Middle Ages or the Reformation period when discussing the effect of Christian scholarship on Western culture,[3] but I'd like to deal with examples that are a little closer to here and now.

But first, in 1606, King James I (the same king credited with authorizing the King James translation of the Bible), granted a charter to the Virginia Company of London for the purposes of exploration and establishing colonial settlements in the new world.[4] These early

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* Glen Huff is the Chief Judge of the Court of Appeals of Virginia. These remarks were given at the Regent University School of Law Chapel on April 14, 2016, for the occasion of the Award Ceremony for the Ninth Annual Hon. Leroy R. Hassell, Sr., Legal Scholarship Competition. The personal views expressed herein are not to be construed as the views of the Court of Appeals of Virginia. Chief Judge Huff gratefully acknowledges the editorial assistance provided by his senior law clerk, Ottie Allgood, Esq.

1 *Exodus* 19:20, 20:1–17.

2 *See* John W. Welch, *Biblical Law in America: Historical Perspectives and Potentials for Reform*, 2002 BYU L. REV. 611, 630 (2002) ("'It is impossible to list all these indirect influences which Scripture has had on the minds of judges, lawmakers, and the electorate,' for many aspects of American law were 'strongly shaped by the popular understanding of biblical morality.'").

3 *E.g.*, HAROLD J. BERMAN, LAW AND REVOLUTION 40 (1983) (explaining that the Western legal system developed during the latter part of the Middle Ages due to papal supremacy and the church's independence from secular control).

4 *The First Charter of Virginia, 1606*, *in* SOURCES OF OUR LIBERTIES 32, 32, 39 (Richard L. Perry & John C. Cooper eds., 1978).

adventurers included learned, God-fearing men.[5] Nearly 409 years ago, on April 26, 1607, these adventurers from the Virginia Company made landfall here in Virginia Beach—at Cape Henry on the mouth of the Chesapeake Bay.[6]

After spending considerable time in prayer, they claimed this territory, including where we sit today.[7] Although they had been commissioned by the King of England, when they stepped on the beach they did not post the Union Jack or the flag of England.[8] Rather, they planted a cross.[9] They claimed this very land as Christian territory—a place for believers.[10] Today, a granite cross stands on the beach in remembrance of that claim made in the spring of 1607.[11] From there, the adventurers made their way up the James River, planting crosses along the way.[12]

One hundred and eighty years later, on September 17, 1787, our forefathers drafted the Constitution of the United States.[13] James Madison has been credited as the principal author of the Constitution.[14] Madison had studied philosophy, law, Latin, Greek, and Hebrew at Princeton, and he later served as the rector at the University of Virginia.[15] He was a Christian scholar.[16]

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[5] *Id.* at 39–40.

[6] DAVID R. BASCO & CHRISTOPHER B. COLBURN, THE STATE OF THE REGION'S BEACHES vii (2006), http://media.hamptonroads.com/images/news/2006/11nov/Basco%20beach%20report.pdf.

[7] Lewis Wright & Brenda Gardner, *Robert Hunt, Vicar of Jamestown*, 66 ANGLICAN & EPISCOPAL HIST. 500, 507–08 (1997); *see also* Mrs. Robert Bennett Bean, *Colonial Church in Virginia*, VA. MAG. HIST. & BIOGRAPHY, Jan. 1947, at 78, 78–79 (explaining that the travelers knelt before the cross at Robert Hunt's bidding to give thanks for their preservation and pray for safety in the new world).

[8] U.S. DEP'T OF INTERIOR & NAT'L PARK SERV., CAPE HENRY MEMORIAL: A PART OF COLONIAL NATIONAL HISTORICAL PARK, VIRGINIA (1960) http://npshistory.com/brochures/colo/1960ch.pdf [hereinafter CAPE HENRY MEMORIAL].

[9] *Id.*

[10] *The First Charter of Virginia, 1606*, *supra* note 4, at 39–40.

[11] CAPE HENRY MEMORIAL, *supra* note 8.

[12] James Horn, *The Conquest of Eden: Possession and Dominion in Early Virginia*, *in* ENVISIONING AN ENGLISH EMPIRE: JAMESTOWN AND THE MAKING OF THE NORTH ATLANTIC WORLD 25, 38 (Robert Appelbaum & John Wood Sweet eds., 2005).

[13] Draft Constitution by the Committee of Style, as Amended by the Convention (Sept. 17, 1787), *reprinted in* 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 1776–1787, at 284, 305 (Merrill Jensen et al. eds., 1976).

[14] Thomas R. Eddlem, *Father of the Constitution*, THE NEW AM., July 1, 2002, at 33, 33.

[15] RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 29, 657–58 (Univ. Press of Va. 1990) (1971).

[16] Eddlem, *supra* note 14, at 33; *see also* Ralph L. Ketcham, *James Madison and Religion–A New Hypothesis*, 38 J. PRESBYTERIAN HIST. SOC. 65, 66 (1960) (examining

Madison was particularly interested in theology and extended his studies at Princeton for a year of post graduate study in theology.[17] Doubtless, Madison's commitment to Christian theology influenced his thinking. Perhaps that accounts for our form of government in which the president is not above the law,[18] a principle that dates back to Deuteronomy 17:20: The king must "not consider himself better than his fellow Israelites and turn from the law."[19] Like the ancient Hebrew model of government, the law (the U.S. Constitution) ranks above mortals, even above heads of state.[20]

The influence of Christianity in our country is found in many places. Over the years that influence has been reflected in public actions (in 1782, Congress formally recommended an edition of the Bible developed "for the use of schools"[21]), in public monuments (including the inscription "Laus Deo," which means "praise be to God," at the top of the Washington monument[22]), in the stone relief carvings in the chambers of the House of Representatives, in the Supreme Court depiction of Moses,[23] and even in the motto inscribed on all U.S. currency: "IN GOD WE TRUST."[24]

But for me, Christian influence is best exemplified by George Washington's actions when he took the oath of office. Washington was so popular that he could have taken the oath in whatever fashion he desired.[25] History tells us that Washington decided to take the oath by placing his left hand on the Bible, raising his right hand, and swearing to

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Madison's religious beliefs, and quoting Madison: "the belief in a God All Powerful, wise and good, is so essential to the moral order of the World and to the happiness of man, that arguments which enforce it cannot be drawn from too many sources . . . .").

17 KETCHAM, *supra* note 15, at 56.

18 U.S. CONST. art. II, § 1, cl. 8; *id.* art. II, § 4.

19 *Deuteronomy* 17:20 (New International Version).

20 *See* U.S. CONST. art. II, § 1, cl. 8 (indicating that the constitution is preeminent over even the President, as he or she must take an oath of office to defend and uphold the Constitution); *id.* art. II, § 4 (stating that the President, Vice President, and all civil officers are subject to impeachment for violating the law).

21 Thomas C. Pears, *The Story of the Aitken Bible*, 18 J. DEP'T HIS. PRESBYTERIAN CHURCH U.S.A. 225, 299, 234 (1939).

22 NEWT GINGRICH, REDISCOVERING GOD IN AMERICA: REFLECTIONS ON THE ROLE OF FAITH IN OUR NATION'S HISTORY AND FUTURE 37–38 (2006).

23 *Id.* at 81, 87.

24 Louis Fisher & Nada Mourtada-Sabbah, *Adopting "In God We Trust" As the U.S. National Motto*, 44 J. CHURCH & ST. 671, 681 (2002).

25 *See* Robert P. Hay, *George Washington: American Moses*, 21 AM. Q. 780, 781–82 (1969) (discussing Washington's unrivaled popularity and characterization as the American savior and deliverer).

uphold the Constitution—a tradition followed by most presidents after Washington.[26]

Washington, however, insisted that the Bible be open when he placed his hand upon it, and not opened randomly, but specifically to Deuteronomy 28.[27] That chapter outlines the blessings given to a godly nation and the curses of a nation that disobeys God.[28] I believe that Washington, by using the Bible opened to Deuteronomy 28, was claiming this to be a godly nation, and he was invoking God's blessings for this country.

For nearly the first two centuries after Washington's inauguration, this young country followed God's principles.[29] During this time, the United States was blessed. The passage in Deuteronomy says of the nation obedient to God: "Blessed shall you be in the city, and blessed shall you be in the field."[30] This is a promise that an obedient nation will be blessed in its crops and herds, blessed in its food baskets, and safe in its boundaries.

Sure enough, this country experienced those very blessings. In short order, America became the breadbasket of the world.[31] We were secure in our boundaries; we were strong and protected the world, as evidenced by

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[26] Gleaves Whitney, *Bible Passages at Inaugurations,* GRAND VALLEY ST. U. (Jan. 25, 2005), http://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1032&context=ask_gleaves. The vast majority of presidents have followed George Washington's example of taking the oath of office with his hand on the Bible. *Id.* Theodore Roosevelt in 1901 was the only president who did not take the oath of office with his hand on the Bible. *Id.* Hayes in 1877 and Arthur in 1881 did not use a Bible when they were sworn in privately, but used a Bible for the public ceremony. *Id.*

[27] GINGRICH, *supra* note 22, at 35.

[28] *Deuteronomy* 28:1–68.

[29] See, for example, the Supreme Court's opinion in *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49 (1890), stating that polygamy "is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western World," which was later quoted with approval in *Cleveland v. United States*, 329 U.S. 14, 19 (1946).

[30] *Deuteronomy* 28:3 (New International Version).

[31] *See, e.g.*, James Moreland, *America is No Longer the World's Breadbasket* (Aug. 11, 2013), http://economyincrisis.org/content/america-is-no-longer-the-worlds-breadbasket ("For generations, the United States was a global agricultural power, sometimes referred to as the breadbasket of the world. Today, however, the U.S. is simply an afterthought.").

heroic actions in World War I[32] and World War II.[33] Industry was strong[34] and prosperity followed, just as Scripture said it would.

II. THE DETERIORATION OF OUR FOUNDATION

But then in the 1950s and 60s we began squeezing God out of our nation's everyday life. Prayer was no longer allowed in public schools.[35] Biblical moral standards were disregarded.[36] Mere mention of God in public was no longer "politically correct."[37] And what happened? We lost the war in Vietnam.[38] Our borders were penetrated by enemies on September 11, 2001.[39] Our food supplies have been contaminated[40] and our blessings are on the wane.[41]

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[32] *See* Treaty of Peace Between the United States and Germany, Ger.-U.S., Aug. 25, 1921, 42 Stat. 1939 (declaring the end of the war, and thus exemplifying that the United States played an important role in defeating Germany and preserving democracy worldwide); PAT ROBERTSON, AMERICA'S DATES WITH DESTINY 174 (1986) (stating that President Wilson remarked when asking Congress for a declaration of war to enter World War I: "The world must be made safe for democracy! . . . It is a fearful thing to lead this great peaceful people into war, into the most terrible and disastrous of all wars, civilization itself seeming to be in the balance. But the right is more precious than peace, and we shall fight for the things which we have always carried nearest our hearts.").

