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THE LAW'S MYSTERY

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ABSTRACT

What is the continuing significance of Cohen v. California, *the 1971 U.S. Supreme Court decision holding that "Fuck the Draft" is a message protected by the First Amendment? Using* Cohen *as an exemplar, this article offers a new theory about how to understand the law and judicial opinions.*

The theory begins in a recognition of the "law" as resting upon mystery and uncertainty, a mystery that is also the source of the law's enchantment. It is this enchantment that we depend upon for the law to be authoritative rather than authoritarian and reducible to the political and thus to power. In simple terms, the mystery of the law—its being beyond us in this way—constitutes its legitimate authority over us. The law that discloses itself to us does so through the openings that language provides. For our culture, judicial opinions are its primary way of doing this.

Having introduced the theory, the article applies it, exploring whether it is possible to bring to the surface the tracings of a "great" judicial performance, using "great" in the sense of revealing an opening through which the law discloses itself. This section describes a reading of Cohen *that aims to discover whether through the performance of the opinion, its author has uncovered something that is "of the essence" of our community.*

The article finally raises questions about what it would mean to legal education and law practice if judicial opinions were evaluated without destroying the law's mystery. What would it mean if we thought of judges as preservers of this mystery? What would it mean if readers of opinions started thinking in terms of their own experience of the opinion rather than as critics of it? And what would it mean if lawyers saw their task as related to "truth"?

CONTENTS

I. INTRODUCTION

What you are about to read is not what it appears to be: the work of two people who together offer a theory about a way of understanding the law and opinions and then together put this theory into practice in the analysis of a well-known opinion, *Cohen v. California*.[1]

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[1] Cohen v. California, 403 U.S. 15 (1971). Thomas G. Krattenmaker, a law clerk to Justice John Marshall Harlan during the 1970 Term, has claimed that he wrote the opinion in *Cohen*. *See*

It is not this because the authors did not come together in this sense on either part, the theory or the practice. The theory is almost entirely the work of one; the practice almost entirely the work of the other. Neither author is necessarily committed to what the other says. In this way, and perhaps in others, the article may be more complex than it first appears. It is an experiment really, one in which one author, Jack Sammons, offers something to the other, Linda Berger, to see what she makes of it, and, in this, to teach him what he has said and what value it might have. The one, Linda, was and is skeptical of Jack's approach to law, skeptical especially of his use of something called the "truth" (whether this be in the form of *aletheia*, i.e., a phenomenological uncovering of something, or not) and, later, skeptical of any project that attempts to think the ineffable as his seems to do. Jack, for his part, worries whether what he has offered makes the sort of sense that could be useful to those who live their lives in the law as Linda does. He does not worry that he has not said enough—he knows he has not—but worries if he could ever say enough to capture some part of his fleeting pleasant moments of apparent coherence in an otherwise chaotic mind, those moments that prompted his writing something like this. Is there something revealed in those moments? Is there something to be revealed in them?

Neither of us has had our different concerns adequately addressed or (of course) our questions answered by this experiment. What has happened instead is that we have learned to let these be, but then there is something terribly important in that, no?

A. MYSTERY

Jack would like to start with a brief reminder of what Steven Smith has called the law's ontological gap[2] which can be expressed simply (in terms borrowed from Joe Vining) by saying that everything we might be tempted to think of as law is only evidence of it and not the thing itself.[3] Vining and Smith find this odd way of our thinking of law reflected in our ordinary speech.[4] It is there, for example, in dissenting opinions when the dissent says that the majority got the "law" wrong. In such speech, we treat law as something immaterial and yet fully external to us as we treat few other things. The odd things we do treat this way in ordinary speech are quite telling: "it was meant to be," we say, or "the muse speaks," or "what fate holds in store for us," or "the character took on a life of her own," or "he found inspiration" (when it retains the sense of something

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Thomas G. Krattenmaker, *Looking Back at* Cohen v. California: *A 40-Year Retrospective from Inside the Court*, 20 WM. & MARY BILL RTS. J. 651, 652 (2012) ("With two [minor] alterations, Justice Harlan filed the opinion as drafted."). Whatever the contributions of "authors" outside the opinion to the text of the opinion, they are irrelevant to the theory and practice described here, which focuses on what is revealed through the opinion.