[33] *See* Surrender by Germany, May 8, 1945, 59 Stat. 1857 (delineating Germany's terms of surrender to the United States and other Allied powers following World War II); R.J. RUMMEL, DEATH BY GOVERNMENT 4, 8 (7th prtg. 2009) (indicating the level of horror and genocide committed by the Nazi regime).

[34] *The Industrial Revolution in the United States*, LIBRARY OF CONGRESS, http://www.loc.gov/teachers/classroommaterials/primarysourcesets/industrial-revolution/pdf/teacher_guide.pdf (last visited Sept. 11, 2016).

[35] Engel v. Vitale, 370 U.S. 421, 433 (1962).

[36] *See, e.g.*, Jeremy Greenwood & Nezih Guner, *Social Change: The Sexual Revolution*, 51 INT'L ECON. REV. 893–94 (2010) (providing statistics regarding the sexual revolution during the twentieth century—e.g., in 1900 only six percent of teenage girls engaged in premarital sex, but by 2002 only twenty-five percent of teenage girls abstained from premarital sex).

[37] *See Engel*, 370 U.S. at 422, 433 (holding that a school prayer to God was unconstitutional).

[38] JAMES CANNON, GERALD R. FORD: AN HONORABLE LIFE 374 (2013) (quoting President Ford: "I can still recall sitting in the Oval Office at my desk, watching those helicopters come and go, live on TV. I saw the war right in front of me. I saw the fear, the hell of war. I saw our country defeated.").

[39] N.R. Kleinfield, *U.S. Attacked: Hijacked Jets Destroy Twin Towers And Hit Pentagon in Day of Terror*, N.Y. TIMES, Sept. 12, 2001, at A1.

[40] Eric Schlosser, *Has Politics Contaminated the Food Supply?*, N.Y. TIMES, Dec. 11, 2006, http://www.nytimes.com/2006/12/11/opinion/11schlosser.html?_r=2.

[41] *See* DEP'T OF ST. & JOINT LIBR. COMM. CONGRESS, THE PAPERS OF JAMES MADISON 1391 (1840) (reporting on a debate at the Constitutional Convention and quoting Colonel Mason: "As nations cannot be rewarded or punished in the next world, they must be in this. By an inevitable chain of causes and effects Providence punishes national sins by national calamities.").

The passage claimed for this country by Washington at his inauguration had come home to roost. Shortly after I learned about the way in which Washington took his oath, I had occasion to be sworn in as a judge of the Court of Appeals of Virginia. My wife held the Bible, opened to Deuteronomy 28. I placed my left hand on those words of Scripture and repeated the oath of office.

You see, I want to believe that we are a godly nation, or at least that we can return to that status. I want to count on God's blessings for the United States. But as I reflect on the cultural shifts that have taken place during my lifetime, I am concerned that we are rapidly becoming the disobedient land referenced in the second half of Deuteronomy 28.

I recall the days when opening exercises in my public school classes included recitation of the Lord's Prayer. I recall that the norm for public dinners and public programs was to begin with prayer invoking God's presence and blessings. I recall a time when even our U.S. Supreme Court openly defended Biblical standards for marriage and sexual behaviors, before *Lawrence v. Texas* and *Obergefell.*[42]

The trends I have seen may have had innocent beginnings. In the 1960s our national standard of living took a dramatic upswing. Advances in communication (especially telephone and television) filled our idle time.[43] Construction of the interstate road system enhanced our mobility—and as a result accelerated commerce and the exchange of ideas.[44] The "God is Dead" movement,[45] the sexual revolution,[46] and

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[42] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2614 (2015) (Roberts, C.J., dissenting) (citing precedent that highlighted the importance of marriage between a man and woman as the foundation for society and civilization); The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890) (criticizing polygamy as a return to barbarism against the spirit of Christian principles). *But see* United States v. Windsor, 133 S. Ct. 2675, 2689 (2013) ("For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. . . . The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.").

[43] *See* CHARLES T. MEADOW, MAKING CONNECTIONS: COMMUNICATION THROUGH THE AGES 167, 239 (2002) (describing the history of television broadcasting).

[44] Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374 (1956); Mona L Hymel, *Environmental Tax Policy in the United States: A "Bit" of History*, 3 ARIZ. J. ENVTL. L. & POL'Y 157, 163–64 (2013).

[45] JOHN WARWICK MONTGOMERY, THE 'IS GOD DEAD?' CONTROVERSY 9–10, 9 n.2 (1966).

[46] Greenwood & Guner, *supra* note 36, at 893–94.

epidemic drug abuse[47] resulted from an inquisitive generation consumed by desires to explore new frontiers.[48]

Unfortunately, those explorations became the avenues for deterioration of social standards. Over time the new social order gave way to constitutional "discoveries"—discoveries like the constitutional right to abortion[49] and the constitutional right to aberrant sexual relations.[50] We stand now on the brink of a titanic clash between the new social order and the First Amendment right to freely exercise religion.[51]

Polarization and self-centeredness deadlock our legislatures.[52] Crassness and foul language infect our national debates—even in the context of electing a new president.[53] We live in a sea of depravity, a morass of busyness and complacency, and an ever downward spiral of morality—trying to reach the lowest common denominator.[54] We are swiftly departing from being the godly nation referenced in the first half of Deuteronomy 28.

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[47] *See, e.g.*, *The History of Drug Abuse and Addiction in America and the Origins of Drug Treatment Part 4*, NARCONON NEWS (July 15, 2009), http://news.narconon.org/drug-abuse-treatment-origins-america/ (discussing how the countercultural youth of the 1960s rebelled by embracing narcotics).

[48] Constance A. Flanagan & Lonnie R. Sherrod, *Youth Political Development: An Introduction*, 54 J. OF SOC. ISSUES 447, 448 (1998).

[49] Roe v. Wade, 410 U.S. 113, 153 (1973).

[50] Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

[51] *See, e.g.*, Associated Press, *Oregon Bakery Pays $144,000 Fine for Refusing to Bake Gay Wedding Cake*, CHRISTIAN SCI. MONITOR (Dec. 29, 2015), http://www.csmonitor.com/USA/Society/2015/1229/Oregon-bakery-pays-144-000-fine-for-refusing-to-bake-gay-wedding-cake (reporting the story of Christian bakery owners who were fined $144,000 for refusing to bake a wedding cake for a same-sex wedding due to their religious beliefs).

[52] *See* Carroll Doherty, *7 Things to Know About Polarization in America*, PEW RES. CTR. (June 12, 2014), http://www.pewresearch.org/fact-tank/2014/06/12/7-things-to-know-about-polarization-in-america/ (finding that there is greater polarization between the two major parties now than at any previous point in American history).

[53] *See, e.g.*, Abby Phillip, *Clinton: Half of Trump's Supporters Fit in 'Basket of Deplorables,'* WASH. POST (Sept. 9, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/09/09/clinton-half-of-trumps-supporters-fit-in-basket-of-deplorables/ (reporting Hillary Clinton's remark that "you could put half of Trump's supporters into what I call the 'basket of deplorables'. Right? . . . The racist, sexist, homophobic, xenophobic, Islamophobic—you name it.").

[54] *See, e.g.*, Sheryl Gay Stolberg, *U.S. Awakes to Epidemic of Sexual Diseases*, N.Y. TIMES (Mar. 9, 1998), http://www.nytimes.com/1998/03/09/us/us-awakes-to-epidemic-of-sexual-diseases.html?pagewanted=all&_r=0 (discussing the growth of sexually transmitted diseases in the United States since the early 1980s); Kate Murphy, *No Time to Think*, N.Y. TIMES (July 25, 2014), http://www.nytimes.com/2014/07/27/sunday-review/no-time-to-think.html (discussing modern society's addiction to busyness).

III. THIS IS NOT IRREVERSIBLE—WE ARE CALLED TO REPAIR OUR FOUNDATION

Are we destined for ignominy? Some days I fear the answer is a resounding "yes." But then I read the scholarly Christian works that have been submitted in this competition and I have the good fortune to work with Regent Law students. You bring clean minds and well calibrated moral compasses to bear on the social issues of the day. A glimmer of hope shines through.

You are that glimmer of hope. You have been elected by the Creator of the universe to use Christian scholarship to turn the tides of rampant secularism and social depravity. You are nothing less than instruments of God. That's why you are here.[55]

When I think of the Christian scholarship that comes from Regent Law School, I think of the example of Daniel in scripture. The Bible describes Daniel as "without any physical defect, handsome, showing aptitude for every kind of learning, well informed, quick to understand."[56] When the Babylonians invaded Jerusalem and took Daniel captive to be pressed into service of the enemy kingdom,[57] people surely lamented this tragic turn of events. What a waste of talent; this person of great potential was now forced to survive in the enemy's land.

Daniel, as we know, did much more than survive. He applied his God-given scholarship—his aptitude for learning and understanding[58]—with discipline and integrity and made a lasting difference in this world.[59]

Each of you is like Daniel. You are young, you have shown an aptitude for learning, you are well-informed and quick to understand—and you are even handsome! Like Daniel, you have been delivered into a foreign kingdom.[60] You are citizens of a Heavenly Kingdom,[61] but have been transported by our Master's plan to survive in an increasingly hostile

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[55] 1 *Peter* 2:9 (English Standard Version) ("But you are a chosen race, a royal priesthood, a holy nation, a people for his own possession, that you may proclaim the excellencies of him who called you out of darkness into his marvelous light.").

[56] *Daniel* 1:4 (New International Version).

[57] *Daniel* 1:1–7.

[58] *Daniel* 1:20 (English Standard Version) ("[I]n every matter of wisdom and understanding about which the king inquired of them, he found [Daniel, Hananiah, Mishael, and Azariah] ten times better than all the magicians and enchanters that were in all his kingdom.").

[59] *Daniel* 2:48 (English Standard Version) ("Then the king gave Daniel high honors and many great gifts, and made him ruler over the whole province of Babylon and chief prefect over all the wise men of Babylon.").

[60] *Hebrews* 13:14.