[2] *See* STEVEN D. SMITH, LAW'S QUANDARY (2004).

[3] JOSEPH VINING, FROM NEWTON'S SLEEP 26 (1994).

[4] SMITH, LAW'S QUANDARY, *supra* note 2, and VINING, FROM NEWTON'S SLEEP, *supra* note 3.

being breathed in to us), or "there's something in the air," just to mention a few.

This immaterial and yet external "law" somehow discloses itself to us, we might say, since nothing we can say about it (and, therefore, none of our ways of thinking about it) is sufficient to let us know what it is. This is surely mysterious and, because a law that is beyond our conceptions of it is also beyond our control to some extent, it is unsettling in its uncertainty.

This characteristic of "law" as resting upon mystery and uncertainty is, however, also the source of the law's enchantment for us, however little we may now acknowledge it. It is this enchantment that we depend upon for law to be authoritative over us, as we hope it will be, rather than authoritarian and reducible to the political and thus to power.[5] In simple terms, the mystery of the law—its being beyond us in this way—*is* its legitimate authority over us. The task this imposes upon us, the one I undertake here, is to explore a way of thinking such "law" without destroying it by concealing from ourselves its mystery or avoiding its uncertainty.

To conceal and to avoid these things is certainly very tempting. Our anxieties about law produce in us a very strongly felt need to be its master, to place it conceptually within our control (even if only through self-imposed limits on possible conceptions of it), and to render it subject to our own will. We don't want mystery and uncertainty in other words. We want to think that we are in control, so typically we enframe law conceptually to make it appear that we are.

Let me pause here for a very brief aside on phenomenology and on how phenomenology would have us consider cultural realities, like law, of the world into which, as some phenomenologists would put it, we are thrown.[6] For phenomenology the question of whether or not this law is "*really* there," which is the question I bet that is occurring to you right now, is odd since what prompts a question like this is a phenomenon that *really* appeared. And, for phenomenology, there are no "mere" appearances and nothing is "just" an appearance. Instead, and quoting a well-known text, "phenomenology allows us to recognize and to restore the world that seemed to have been lost when we were locked into our own internal world by philosophical confusion. Things, like . . . [the] law . . . that had been declared to be merely psychological [projections] are now found to be ontological."[7]

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[5] There are similarities here to Jim White's concerns in JAMES BOYD WHITE, LIVING SPEECH: RESISTING THE EMPIRE OF FORCE (2006).

[6] For "thrownness," see especially MARTIN HEIDEGGER, BEING AND TIME Division 1, Chapter 5 (Macquarrie and Robinson trans., Harper & Row 1962).

[7] ROBERT SOKOLOWSKI, INTRODUCTION TO PHENOMENOLOGY 15 (1999).

B. LAW AS ART AS TRUTH

This law, which discloses itself to us, does so through the openings that language provides.[8] For our culture, judicial opinions are its primary way of doing this. Yet judicial opinions can do this only when judges resist the temptations towards control and avoidance I have described and are sufficiently humble before the law that they are willing to become inconsequential to opinions they have written in order to permit the law to speak.

To explore this disclosing of law I will be thinking here of opinions, as James Boyd White and others have taught me to do,[9] as creative acts, that is, as the works of art they are. And, as with other works of art in which we say it is Art and not the artist that is the origin of a great work,[10] we will need to think here of the Law and not of judges as the origin of great opinions. Great opinions are great, then, to the extent that the Law speaks through them, and for no other reason.