[61] *Philippians* 3:20 (English Standard Version) ("But our citizenship is in heaven, and from it we await a Savior, the Lord Jesus Christ.").

secular kingdom.[62] You have been dropped behind enemy lines[63] where you will be pressured to give up on scholarship, abandon God's ways, and conform to the base instincts that seem to now govern this land.[64]

But scholarly Christian writing matters. In the fall of 1993, President Bill Clinton signed the Religious Freedom Restoration Act into law.[65] He remarked then that certain Christian writings had greatly influenced his support of the legislation.[66]

Christian scholarship in the form of law review articles published at Regent University have found their way into appellate court decisions in the Second,[67] Eighth,[68] and Ninth[69] Circuits, and a Regent Law review article was cited by Justice Kennedy in a 2011 decision of the United States Supreme Court.[70]

The writing competition that brings us together today is not a meaningless exercise or an empty drill. This is an opportunity to hone skills that are desperately needed in the world where you and I have been planted. Your Christian scholarship is a gift.[71] It is also a responsibility. Like Daniel, you have the opportunity to be obedient to God's calling, even in the face of a hostile world environment. Like Daniel, you have the opportunity to make a difference.

You have been made for a time such as this.[72] You have been called to salt today's culture and bring light to darkened recesses.[73] Be bold. Be all that you have been called to be. Correct actions are not a matter of

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62 *John* 15:19.

63 1 *John* 5:19 (English Standard Version) ("We know that we are from God, and the whole world lies in the power of the evil one.").

64 *Romans* 12:2 (English Standard Version) ("Do not be conformed to this world, but be transformed by the renewal of your mind . . . .").

65 Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17, 1993), http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html.

66 Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 WEEKLY COMP. PRES. DOC. 2377, 2378 (Nov. 16, 1993) ("As many of you know, I have been quite moved by Stephen Carter's book, 'The Culture of Disbelief.' ").

67 Dawes v. Walker, 239 F.3d 489, 497 (2d Cir. 2001).

68 Edwards v. Beck, 786 F.3d 1113, 1118 (8th Cir. 2015) (discussing viability of pre-term infants as it relates to abortion).

69 Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell, 729 F.3d 1025, 1032 (9th Cir. 2013).

70 Bullcoming v. New Mexico, 131 S. Ct. 2705, 2725 (2011) (Kennedy, J., dissenting).

71 *Romans* 12:6.

72 *Esther* 4:14.

73 *Matthew* 5:13–16.

majority vote.[74] Godly obedience does not make you popular.[75] Nevertheless, "work heartily, as for the Lord and not for men, knowing that from the Lord you will receive the inheritance as your reward."[76]

This country was built on godly principles and scriptural moral standards.[77] We've drifted seriously off course. But you have been drawn into pursuits of Christian scholarship for a purpose. You have been gifted with talent and opportunity. With the gift comes responsibility.

You are the "people who are called by [His] name"[78]—Christians—and you are therefore called to prayerfully and boldly work to return our people to the founding Christian principles. Then, but only then, can we once again expect to be aligned for the blessings of Heaven.

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[74] *Cf. Exodus* 23:2 (New International Version) (indicating that it is wrong to follow the crowd and that what is right is unconnected from popularity or majority vote).

[75] *James* 4:4 (New International Version) ("You adulterous people! Do you not know that friendship with the world is enmity with God? Therefore whoever wishes to be a friend of the world makes himself an enemy of God."); *See* Steve McSwain, *Why Nobody Wants to Be Around Christians Anymore*, HUFFINGTON POST (Sept. 4, 2014), http://www.huffingtonpost.com/steve-mcswain/why-nobody-wants-to-be-ar_b_5759918.html (stating that no one wants to be around Christians because they are considered judgmental and believe that the Bible is the inerrant Word of God, among other things).

[76] *Colossians* 3:23–24 (English Standard Version).

[77] *See, e.g.*, *The First Charter of Virginia, 1606*, *supra* note 4, at 39–40 (declaring the propagation of Christianity as one purpose of the Virginia colony); *see also* Whitney, *supra* note 26 (showing that nearly every United States president has placed his hand on the Bible during his inauguration).

[78] 2 *Chronicles* 7:14 (English Standard Version).

THE TRUE JURISPRUDENCE OF DOUBT: THE THRESHOLD QUESTIONS OF PERSONHOOD THAT THE SUPREME COURT WOULDN'T, COULDN'T, AND SHOULDN'T ANSWER

INTRODUCTION

"Liberty finds no refuge in a jurisprudence of doubt." This phrase opens the joint opinion of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[1] That case came nineteen years after the Court declared in *Roe v. Wade* that the fundamental right of personal privacy includes a woman's right to abort her unborn child.[2] *Casey* reexamined and reworked parts of that holding, recognizing that *Roe* and decisions following it had left in their wake a "jurisprudence of doubt" due to *Roe*'s attempt to "draw[] a specific rule from what in the Constitution is but a general standard."[3] With *Casey*, the Court sought to solve the problem by reaffirming the "central holding"[4] of *Roe*, but substituting its arbitrary trimester framework (designed to balance the mother's right to have an abortion and the state's interest in protecting the unborn) with a no less arbitrary viability standard.[5] The true cause of doubt and uncertainty engendered by *Roe* and unalleviated by *Casey*, however, is the fact that the Supreme Court has failed to properly address the threshold questions of life and personhood that must be answered before any rational judgment can be made between the rights of a mother and the rights of her unborn child.[6]

The purpose of this Note is twofold: first, it will establish that the Supreme Court has failed to properly answer the fundamental questions of personhood that must be answered before a sensible social policy regarding abortion can be adopted. Second, it will demonstrate why the Court, practically speaking, is the wrong branch of government to answer those questions in the first place.

Part One introduces the two threshold personhood questions that must be answered for our nation's social policy on abortion to be logical and rational, and discusses how the Court treated these questions in its landmark abortion decisions. Part Two examines three departments of

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1 505 U.S. 833, 844 (1992) (plurality opinion).

2 410 U.S. 113, 154 (1973).

3 *Casey*, 505 U.S. at 844, 869.

4 *Id.* at 853.

5 *Id.* at 853, 870.

6 Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 813 (1973).

government—the federal judiciary, the federal legislature, and the state legislatures—to determine what branch is best suited to address these questions. Finally, Part Three offers a suggestion as to how our nation should proceed from here.

I. THE TWO QUESTIONS

The old saying "don't put the cart before the horse" reflects the inherent impracticability of taking a sequence of steps out of their proper and logical order. Skipping a step in any process is usually done to save time or to avoid doing something the actor does not want to do.[7] In legal analysis, however, and especially in the protection of legal rights, skipping logical steps is simply not acceptable. A judge cannot resolve a contract dispute after only reading the terms of the contract that are favorable to one side, ignoring the rest of the contract; nor can she grant a motion for judgment as a matter of law against a defendant after hearing only the plaintiff's case.[8] Similarly, the Supreme Court has a general duty to examine and address any factual questions on which constitutional issues rest.[9]

In *Roe v. Wade* and *Planned Parenthood v. Casey*, the Supreme Court put the proverbial cart before the horse. The Court attempted to adjudicate between the rights of two parties without first properly establishing what rights one of the parties had.[10] The Fourteenth Amendment requires that lives of persons must be protected;[11] but, as recognized by the report of the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, in order to determine if the lives of the unborn should be protected, two fundamental questions must first be answered.[12] The first question is scientific: When does human life begin?[13] The second is legal: Is all human life deserving of value?[14] These two questions are connected, and follow one another in self-evident

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[7] STAFF OF S. COMM. ON THE JUDICIARY, 97th CONG., REP. ON HUMAN LIFE BILL 2–5 (Comm. Print 1981) [hereinafter HUMAN LIFE BILL REPORT] (showing how the Supreme Court followed this exact rationale in determining the abortion issue).

[8] *See* FED. R. CIV. P. 50(a)(1)(B) (stating that a motion for judgment as a matter of law can be granted against a party on an issue "[i]f [that] party has been fully heard on [the] issue").

[9] Kern-Limerick v. Scurlock, 347 U.S. 110, 121 (1954).

[10] HUMAN LIFE BILL REPORT, *supra* note 7, at 2–3; Byrn, *supra* note 6, at 813.

[11] *See* U.S. CONST. amend. XIV, § 1 ("No State . . . shall . . . deprive any person of life . . .").

[12] HUMAN LIFE BILL REPORT, *supra* note 7, at 3; *see also* Byrn, *supra* note 6, at 813 (discussing the threshold questions that should have been resolved in *Roe* before declaring a constitutional right to abortion).

[13] HUMAN LIFE BILL REPORT, *supra* note 7, at 3.

[14] *Id.*

logical order: you cannot determine whether someone is a legal person without first determining if he or she is at least a living person. Any attempt to do so is irrational and arbitrary.[15] The Supreme Court failed to give either question the proper consideration and analysis it deserved.[16]

A. The "Life Question": When Does Human Life Begin?

Perhaps the most fundamental duty of any government devoted to justice is the duty to protect life.[17] It seems no coincidence that the Declaration of Independence lists "Life" first in its famous delineation of unalienable rights.[18] Furthermore, the Fourteenth Amendment to the United States Constitution, ratified in 1868, enshrined in our nation's written law the duty of the federal government to protect the lives of all persons from government intrusion.[19] As Congressman John Bingham of Ohio, the primary architect of the Fourteenth Amendment, stated before Congress: "Before that great [American] law the only question to be asked of the creature claiming its protection is this: Is he a man?"[20]

But the duty to protect life for all persons is meaningless if there are no operational definitions for the words "life" and "person."[21] The Fourteenth Amendment, unfortunately, provides no answer to this difficult threshold question.[22] While the Amendment gives a definition of who qualifies as a United States citizen for the purpose of the Privileges

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[15] *Id.*; *see also* Kelly J. Hollowell, *Defining a Person Under the Fourteenth Amendment: A Constitutionally and Scientifically Based Analysis*, 14 REGENT U.L. REV. 67, 68 (2001) ("To avoid arbitrary enforcement of [the rights guaranteed by the Fourteenth Amendment], it is necessary to agree upon a definition of the word person.").

[16] HUMAN LIFE BILL REPORT, *supra* note 7, at 4.

[17] Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R.L.J. 219, 238 (2009); *see also* Herbert W. Titus, Lecture, *The Bible and American Law*, 2 LIBERTY U.L. REV. 305, 317 (2008) ("[T]he first duty of civil government is to protect the unalienable right to life, as the Declaration of Independence, the charter of our Nation, attests . . . .").

[18] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men . . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[19] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1, cls. 3–4.

[20] THE RECONSTRUCTION AMENDMENTS' DEBATES 274 (Alfred Avins ed., 1967).

[21] *See* Hollowell, *supra* note 15, at 68 (arguing that "it is necessary to agree upon a definition of the word person," to "avoid arbitrary enforcement of" our rights under the Fourteenth Amendment).

[22] Jack Wade Nowlin, Roe v. Wade *Inverted: How the Supreme Court Might Have Privileged Fetal Rights over Reproductive Freedoms*, 63 MERCER L. REV. 639, 652 (2012).

or Immunities Clause,[23] it conspicuously changes terminology, within the very same sentence, to speak of "any *person*" when it guarantees life and equal protection under the law in the Due Process and Equal Protection Clauses.[24] The Court has traditionally interpreted this change of terminology to mean that the Fourteenth Amendment's protections for "persons" encompass a broader category than its protections specifically designated for "citizens;" thus, these terms are not fungible alternatives.[25]

1. The Life Question in *Roe*

When the Supreme Court in *Roe* undertook to determine whether the unborn have any legal rights (which would need to be considered against and in conjunction with the right of a mother to have an abortion),[26] the first question that required answering was whether the unborn are *living* persons; that is, when does human life begin? Unfortunately, the Court expressly refused to answer this fundamental question. According to Justice Blackmun's opinion, the Court "need not resolve the difficult question of when life begins. . . . [T]he judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[27] Thus, this appropriately difficult question was simply pushed aside and treated as though it were unimportant for the mere fact that it was inconvenient. Taking the opinion as a whole, the Court implicitly held that the unborn are not alive, stating that "the unborn have never been recognized in the law as persons in the whole sense."[28] This implied answer is problematic, given the Court's frank admission of the judiciary's incapability of providing a true answer.[29] By not addressing the question explicitly and directly, the Court did "speculate as to the answer," even while claiming not to do so.[30]

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[23] U.S. CONST. amend. XIV, § 1, cl. 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .").

[24] *Id.* at cls. 3–4 (emphasis added); *see also* Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 62 (2011) (contrasting the Bill of Rights, which "guarantees rights generally, without distinguishing citizens from other persons," with the Fourteenth Amendment, which "sharply juxtaposes the privileges or immunities of 'citizens' with the due process and equal protection rights owed to 'any person.' ").

[25] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[26] *Roe*, 410 U.S. at 155–57.

[27] *Id.* at 159.

[28] *Id.* at 162.

[29] *Id.* at 159.

[30] *Id.*

The Court actually predicated its dismissal-without-answer of the Life Question by first asserting what seemed a strong statement in favor of the state interest in protecting the unborn.[31] "Logically," the Court surmised, a state's interest in protecting prenatal life "need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth."[32] In other words, so long as one accepts the premise that life begins *at some point* after conception and before birth, then it logically follows that the state has an interest or even a duty to protect that life; there is therefore no need, according to the Court, to pinpoint the exact point at which that life comes into being. The problem is that without establishing when life begins, there is no principled way to judge when a state must perform its duty to protect it.[33]

2. The Life Question in *Casey*

Nineteen years after the first refusal to answer in *Roe*, the Court's holding in *Casey* recognized that the Life Question remained unanswered. The joint opinion of Justices O'Connor, Kennedy, and Souter referred to the unborn's status rather ambiguously as being either "life or potential life," "depending on one's beliefs."[34] Treating the question as if it were dependent upon the subjective beliefs of each person considering the question is unsatisfactory: life is a biological, scientific, factual matter.[35] By comparison, the joint opinion's statement makes no more sense than the suggestion that the solar system is either geocentric or heliocentric, depending on one's beliefs. At other times in history, the majority of the world believed that the solar system was geocentric; but you will never read a history book that claims the world *was* geocentric up until the point when scientists collectively changed their minds on the issue. Such a statement is ridiculous: the cosmic order of our solar system does not shift depending on how one feels about it, and neither does the biological point of distinction between life and nonlife alter based on one's opinion. As surely as "[l]iberty finds no refuge in a jurisprudence of doubt,"[36] the laws of science do not operate based on subjective intuition. The logical mistake that the joint opinion made, however, is at least partially explicable: the Justices conflated the *factual* question of life with the *valuation* question of personhood, which

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[31] *Id.* at 150.

[32] *Id.*

[33] Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 17 (2013).

[34] *Id.*

[35] HUMAN LIFE BILL REPORT, *supra* note 7, at 3.

[36] *Casey*, 505 U.S. at 844.

will be discussed below.[37] The confusion resulting from this improper merger is precisely why the two questions must be considered and answered separately, and in the proper logical sequence.

B. The "Value Question": Are the Lives of the Unborn Deserving of Value?

While the Life Question is one that the Court refused to answer, the Value Question is one that the Court has attempted to avoid answering directly by reframing the question in terms less extreme. Rather than acknowledging that it has "extended to government . . . the power to decide the terms and conditions under which membership in good standing in the human race is determined,"[38] the Court has treated the question as though it were simply a matter of defining a legal category.[39] The Supreme Court stated frankly that the question of whether the unborn are persons for the purposes of the Fourteenth Amendment is material and central to the whole issue: "If this suggestion of personhood is established . . . the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."[40] However, the Court failed to recognize that the answer to the Life Question is material and central to answering the Value Question, and therefore it did not adequately address either.[41]

By not answering the Life Question first, the Court turned the necessary question of "Are all human lives deserving of value and protection under the law?"[42] into the more innocuous legal question of "Are the unborn included in the legal category of 'Persons?' "[43]

1. The Value Question in *Roe*

In *Roe*, the Court jumped the gun by avoiding the first question and yet presuming to answer the second.[44] Without determining whether the unborn are living persons, the Court declared that the Fourteenth Amendment's protection of legal persons does not extend to the unborn.[45] In this way, the Court placed the "cart" of legal personhood before the

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[37] *See also infra* Part I.B, I.C.

[38] 119 CONG. REC. 17,538 (1973) (statement of Sen. Buckley).

[39] *Roe*, 410 U.S. at 156–57.

[40] *Id.*

[41] Byrn, *supra* note 6, at 813–14.

[42] *See id.* at 859–60 (describing the value question at the heart of the abortion issue as "whether the life of a human being, distinguishable from other human beings only by kind and degree of dependency, is meaningful.").

[43] *See Roe*, 410 U.S. at 156–58 (addressing the definition of "Person" as used in the Constitution).

[44] HUMAN LIFE BILL REPORT, *supra* note 7 at 4–5.

[45] *Roe*, 410 U.S. at 153.

"horse" of human life. Since the Life Question remained unanswered, the Court's ruling essentially stands for the proposition that regardless of whether the unborn are living persons—indeed, *even if* they are living persons—their lives are not deserving of value and legal protection until at least the third trimester, and they are not legal persons entitled to full protection of the law until after live birth.[46]

The *Roe* decision, of course, did not expressly state that human life does not deserve to be valued until after live birth. Instead, Justice Blackmun presented the issue in a morally sterilized format, by simply asking the categorization question of whether the Fourteenth Amendment's use of the word "person" includes the unborn.[47] He noted that there had been no cases or precedent stating that the unborn are included within the Fourteenth Amendment's category of "persons," and that nearly all other instances of the word "person" in the Constitution could have only post-birth application.[48] On those grounds the Court declared that the unborn are not included within the legal category of "persons."[49]

Despite the fact that it dismissed the Life Question as irrelevant and categorically declared the unborn not to be legal persons under the Fourteenth Amendment, the Court still recognized that the "might-be-life" of the unborn was deserving of some value, which it termed as "the State's interest[] in protecting . . . potential life."[50] Its failure to properly address the foundational questions, however, left it with no principled standard by which it could determine how much value should be afforded "potential life," or at what point in development the value of "potential life" becomes "sufficiently compelling to sustain regulation" of abortion.[51]

2. The Value Question in *Casey*

Casey had no need to retread the same ground regarding personhood, accepting that *Roe* had established the non-personhood of the unborn.[52] However, *Casey* did reexamine and completely rework *Roe*'s decision regarding when the state can place value on pre-birth life

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[46] *Roe*, 410 U.S. at 157–58, 160–61.

[47] *See id.* at 156–57 (presenting the issue of defining "person" without acknowledging potential moral or scientific sources for definition).

[48] *Id.*

[49] *Id.* at 156–58.

[50] *Id.* at 156.

[51] *Id.* at 154.

[52] *See Casey*, 505 U.S. at 846 (stating that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.").

by enacting laws to protect it.[53] *Roe* infamously created a trimester framework for analyzing how compelling the state's interest is in protecting the "potential life" of the fetus, tying the value of unborn life to a point in prenatal development.[54] In *Casey*, however, the Court recognized that this trimester framework was flawed, in part because "it undervalue[d] the State's interest in potential life."[55] The Court also implicitly acknowledged that the original trimester framework was inherently arbitrary, by stating that "legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw."[56]

However, *Casey* did no better job of justifying its judicial line-drawing than did *Roe*.[57] *Roe*'s trimester framework, which drew lines regarding the state's interest in the protection of life without first establishing any firm standards by which to judge the value of life,[58] was rejected by the Court, but replaced with a standard prohibiting the state from placing any "undue burden" on a woman's right to choose an abortion before viability.[59] Since the Court did not answer the fundamental Value Question, however, the line drawn at viability was as arbitrary as the trimester framework, and it has been criticized on these grounds.[60] Even Justice Blackmun, before delivering the opinion of *Roe v. Wade*, had acknowledged that viability would be an arbitrary standard, when he stated in a Supreme Court memorandum accompanying a draft of the *Roe* opinion: "You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary."[61]

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[53] *Id.* at 878.

[54] *Roe*, 410 U.S. at 162–65.

[55] *Casey*, 505 U.S. at 873.

[56] *Id.* at 870.

[57] *Id.* at 985–88 (Scalia, J., concurring in judgment in part and dissenting in part).

[58] *Roe*, 410 U.S. at 162–65.

[59] *Casey*, 505 U.S. at 874.

[60] *See* MKB Mgmt. Corp.v. Stenehjem, 795 F.3d 768, 774–75 (8th Cir. 2015) (discussing the serious problems with the Supreme Court's viability standard, because it "tied a state's interest in unborn children to developments in obstetrics," and is therefore based on a medical standard that is subject to change as science and medicine naturally advance); Randy Beck, *The Essential Holding of* Casey*: Rethinking Viability*, 75 UMKC L. REV. 713, 740 (2007) (reviewing the viability standard established in *Casey* and concluding that "[i]n the decades since *Roe*, the Court has offered no adequate rationale for the viability standard, notwithstanding persistent judicial and academic critiques.").