Thinking of opinions as works of art, however, is not to think of them aesthetically.[11] But why not think of law aesthetically? Aesthetic thinking about art (and, in our comparison, about opinions) distances art from our world, making art inconsequential to our lives and the special province of a social elite with time, money, and education enough to create a false sense of its importance. In this, the experience of art becomes peripheral to our ordinary lives as if on holiday. These are the conditions in which Art dies.[12] This is exactly the opposite of what is sought here for law. Rather than thinking of opinions aesthetically, to think of opinions as art is to think of them as truth-revealing in the way we often say that a great work of art reveals a truth—however fleeting, however contingent, however cultural, however partial, the moment of truth might be.

The truth revealed in opinions, as in art, is not truth as a correspondence to something or coherence with something. For then the question of truth would just be moved to that to which we say a truth corresponds or

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[8] For discussions of the disclosure made possible through the openings that language provides, see MARTIN HEIDEGGER, *Language, in* POETRY, LANGUAGE, THOUGHT (Hofstadter trans., 1971) and MARTIN HEIDEGGER, ON THE WAY TO LANGUAGE (Peter D. Hertz trans., Harper and Row, 1971).

[9] *See, e.g.,* JAMES BOYD WHITE, THE LEGAL IMAGINATION (1973); JAMES BOYD WHITE, HERACLES BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985); JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (1990).

[10] *See* MARTIN HEIDEGGER, *Origin of the Work of Art, in* POETRY, LANGUAGE, THOUGHT, *supra* note 8, especially at 56; *see also* Jack L. Sammons, *The Origin of the Opinion as a Work of Art* (unpublished manuscript on file with author).

[11] You may think that the risk of considering law as an aesthetic is small, but perhaps not. Perhaps most professors who take law seriously, that is, who do not seek to control it conceptually, are tempted towards the aesthetic. And perhaps law schools are where law goes to die.

[12] *See* HEIDEGGER, *Origin of the Work of Art, in* POETRY, LANGUAGE, THOUGHT, *supra* note 8, at 39, 77.

in which it coheres.[13] In other words, any attempt to constitute the world as an object of knowledge—which is what we do when we look for that to which truth corresponds—is derivative of a more primary access to it.

Instead, the truth revealed in opinions is truth as the disclosure (uncovering, deconcealing, unclosedness, *aletheia*, etc.) of an aspect of a world that was concealed from us—using that word "world" as we might say the world of law, the world of baseball, or the world of the waterfront—something, that is, that is already there in a vast network of holistic connections reaching out towards a broad horizon in which to understand a thing truly requires some understanding "of an indefinite number of other things."[14]

As an example of what this means, I offer to you Christo's and Jeanne Claude's *The Gates* in Central Park.[15] I think it is clear that *The Gates* is an interpretation of Central Park and as such it both reveals and conceals something truthful about the world of the Park. In doing this, *The Gates*, in its uncovering, is bringing to presence aspects of the Park that are always already there, but seldom attended to. It does this in a way—as art—that grounds the world of the Park in uncertainty or, a step further for our culture, the ineffable, or, a step still further, what we could call and sometimes do call the holy, and thus also conceals the park from us.

Through *The Gates*, the Park is now uncovered as a living presence in our ordinary lives that was always there, but unnoticed, and in such a way that its awesomeness (to use a word that has been ruined for us) is made manifest. If you watched the documentaries about *The Gates*,[16] this is exactly the way that ordinary New Yorkers who knew the Park well—and were hardened by their culture to things like the holy—described the experience.[17] *The Gates* enacts the experience upon which it depends, calls us to something we already knew but did not know that we knew, and gives life to values in a world in which there is no a priori meaning.

But then, Olmstead's Central Park does quite the same, doesn't it? (The perfect title of the piece, *The Gates*, comes from Olmstead who called the openings in the continuous stone that surrounds the park, the gates, that is, the openings through which the Park was connected to the world and the world to the Park.)[18] The Park uncovers the world of parks; makes us notice, for example, that we are people who need parks—very badly apparently—when we are true to ourselves, and this world too extends out to the horizon of the world into which we are thrown. Olmstead's Park

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[13] For Heidegger's initial discussion of this, see HEIDEGGER, BEING AND TIME, *supra* note 6, at 256-73.