[61] *See* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 580 (1998) (quoting the cover memo that Justice Blackmun circulated to the eight other justices with a draft of the *Roe* opinion on November 22, 1972).

C. The Court's Implied Answer

In sum, because the Court failed to properly address either of these fundamental questions, its analysis of the issue was flawed from the outset. As Professor Robert Byrn wrote in an article published shortly after the *Roe* decision:

> [T]he Court reversed the inquiry, deciding first that the right of privacy includes a right to abort, then deciding that the unborn child is not a person within the meaning of the fourteenth amendment, and finally, refusing to resolve the factual question of whether an abortion kills a live human being. In effect, the Court raised a presumption against the constitutional personality of unborn children and then made it irrebuttable by refusing to decide the basic factual issue of prenatal humanbeingness.[62]

It is more convenient and less straining upon one's conscience to treat the Life Question as inconsequential and the Value Question as a mere cataloguing exercise. However, the mistreatment of these questions together promulgate a dangerous standard: if the unborn may be alive, but are not deserving of legal protection even if they are,[63] then it must be the case that not all human lives are deserving of value and full protection under the law. That is the answer that the Court has implicitly left us with.

II. WHO SHOULD ANSWER?

In order to properly adjudicate between the rights of a mother and the rights of the unborn child within her, both the Life Question and the Value Question require complete and straightforward answers. As the Senate Subcommittee on Separation of Powers stated in its report on the 1981 Human Life Bill: "A government can exercise its duty to protect human life only if some branch of that government can determine what human life is. It can afford no protection to an individual without first ascertaining whether that individual falls within a protected class."[64] The natural follow-up question is: Which branch of government should address these fundamental questions? That question is at once a question of law, history, and practical functionalism.[65] There are three possible governmental entities that might address these questions: the Supreme Court, Congress, and the states. This section of this Note examines each in turn, to determine which is best suited to answer these threshold personhood questions.

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62 Byrn, *supra* note 6, at 813.

63 *Id.* at 861–62.

64 HUMAN LIFE BILL REPORT, *supra* note 7, at 3.

65 *See infra* Part II.A., II.B., II.C.

A. The Judiciary

As has been explored extensively above, the Supreme Court to this point has done an unsatisfactory job of addressing the central threshold questions regarding the life and personhood of the unborn.[66] It has addressed the questions out of logical sequence and it has expressly refused to resolve a necessary factual question.[67] What has yet to be explored is whether those questions are properly meant for the Court to answer at all.

There are three reasons why the Supreme Court is not the proper body to answer either question. First, the Court has expressly stated that it is not suited to answer the Life Question in particular. Second, the constitutional structure and design that the Framers intended the judicial branch to comport with does not allow it to answer these kinds of questions. Third, the Court is not competent to provide answers to these questions.

1. The Court's Own Admission

The first consideration to be noted is the fact that the Court expressly admitted its own inability to properly answer the Life Question,[68] which necessarily must be answered before the Value Question can be properly addressed.[69] In writing the opinion of *Roe*, Justice Blackmun did not simply ignore the question of when human life begins: he expressly refused to answer it, and provided some compelling reasons for doing so. "We need not resolve the difficult question of when life begins," he said.[70] "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[71] Although the Court's ultimate holding in *Roe* implicitly suggests as an answer that the unborn are not alive,[72] Justice Blackmun's description of the unsuitability of the Court to answer such a question is compelling and informative.

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66 *See supra* Part I.

67 Byrn, *supra* note 6, at 813.

68 *Roe*, 410 U.S. at 159.

69 HUMAN LIFE BILL REPORT, *supra* note 7, at 2–4.

70 *Roe*, 410 U.S. at 159.

71 *Id.*

72 *Id.* at 160–62.

2. The Court's Constitutional Design

The second reason that the Supreme Court should not answer these questions is that it was not designed to do so. If the Court were to remain within its originally designated place in the intricately-arranged federal system, it would operate solely as an organ of judgment, not one of policymaking.[73] As Alexander Hamilton famously stated in Federalist No. 78:

> The judiciary, [unlike the legislature and the executive], has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[74]

The American founders established a unique form of government that is divided according to the three basic categories of governmental power—executive, legislative, and judicial.[75] The judicial branch of government was originally intended simply to have the power of applying the law and deciding cases and controversies brought before it,[76] while the general lawmaking powers were vested in the legislature.[77] This distinction between lawmaking powers and judicial powers is the underlying purpose for having an independent and unelected judiciary: federal judges are meant to be bound solely to the law, rather than accountable to the people, applying only those policies fairly found in a congressionally-enacted statute or in the Constitution.[78] The very nature of this divided system, therefore, with which most Americans are naturally very familiar, speaks against the idea of judicial policymaking.[79] The fundamental threshold questions of when life begins and whether all lives are deserving of value are not questions of legal

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[73] THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[74] *Id.* at 464.

[75] U.S. CONST. art. I, § 1, cl. 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1, cl. 1.

[76] U.S. CONST. art. III, § 2; *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 4 (1991) ("There is no faintest hint in the Constitution . . . that the judiciary shares any of the legislative or executive power. The intended function of the federal courts is to apply the law as it comes to them from the hands of others.").

[77] U.S. CONST. art. I, § 1.

[78] BORK, *supra* note 76, at 4–5.

[79] *See* Lino A. Graglia, *Do Judges Have a Policy-Making Role in the American System of Government?*, 17 HARV. J.L. & PUB. POL'Y 119, 119–20 (1994) ("[L]awmaking by judges is obviously inconsistent with the most basic principles of the Constitution: separation of powers, republican self-government, and federalism. . . . Policymaking by the Supreme Court in Washington, D.C., therefore, is the antithesis not only of representative self-government, but also of decentralized government.").

interpretation or judgment: they are broad questions of policy that greatly affect the lives of every citizen in the nation.

It would be naïve, however, to think that the judicial institution existing today is the same creature that it was at the beginning of our nation, when Hamilton referred to it as the branch of government "least dangerous to the political rights of the Constitution."[80] The Supreme Court today occupies a far grander role in our national system of government than it did at its inception.[81] This is in part due to the early acceptance of the Court's power of judicial review, through which the Court has the power to strike down laws that conflict with the Constitution.[82] However, the kind of judicial review supported by Hamilton in Federalist No. 78[83] and proclaimed by Chief Justice John Marshall in *Marbury v. Madison*[84] was not inherently inconsistent with the idea of the judge's role being one of simply applying law and abstaining from policymaking.[85] The earliest conceptions of judicial review envisioned its use in situations where a law was so clearly inconsistent with the requirements of the Constitution that no special interpretation of the Constitution would be required to discover the inconsistency.[86] The Framers never envisioned the power of judicial review as giving the judiciary supremacy over the other branches.[87] The broadening of judicial power instead occurred subtly, beginning in the mid-nineteenth century, as the judiciary began to exercise the power of judicial review more frequently and to base its invalidations more often "upon broad constitutional phrases rather than the comparatively definite provisions that had been used in the Marshall and Taney

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[80] THE FEDERALIST NO. 78, *supra* note 73, at 465 (Alexander Hamilton).

[81] JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 34–36 (1984); *see also* Graglia, *supra* note 79, at 120–21 (discussing the expanded scope and significance of judicial policymaking in America).

[82] Marbury v. Madison, 5 U.S. 137, 177–78 (1803).

[83] "Limitations [on Congress's power, set forth in the Constitution] can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." THE FEDERALIST NO. 78, *supra* note 73, at 465 (Alexander Hamilton).

[84] *Marbury*, 5 U.S. at 177.

[85] *See* Graglia, *supra* note 79, at 122 (stating that judicial review, in theory, is simply "the disallowance of laws clearly prohibited by the text of the Constitution.").

[86] *Id.*; *see also Marbury*, 5 U.S. at 179 (using as examples hypothetical laws passed by Congress that specifically contradict the Constitution, such as an ex post facto law or bill of attainder, or a law allowing a person to be convicted of treason on the testimony of one witness or a confession made out of court).

[87] Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2708 (2003).

periods."[88] Thus, the modern epidemic of judicial policymaking, despite having roots that extend all the way back to the end of the eighteenth century,[89] is not in line with the original design of the judicial system.

3. The Court's Inability to Change Social Policy Effectively

A third reason why these important questions should not be answered by the Court is simply that the Court, as a practical matter, is not competent to do so.[90] As the Court itself noted in *Roe*,[91] the fundamental questions that this Note has focused on involve complex questions of science, medicine, and morality, which the Court is not equipped to answer.[92]

Even acknowledging that the courts have taken upon themselves an expanded policymaking role, it is neither preferable nor desirable that important policy questions be decided by the branch of government that does not represent the people.[93] It must be remembered that a non-representative judiciary with the power to enact "good" or "wise" social policy also, by that same token, has the power to enact "bad" policies, and yet the independent nature of the judicial branch removes the ability of the people to determine what is "good" and what is "bad."[94] In a 1994 article on judicial policymaking, Professor Lino A. Graglia explained clearly why judges are not well suited to answer difficult social policy questions: "Difficult issues of social policy are difficult, not because of a failure to discern a resolving principle, but because they involve conflicting principles, or conflicting interests that are recognized as legitimate."[95] Because the issue requires more than mere application of a legal principle, judges can only answer such questions based on their own preferences and value judgments.[96] In a republican government

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88 FRED V. CAHILL, JR., JUDICIAL LEGISLATION: A STUDY IN AMERICAN LEGAL THEORY 49 (1952).

89 BORK, *supra* note 76, at 15.

90 *See* Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1134–37 (1992) (discussing the fundamental risks associated with judicially derived policies).

91 *Roe*, 410 U.S. at 159.

92 *See* Robert W. Adler, *The Supreme Court and Ecosystems: Environmental Science in Environmental Law*, 27 VT. L. REV. 249, 250–51 (2003) (critiquing the inconsistent methodology of the Supreme Court's use of science); Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN ST. L. REV. 139, 165–66 (2012) (describing the problems inherent in court-dictated morality); Graglia, *supra* note 79, at 125 (same).

93 *See* AGRESTO, *supra* note 81, at 34–35 (asserting that the judiciary has indisputably expanded its policy-making role in America, but runs afoul of the democratic process because its policies are not directed by the will of the people).

94 Graglia, *supra* note 79, at 124–25.

95 *Id.* at 125.

96 *Id.*

established on the principle of consent of the governed, however, that kind of decision-making should be left to the people.[97] Exactly as described by Professor Graglia, the fundamental personhood questions implicated by the subject of abortion involve significant conflicts between legitimate interests and principles, and therefore, the answers should not be mandated by judges without properly accommodating the consent of the governed.

Furthermore, even if one views judicial policymaking as a beneficial way to bring about progressive social policy change, the Court's attempts to affect a substantial change in national social policy often fail to do so in the way that advocates of that change desire, for the simple reason that the Court is not representative of the people and it does not truly have any ability to enforce its decisions without the cooperation of Congress and the Executive branch.[98]

By way of example, even Justice Ruth Bader Ginsburg, one of the most liberal members of the modern Court and a strong supporter of abortion,[99] has criticized the *Roe* opinion (though not its outcome) as having gone too far by proclaiming nationwide social policy, ultimately resulting in a cultural effect that was in some ways counterproductive to the pro-abortion cause.[100] In an interview conducted in July 2014, Justice Ginsburg stated: "[T]he problem with *Roe v. Wade* was it not only declared the Texas law . . . unconstitutional, but it made every law in the country, even the most liberal, unconstitutional. . . . [it created an effective target for pro-life advocates]; it was nine unelected judges making a decision that they argued should be made by the individual state legislatures."[101] Thus, even though the policy embraced by *Roe v. Wade* was one that Justice Ginsburg believes was in the best interests of the nation and of positive societal progress, she acknowledges the

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[97] *Id.*; *see also* Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEX. REV. L. & POL. 301, 322 (2005) (critiquing the antithetical relationship between the republican form of government and the power of judicial review).

[98] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 15–16 (2d ed. 2008) (examining the history of the Supreme Court as an instigator of progressive social change, and how it has generally failed to bring about the intended change in the way that the advocates of that change desire).

[99] *See* Jeffrey Toobin, *How Justice Ginsburg Has Moved the Supreme Court*, NEW YORKER (Mar. 11, 2013), http://www.newyorker.com/magazine/2013/03/11/heavyweight-ruth-bader-ginsburg (referring to Justice Ginsburg as "the senior member of the Court's liberal quartet," and explaining her support for abortion rights and misgivings about *Roe v. Wade*).

[100] *Exclusive: Ruth Bader Ginsburg on* Hobby Lobby, Roe v. Wade, *Retirement and Notorious R.B.G.*, at 7:12, Yahoo NEWS, https://www.yahoo.com/news/video/exclusive-ruth-bader-ginsburg-hobby-091819044.html?ref=gs (last visited Aug. 27, 2016).

[101] *Id.*

inherent problem of such a policy being mandated by the Court. Because the Court is a body neither representative of nor accountable to the people, Supreme Court policymaking is simply not an effective means for changing the culture—let alone a proper one.

B. Congress

The same aspects of our government's structure and function that make the judiciary an unattractive candidate to answer these fundamental questions of life and the value of life also serve to establish Congress as a better option. As described by the late Judge Robert Bork, "[l]egislation is far more likely to reflect majority sentiment while judicial activism is likely to represent an elite minority's sentiment."[102] In a society founded on the principle of the consent of the governed, it is ideal that questions of social policy—especially those involving competing interests and values that necessarily have a huge impact on the lives of the citizenry—be left to the branch of government that is most representative of the people.[103]

There are three reasons why Congress is well suited to address these threshold personhood questions. First, Section 5 of the Fourteenth Amendment expressly confers upon Congress the "power to enforce [the Amendment's provisions] by appropriate legislation."[104] Therefore, it is appropriate for Congress to answer the questions fundamental to the Amendment's protection of life. Second, it can better examine the scientific and medical data that underlies the Life Question. Finally, as a body more representative of the people, Congress can better respond to the social conscience and values of the citizenry. Because these questions involve complex and competing interests and values, the representative democratic process that exists in Congress is the ideal forum to provide the answers.

1. The Fourteenth Amendment's Enforcement Clause

The Fourteenth Amendment was a product of the Reconstruction of the South, which occurred immediately following the American Civil War.[105] It was adopted primarily to empower Congress to enact the Civil Rights Act of 1866 and similar legislation.[106] That Act, which guaranteed full citizenship to all former slaves, had been vetoed by President

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[102] BORK, *supra* note 76, at 17.

[103] Graglia, *supra* note 79, at 119–20.

[104] U.S. CONST. amend. XIV, § 4.

[105] RANDY E. BARNETT & HOWARD E. KATZ, CONSTITUTIONAL LAW: CASES IN CONTEXT 770 (2d ed. 2013).

[106] *Id.* at 768–70.

Andrew Johnson and immediately challenged as unconstitutional.[107] Although Congress managed to pass the Civil Rights Act over the President's veto, the lingering concern over its constitutionality and the fear that it might be repealed by a future Congress instigated the formulation of the Fourteenth Amendment.[108] Thus, the Amendment's history as well as its text[109] demonstrate that the main thrust and purpose of the Fourteenth Amendment was to ensure that Congress would have the legislative authority to protect the fundamental rights of life and liberty.[110]

The Enforcement Clause of the Fourteenth Amendment, found in Section 5, states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[111] Because resolution of the Life Question and the Value Question is essential to the government's ability to protect life under the Fourteenth Amendment, legislation directed toward resolving those questions is appropriate for Congress to enact.[112] Further, because the Supreme Court has expressly stated its inability to determine when life begins, and because defining when life begins and determining whether to value all life equally are necessary to enforce the Fourteenth Amendment's protection of life, it naturally falls to Congress to be the branch of the federal government that addresses these issues.[113]

According to *Katzenbach v. Morgan*, the enforcement power found in Section 5 of the Fourteenth Amendment is a very broad power, analogous to the power granted to Congress by the Necessary and Proper Clause.[114] *Katzenbach* held that the test for a law enacted under Section 5 is whether it is "plainly adapted" to a legitimate end, and whether the means adopted are allowed by the letter and spirit of the Constitution.[115] In *City of Boerne v. Flores*, the Court emphasized that when Congress enacts preventive rules under Section 5, "there must be a congruence

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[107] *Id.* at 768.

[108] *Id.*

[109] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
U.S. CONST. amend. XIV, § 1.

[110] *See infra* notes 172–174 and accompanying text.

[111] U.S. CONST. amend. XIV, § 5.

[112] HUMAN LIFE BILL REPORT, *supra* note 7, at 3.

[113] *Id.* at 21.

[114] 384 U.S. 641, 650 (1966).

[115] *Id.*

between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented."[116] Congress is thus authorized "to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,"[117] so long as that legislation is congruent and proportional to the harm being addressed.[118]

This grant of power under Section 5 allows Congress to address the important threshold questions of personhood underlying the abortion issue through congruent and proportional means. The "evil presented" in this case is serious: it is potentially the destruction and devaluation of human life.[119] A legislative determination of when life begins and when human life should be valued would certainly be congruent and proportional to the purpose of protecting human life.

2. Legislative Fact-Finding Ability

Congress is better equipped than the Supreme Court to answer the Life Question because it can use its legislative fact-finding processes to examine the foundational scientific and medical data that must be considered before an answer may be furnished.[120] Although Congress is generally not obligated to engage in fact-finding to support its legislation, it often does engage in extensive fact-finding, especially on difficult questions of social policy.[121]

Historically (although less so modernly), the Supreme Court gave substantial deference to legislative fact-finding, recognizing "Congress' special competence as the fact-finding branch of the federal government."[122] One prime example is *Katzenbach*, where the Court stated that "[i]t was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations" in

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[116] 521 U.S. 507, 530 (1997).

[117] *Katzenbach*, 384 U.S. at 651.

[118] *Boerne*, 521 U.S. at 530.

[119] *Id.*

[120] *See* Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 23 (2009) ("As many commentators have observed, the Court (like all judicial bodies) lacks the fact-finding and information-gathering capacities of a legislature. The Court cannot hold hearings and consult those who may be affected by a particular legal rule, as can Congress.").

[121] *See* Muriel Morisey Spence, *What Congress Knows and Sometimes Doesn't Know*, 30 U. RICH. L. REV. 653 n.1, 655 (1996) (describing "the significant fact-finding value" of Congress).

[122] *Id.* at 655; *see also* Note, *Judicial Review of Congressional Factfinding*, 122 HARV. L. REV. 767, 768–69 (2008) ("The Court has historically deferred to congressional factfinding, as is most evident in the Court's Commerce Clause jurisprudence and Fourteenth Amendment [S]ection 5 jurisprudence.").

determining that a New York voter literacy requirement had the effect of denying the right to vote to a large segment of New York's Puerto Rican community, and it was therefore appropriate for Congress to enact legislation under Section 5 of the Fourteenth Amendment to remedy that problem.[123] Even Justice Harlan in his dissent recognized Congress's important fact-finding role.[124]

Congress has several fact-finding tools at its disposal that it could use to extensively investigate the medical and scientific data that must be examined in order to properly answer the Life Question.[125] These include the ability to subpoena witnesses and documents to conduct congressional hearings and investigations, and "to assign to legislative committees and staff responsibility for detailed scrutiny of legislative proposals, their factual foundations, and their suitability as responses to social policy concerns."[126] Congress also has the assistance of support agencies, such as the Congressional Research Service of the Library of Congress, to facilitate the information-gathering and evaluation process.[127]

Thus, the various fact-finding tools at Congress' disposal, and its ability to consider the entire issue rather than just the case at hand, place it in a better position to address the Life Question.

3. Democratic Resolution of Difficult Societal Questions

As the representative assembly of the People, Congress is better able to respond to the sensitive questions of morality and conscience implicit in the Value Question, and indeed the Framers' original design was for Congress to have "an intimate sympathy with[] the people."[128] The Supreme Court itself has recognized that difficult social policy questions of the sort contemplated by this Note are properly resolved by legislative measures rather than by judicial decree.[129] In the 1977 case of *Maher v. Roe*, the Court reviewed a Connecticut law prohibiting state funding for nontherapeutic abortions.[130] Because the state legislature's

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[123] Katzenbach v. McClung, 384 U.S. 641, 653 (1966).

[124] *Id.* at 668 (Harlan, J., dissenting) ("To the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect.").

[125] Spence, *supra* note 121, at 653–55.

[126] *Id.* at 655.

[127] A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 386–87 (2001).

[128] THE FEDERALIST NO. 52, *supra* note 73,at 327 (James Madison).

[129] Maher v. Roe, 432 U.S. 464, 479–80 (1977).