[14]. JAMES C. EDWARDS, THE PLAIN SENSE OF THINGS: THE FATE OF RELIGION IN AN AGE OF NORMAL NIHILISM 154 (1997)

[15] For the history of this art project and pictures of *The Gates*, see CHRISTO AND JEANNE-CLAUDE, THE GATES: CENTRAL PARK, NEW YORK CITY 1979-2005 (2005).

[16] *The Gates*, *HBO Documentaries* (Antonio Ferrera & Albert Maysles directors, 2005).

[17] *Id*.

[18] CHRISTO AND JEANNE-CLAUDE, THE GATES, *supra* note 15, at 4.

does this in a way that grounds the Park not in some concept, some willing or some control on his part or ours, but in that which is mysterious, ineffable, and holy in our lives. In a very real sense, he brings "park" to a certain life as Christo brought Central Park to a certain life.

Those who viewed *The Gates* have their role in this art as well for they are the "preservers" of the truth of this now disclosed living park. It is they who through their choices in viewing *The Gates*—this view, not that one; this path, not that one; this weather, not that; this day, not that; this connection to my world, and not that, and so on—make possible the living parks of Olmstead and Christo for it is they who have understood *The Gates* to be an important aspect of their world. It is they who have kept it from being an aesthetic object (in which, once again, "Art" can only die) which is to say, kept this work of art from being peripheral to their ordinary lives rather than a central element of those lives and, in some crucial sense, defining. It is these "preservers"[19] who permit me to use the present tense in describing *The Gates*. And there is no great art, as there are no great opinions, without such preservers.

C. *SUCH ART DISCOVERS A CULTURE, DISCOVERS A PEOPLE, AND IS TRUTHFUL ABOUT OURSELVES, PERHAPS IN THE ONLY WAY WE CAN BE.*

Just as in *The Gates*, what is uncovered for us in Law, that is, what the disclosure of Law is truthful about, seems to be something about our identity. It is, for example, a disclosing of those things about which we care as it was in the example of *The Gates*. Like *The Gates*, the Law's disclosures, in Jim Edwards' description of great art "exhibit not only its own specific conditions of presencing but also—and quite perspicuously—the general and universal conditions under which any human thing comes to presence."[20] So, to say all this as simply as I can, and, I hope, to render it something that will now be obvious to you if it wasn't before: the Law is a truthful uncovering of our given identity—to ask by whom it is given is to miss the point[21]—within the legal world and, in it, we discover that our identity, too, is grounded in mystery and uncertainty. Because it is our own identity that is uncovered for us in Law, it is authoritative over us.

You may be wondering now, I also hope, what else it could be or how else our identity might be known other than it somehow being dis-

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[19] For a discussion of the role of "preservers" in art, see HEIDEGGER, *Origin of a Work of Art*, *in* POETRY, LANGUAGE, THOUGHT, *supra* note 8, at 64-67.

[20] EDWARDS, *THE PLAIN SENSE OF THINGS*, *supra* note 14, at 212.

[21] We are seeking not to ask questions in our usual fashion but to examine the place from which such questions come. Our not knowing the origin of the gift is what is important here and what is revealing. The gift is always already there and our task is not to control it through conceptualization, whose truth we then argue, but to experience the gift. From whom, from where, does the inevitability in art come? Who provides the Ninth Symphony? The only possible answer to that is no thing. And so we can, if you want to, say that nothing gifts.

closed to us through openings of language including the openings of language that the law is—for we certainly could not do this through our own analytic conceptions of who we are, nor could we capture who we are in any circular reflections upon our own identity. In great opinions we come to know who we are through the contingent resolution of the anxieties about our identity that each good case creates for us and part of what is disclosed to us in this resolution is who we are in our relationship to the very language we use, the very language in which all openings occur. The power of a great opinion is not just that "it lets us see, but [through language] it lets us see the seeing."[22]

D. INEVITABILITY

With this background, I would now like to turn to one way of thinking Law without destroying it. In doing so, and trying to be a good phenomenologist about this, I want to draw upon something many of you, if not all, have already experienced. In offering this way of thinking law, I am not trying to make the law less mysterious or even clearer, but instead to further uncover its mystery. I do this, however, by trying to invoke your experience of mystery in other settings.