[130] *Id.* at 478–80.

decision regarding whether to fund nontherapeutic abortions was naturally "fraught with judgments of policy and value over which opinions are sharply divided," the Court affirmatively approved of leaving such decisions to be confronted by the legislature:[131]

> [W]hen an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. We should not forget that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[132]

Similarly, in his concurrence in judgment in *Webster v. Reproductive Health Services*, Justice Antonin Scalia argued that the difficult questions of social policy implicit in the abortion debate would be better left to Congress rather than the Court, both in terms of the proper governmental roles of each branch as well as simple practicality.[133]

> The outcome of today's case will . . . needlessly . . . prolong this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical—a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive.[134]

A contemporary example of Congress's ability to respond to concerns of the citizenry, and one that intimately involves the topic of abortion, is the Congressional movement to defund Planned Parenthood. In July 2015, the Center for Medical Progress began releasing undercover videos that revealed statements of Planned Parenthood officials, made during private conversations with actors whom they believed were representatives of a biological research company, regarding the sale of fetal body parts for profit.[135] The videos showed Planned Parenthood personnel haggling over prices for fetal organs.[136] The reaction to the videos was visceral, and the outrage only grew as more videos were released, including unedited raw footage to combat the assertion that the

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[131] *Id.*

[132] *Id.* (quoting Mo., Kan. & Tex. Ry. Co. of Tex. v. May, 194 U.S. 267, 270 (1904)).

[133] 492 U.S. 490, 532 (1989) (Scalia, J., concurring in judgment and concurring in part).

[134] *Id.*

[135] Sandhya Somashekhar & Danielle Paquette, *Undercover Video Shows Planned Parenthood Official Discussing Fetal Organs Used for Research*, WASH. POST (July 14, 2015), https://www.washingtonpost.com/politics/undercover-video-shows-planned-parenthood-exec-discussing-organ-harvesting/2015/07/14/ae330e34-2a4d-11e5-bd33-395c05608059_story.html.

[136] *Id.*

videos had been deceptively edited.[137] The concern was not limited to those who were already in the pro-life camp, either: several self-proclaimed pro-choice voices chimed in to express disgust, queasiness, or at the very least concern over the way Planned Parenthood clinic personnel in the videos display such "cavalier attitude[s] toward the aborted fetuses."[138] Only a few days after the release of the first video, the Energy and Commerce Committee of the House of Representatives launched an investigation into Planned Parenthood to "get to the bottom of this appalling situation."[139] The Judiciary Committee and Oversight and Government Reform Committee also launched investigations and conducted several hearings, from July through October.[140] By October 2015, the House of Representatives passed a bill that would defund Planned Parenthood for one year.[141] Although the bill was ultimately vetoed by President Obama, a state-by-state campaign to defund Planned Parenthood gained significant traction in 2015 and 2016.[142]

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[137] Mark Hemingway, *Media Calls Planned Parenthood Videos 'Highly Edited' But Won't Explain Why Editing Is Bad*, WEEKLY STANDARD (Aug. 4, 2015, 4:50 PM), http://www.weeklystandard.com/blogs/media-calls-planned-parenthood-videos-highly-edited-wont-explain-why-editing-bad_1005205.html.

[138] Bunnie Riedel, *The Solemnity of Abortion*, BALT. SUN (Aug. 10, 2015, 8:00 AM), http://www.baltimoresun.com/news/opinion/oped/bs-ed-pp-abortion-20150810-story.html; *see also* Ellen Painter Dollar, *It's Complicated: A Pro-Choice Christian Responds to the Planned Parenthood Scandal*, PATHEOS (July 29, 2015, 10:53 AM), http://www.patheos.com/blogs/ellenpainterdollar/2015/07/its-complicated-a-pro-choice-christian-responds-to-the-planned-parenthood-scandal/; Ruth Marcus, *Defunding Planned Parenthood Would Actually Increase Abortions*, WASH. POST (July 31, 2015), https://www.washingtonpost.com/opinions/dont-cut-planned-parenthoods-fundsincrease-them/2015/07/31/fe66aad8-379e-11e5-b673-1df005a0fb28_story.html?utm_term=.83f228861bc9; Ruben Navarrette Jr., *I Don't Know If I'm Pro-Choice After Planned Parenthood Videos*, DAILY BEAST (Aug. 10, 2015, 1:00 AM), http://www.thedailybeast.com/articles/2015/08/10/i-don-t-know-if-i-m-pro-choice-anymore.html.

[139] Press Release, Energy & Commerce Comm. Launches Investigation Following "Abhorrent" Planned Parenthood Video, Energy & Commerce Comm. (July 15, 2015), https://energycommerce.house.gov/news-center/press-releases/energy-and-commerce-committee-launches-investigation-following-abhorrent; *House Investigation into Planned Parenthood*, HOUSE REPUBLICANS, http://www.gop.gov/solution_content/plannedparenthood/ (last visited Oct. 21, 2016).

[140] *House Investigation into Planned Parenthood*, *supra* note 139.

[141] Kate Scanlon, *House Approves Bill That Dismantles Parts of Obamacare, Defunds Planned Parenthood*, DAILY SIGNAL (Oct. 23, 2015), http://dailysignal.com/2015/10/23/house-approves-bill-that-dismantles-parts-of-obamacare-defunds-planned-parenthood/.

[142] David Crary, *Though Congressional Republicans' Bid to Defund Planned Parenthood Was Vetoed by President Barack Obama, Anti-Abortion Activists and Politicians Are Achieving a Growing Portion of Their Goal with an Aggressive State-by-State Strategy*, U.S. NEWS (Mar. 28, 2016, 1:57 PM), http://www.usnews.com/news/us/articles/2016-03-28/state-by-state-strategy-wielded-to-defund-planned-parenthood ("Over the past year, more than a dozen states have sought to halt or reduce public funding for Planned Parenthood.").

In presenting this example, it is important to note that Congress does not provide a quick and efficient means for resolution of difficult policy questions. On the contrary, the legislative process is infamously difficult and time-consuming, due to the obstacles presented by partisanship, the intricacies of bicameralism and presentment, and the fundamental difficulty of resolving controversial issues.[143] Contention, debate, and deliberation are part of the inherent design that the Framers intended for Congress, believing that this process would distill and refine legislation to produce better laws than would be possible in a system in which the lawmaking process is simpler.[144] The example given does tend to show, however, that when the public becomes sufficiently concerned about an important issue, Congress, being the branch that the electorate can most directly influence and hold accountable, is naturally better able to respond than the Supreme Court, which must wait for an appropriate "case" or "controversy" to arise before it can act.[145]

C. State Legislatures

Having made the case for these preliminary social policy questions to be addressed by a representative legislature instead of the Supreme Court, the remaining question is why Congress should do so rather than the state legislatures. This question implicates the important concept of federalism, which is as much a fundamental part of our nation's underlying structure as separation of powers.[146] Federalism is rooted in the history of this nation's birth.[147] The federal government was created by delegations of representatives formed by the states, which conferred

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[143] Jeff Jacoby, *Gridlock, or Democracy as Intended?*, BOS. GLOBE (Dec. 25, 2011), https://www.bostonglobe.com/opinion/2011/12/25/gridlock-democracy-intended/EJlqriPsRHqeW9wxlAhtMK/story.html.

[144] *Id.*; David G. Savage, *Justice Scalia: Americans 'Should Learn to Love Gridlock,'* L.A. TIMES (Oct. 5, 2011), http://articles.latimes.com/2011/oct/05/news/la-pn-scalia-testifies-20111005.

[145] From as early as 1793, the "Case or Controversy Clause" of Article III, Section 2 of the Constitution has been interpreted by the Supreme Court to mean that the federal judiciary's role is limited to applying the law in cases of live controversy. *Justices of the Supreme Court to George Washington*, *in* 6 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800 755 (1998). It cannot, for example, issue advisory opinions at the request of the president. *Id.* It also cannot hear a case that is not yet "ripe:" i.e., where an injury has not yet occurred. Doe v. Bush, 323 F.3d 133, 137–38 (1st Cir. 2003). Nor can it hear a case that has become "moot:" i.e., where the situation has evolved such that judgment will no longer affect the rights of the parties. DeFunis v. Odegaard, 416 U.S. 312, 316 (1974). Further, litigation is often a very long and drawn out process that could take several years; for example, almost three years passed between the District Court decision in *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), and the final decision of the Supreme Court in 1973, *Roe v. Wade*, 410 U.S. 113 (1973).

[146] Forsythe & Presser, *supra* note 97, at 322–23.

[147] *Id.* at 324.

limited powers to the government and reserved to the states all others.[148] Thus, combining the notions that the states preceded the union and that the federal government created was one of limited and enumerated power, one arrives at the structure of federalism, which requires that any power or authority not within the purview of the federal government is reserved to the states and should not be intruded upon by the federal government. The Framers viewed the states as the "reliable guardians of liberties" as is evidenced by the fact that the original Bill of Rights restricted only the federal government, not the state governments.[149]

Before *Roe v. Wade*, the abortion issue was wholly decided by individual state legislatures.[150] Further, as noted by advocates of a fully federalist approach to abortion policy, "[p]ublic health and medical regulation is an area generally left to the states in our federal system. . . ."[151] James Madison described his broad conception of state legislative authority in Federalist No. 45: "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . . ."[152] All of this would seem to suggest that the abortion issue would be more properly left entirely to the states, rather than have a nationally-mandated abortion policy.[153]

The federal government, however, is not without purpose: both the design created by the Framers and the testimony of our nation's history have demonstrated that some matters should rightly be determined on a national scale. For instance, the Constitution requires that commerce between the states should be controlled by Congress, not the states,[154] in order to ensure a degree of uniformity in regulation of the national economic marketplace and promote the free flow of commerce.[155] It also grants Congress the exclusive power of declaring war.[156] The

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[148] *Id.*

[149] Russell Hittinger, *Liberalism and the Natural Law Tradition*, 25 WAKE FOREST L. REV. 429, 449 (1990); *see also* Barron v. City of Baltimore, 32 U.S. 243, 250 (1833) ("[The first ten] amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."); Forsythe & Presser, *supra* note 97, at 327–28.

[150] Forsythe & Presser, *supra* note 97, at 326–27.

[151] *Id.* at 328.

[152] FEDERALIST NO. 45, *supra* note 73, at 292–93 (James Madison).

[153] Forsythe & Presser, *supra* note 97, at 329.

[154] "[Congress shall have the power to] regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

[155] Parker v. Brown, 317 U.S. 341, 363 (1943).

[156] "[Congress shall have power to] declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. CONST. art. I, § 8, cl. 11.

Constitution guarantees a republican form of government to each state of the Union,[157] removing the ability of the states to decide their own adherence to fundamental American values such as popular rule and rule of law, and granting to Congress the power and authority to determine if a state's government is republican in form.[158] Further, Article I, Section 10 of the Constitution provides a list of prohibitions and limitations upon the state governments: Thus, the states cannot grant titles of nobility, or pass "ex post facto" laws or laws "impairing the Obligation of Contracts," etc.[159] What all of these textual limitations have in common is the desire to ensure a national commitment to certain fundamental values at the very core of the American tradition, such as consent of the governed, rule of law, individual rights, and unity among the states. In fact, when James Madison proposed his original Bill of Rights, he included an amendment that would have added more limitations on the states to Section 10 in order to protect essential rights.[160] Although this proposal was not adopted in the end, Madison argued in its favor before Congress by reasoning that "[i]f there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments."[161]

It was in a similar spirit that the Thirteenth and Fourteenth Amendments were passed to allow Congress "to define and enforce freedom within state boundaries."[162] In the mid-1860s, after the greatest period of turbulence and disunity in our nation's history, the American people decided that the right of every person to be free from slavery, to not be deprived of life, liberty, or property without due process of law, and to receive equal protection under the laws was so fundamental that it must be guaranteed nationwide.[163] Three new amendments were added to the Constitution to accomplish this.[164]

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[157] "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. CONST. art. IV, § 4.

[158] Luther v. Borden, 48 U.S. 1, 42 (1849).

[159] U.S. CONST. art. I, § 10, cl. 1.

[160] The proposed amendment stated that "no State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases." 5 THE FOUNDER'S CONSTITUTION 93–94 (Philip B. Kurland & Ralph Lerner eds., Liberty Fund, Inc. 2000).

[161] *Id.*

[162] HOWARD N. MEYER, THE AMENDMENT THAT REFUSED TO DIE 43, 64–65 (updated ed. 2000).

[163] Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1808–09 (2010).

[164] *Id.*; U.S. CONST. amends. XIII, XIV, XV.

The protection of life is a primary duty of a just government, and the unalienable right to life is at the core of our nation's fundamental values.[165] It does not offend the structure of federalism to suggest that such a fundamental right should be protected nationally, which is one of the purposes and effects of the Fourteenth Amendment.[166] But in order to carry out that duty, there must be a determination made regarding when life begins and whether unborn life is deserving of value and protection, and that determination must be national.[167] If the individual states are free to define life in different ways, the result will be a grave inconsistency, where a human life protected in one state may be deemed undeserving of protection, and indeed sub-human, in another.[168] This would undermine completely the purpose of the Fourteenth Amendment.

The possibility and danger of this kind of inconsistency is described in *Casey*, although the Court itself unfortunately did not recognize the significance of its own statement. In that case, the Court stated:

> It is conventional constitutional doctrine that where reasonable people disagree [a state government] can adopt one position or the other. . . . That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. . . . [In such cases] we have ruled that a State may not compel or enforce one view or the other.[169]

This statement has some truth to it; however, the Court made a mistake by recognizing only the mother's right to privacy as a protected liberty being intruded upon, and ignored the sacred right to life of the unborn.[170] This is counterintuitive: when a government chooses between "theories of life" regarding whether the unborn are living persons deserving a right to life, the right that is most immediately endangered by such a decision is, by very definition, the unborn's right to life. That is the right hanging precariously in the balance. Thus, while the exact laws regarding *how* a state will protect life should, to a great extent, be left to the individual states to decide, the ultimate issues of *what is life* and *what is its value* are so fundamental that principle requires the nation to have a unified answer.

Abortion is a complex and multifaceted issue, and there are roles to be played by both the state and federal governments. The threshold

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[165] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (asserting that the purpose of the Bill of Rights was to protect fundamental rights such as life, and to withdraw them from political controversy).

[166] Balkin, *supra* note 163, at 1809.

[167] HUMAN LIFE BILL REPORT, *supra* note 7, at 3.

[168] Casey, 505 U.S. at 851.

[169] *Id.*

[170] *See id.* at 852–53 (expressing "reservations" in affirming *Roe v. Wade*, but ultimately doing so because of the liberty interests of the woman and "the force of stare decisis").

personhood questions subsumed within—and preliminary to resolution of—the abortion issue should be addressed by the people represented as a national whole within Congress. That conclusion does not, however, remove the issue entirely from the states. Once we, as a nation, establish answers to these important threshold questions, it will still be up to the individual states to determine how to implement social policy based on those answers.[171] As it currently stands, the states have the ability and duty to define their own criminal and civil laws for the protection of postnatal life.[172] One thing that the states cannot and should not do, however, is adopt disparate ideas of what life is and when it should be protected.[173] A nation committed to the protection of liberty and individual rights cannot exist where a life is protected and valued in one state while wholly disregarded and denied value in another.

III. WHAT NEXT?

In 1981, the Senate considered S. 158, also known as the Human Life Bill, which was specifically designed to answer the threshold personhood questions of when life begins and what value should be given to the lives of the unborn.[174] The bill answered the Life Question by stating that "[t]he Congress finds that the life of each human being begins at conception," and answered the Value Question by stating that "the fourteenth amendment to the Constitution of the United States protects all human beings."[175] Thus, pursuant to the Fourteenth Amendment's Section 5 Enforcement Clause, the bill affirmed that "human life exists from conception . . . and for this purpose 'person' includes all human beings."[176] After eight days of hearings and the testimony of fifty-seven witnesses,[177] the Senate Committee on the Judiciary's Subcommittee on Separation of Powers issued a report on the bill, determining both that "unborn children are human beings" (the

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[171] *See* Forsythe & Presser, *supra* note 97, at 329 (asserting that states are in the best position to create abortion law enforcement policies).

[172] *See* Maher v. Roe, 432 U.S. 464, 472 (1977) (holding that the state may impose penalties to protect life once it becomes viable).

[173] *See Casey*, 505 U.S. at 851 (asserting that the state may not choose one side over another when the decision arguably invades a fundamental liberty). In *City of Akron v. Akron Center for Reproductive Health, Inc.*, the Supreme Court restated the holding of *Roe*, declaring that "a State may not adopt one theory of when life begins to justify its regulation of abortions." 462 U.S. 416, 444 (1983). The inherent problem hinted at by the Court's concern here, but not expressly acknowledged, is the inconsistency of separate states independently determining such a fundamental question as when life begins.

[174] HUMAN LIFE BILL REPORT, *supra* note 7, at 2.

[175] *Id.* at 1.

[176] *Id.* at 1–2.

[177] *Id.* at 7.

term "human being" defined as "including every living member of the human species"),[178] and "that the fourteenth amendment embodies the sanctity of human life and that today the government must affirm this ethic by recognizing the 'personhood' of all human beings."[179] Although introduced in the Senate, the bill was not ultimately passed.

It has now been over forty years since the Court inappropriately mandated a nationwide social policy regarding abortion without addressing the fundamental issue of the value of unborn life. It is time for the people, through Congress, to remedy that problem by appropriately answering the threshold questions of personhood that the Court ignored. As the Senate Subcommittee on Separation of Powers stated in its report on S. 158:

> The task of interpreting the Constitution in the context of specific cases is ultimately for the Supreme Court. But when the Supreme Court has professed an inability to address underlying questions that are fundamental to the interpretation of a constitutional provision, Congress is entirely justified in expressing its view on such questions, subject to Supreme Court review.[180]

Passing a bill similar to S. 158 would not immediately reverse the decision of *Roe*; it would instead force the Court, in reviewing the law, to properly adjudicate between the rights of the unborn and the rights of the mother, equipped with necessary answers to the underlying question.[181]

As discussed *supra*, Congress's authority to enact this kind of legislation is found in Section 5 of the Fourteenth Amendment,[182] which empowers Congress to enforce the amendment "by appropriate legislation."[183] The test for determining whether Section 5 legislation is appropriate was stated by the Supreme Court in *Katzenbach v. Morgan* to be the same as the test for legislation enacted under the Necessary and Proper Clause, as articulated by Justice John Marshall in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[184] Thus, the only questions to ask about this proposed legislation are whether it is plainly adapted to a legitimate end, and whether the means adopted

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[178] *Id.* 12, 18.

[179] *Id.* at 18.

[180] *Id.* at 21.

[181] *Id.*

[182] *See supra* Part II.B.1.

[183] U.S. CONST. amend. XIV, § 5.

[184] McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

are prohibited by the Constitution.[185] Examining S. 158 as an example, such legislation would plainly be adapted to the legitimate end of answering the necessary preliminary questions of human life and its value, for the purpose of establishing a basis for a sensible national policy. Further, the legislation is not prohibited by the Constitution, because it does not attempt to do anything other than state congressional findings of fact.

CONCLUSION

Twenty-four years ago, the Court attempted to make clear the "jurisprudence of doubt" that it had created and fostered for nineteen years by its abortion decisions beginning with and following *Roe*. Clearly, the attempt failed: the abortion issue is still a legally unsettled issue, as evidenced by recent circuit court cases questioning *Roe* and *Casey*'s central holdings,[186] and by the fact that the Supreme Court is still deciding abortion cases.[187] The true doubt that clouds this area of jurisprudence is the lack of answers to the fundamental questions underlying the abortion issue: when does human life begin, and should all human life be valued equally? These questions are difficult only because of the implications they carry for society, but that is no reason to leave them unanswered. The people of America, acting through their representatives in Congress, must answer these questions once and for all. Only then can the true jurisprudence of doubt be made clear.

Noah J. DiPasquale[*]

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[185] Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

[186] *See, e.g.*, MKB Mgmt. v. Stenehjem, 795 F.3d 768, 773–74 (8th Cir. 2015) ("Although controlling Supreme Court precedent dictates the outcome in this case, good reasons exist for the Court to reevaluate its jurisprudence.").

[187] *E.g.*, Whole Woman's Health v. Hellerstedt, No. 15-274, slip op. at 1–2 (June 27, 2016).

[*] J.D. Candidate, Regent University School of Law, 2017. This Note won First Place in the Regent University Law Review's Ninth Annual Chief Justice Leroy R. Hassell, Sr., Writing Competition. My sincerest gratitude is owed to Professor Tessa Dysart, for her invaluable advice and guidance on this Note; to Professor Craig Stern, for his encouragement and helpful insights with regard to the 1981 Human Life Bill; and to my family, without whose love and support I could not have survived three years of law school. *Psalm* 115:1.