The idea here is to look within judicial opinions for what we will call "inevitability." "Inevitability" is used here as it is in art criticism as a term of art.[23] Thus I will be asking you to suspend the usual ways in which you may think of the term: as something somehow destined to happen or invariable or obvious or predictable. Instead, I ask that you think of the "inevitable" as those odd and surprising moments in which something strikes us as something we already knew but did not know, until that moment, that we knew it. This "inevitable" is not something predictable, but something that suddenly and often surprisingly appears as that which must be, although you did not know this before its appearance. Inevitability then, in art and in opinions, appears only in the performance and can be known in no other way.

I don't want to make this seem strange and unusual. It is a very ordinary and common perception. There are moments when you are listening to a popular song, for example, when a turn of a phrase, musical or lyrical; or a shift of keys; or an interesting riff or unlikely arrangement is sensed as if it were always supposed to be as it is even though you could not have known this prior to hearing it. When I first read William Carlos Williams' *The Red Wheel Barrow* [24] for example, I came to know, although I could

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[22] EDWARDS, THE PLAIN SENSE OF THINGS, *supra* note 14, at 212.

[23] *See, e.g.*, John Tasker Howard, *Inevitability as a Criterion of Art*, THE MUSICAL QUARTERLY, Vol. 9, No. 3 (Jul. 1923) 303-13.

[24] THE COLLECTED POEMS OF WILLIAM CARLOS WILLIAMS VOL. 1 1909-1939, 224 (Litz & MacGowen eds., 1991):

> so much depends
> upon
> a red wheel

not have known it before, that "white chickens" needed to be there. They were a necessity, which is another way of describing the same thing we mean by inevitability, and, as Rowan Williams puts it: "[T]he artist looks for the 'necessity' in the thing being made, but this 'necessity' can only be shown when the actual artistic form lets you know that the necessity is not imposed by the hand of the artistic will but uncovered as underlying the real contingency of world that has been truthfully imagined . . . ."[25]

To show you further what I mean, let me turn first to the surprising example of Beethoven—surprising because we think of Beethoven as the prototype of the Romantic genius imposing his vision upon the world when he was quite the opposite. We can start with the lectures of Leonard Bernstein—who was not a particularly analytical critic of music and for our purposes this is much to his credit—on the symphonies.[26]

Throughout the lectures, and always after describing in glorious detail Beethoven's struggles with the music, Bernstein tells us that what renders Beethoven's music great is its inevitability which, he says, is the product of Beethoven's ability to discover what the next note has to be.[27] In this, Beethoven could produce music that, despite its sometimes revolutionary form, seems to us to have been previously written, "in Heaven" as Bernstein put it,[28] for there is in the music an unexpected coherency, a sense that, as he also put it, "something is right in the world."[29]

We hear the same regarding great poetry from Harold Bloom. Writing about Whitman's "Song of Myself," he says: "There is nothing *free* about this verse: in measure and phrase, it has that quality of the inevitable that is central to great poetry. Inevitable in this context takes its primary meaning, phrasing that cannot be avoided, that *must* be."[30] This, for Bloom, is the mark of all great poetry: "the uncanny power of unavoidable . . . phrasing."[31]

But we need not, and Bernstein and Bloom do not, confine this inevitability to small moments in art. To show you its larger use, one on the

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barrow

glazed with rain
water

beside the white
chickens.

[25] ROWAN WILLIAMS, GRACE AND NECESSITY: REFLECTIONS ON ART AND LOVE 147-48 (2005).
[26] *See* LEONARD BERNSTEIN, THE JOY OF MUSIC (1959); LEONARD BERNSTEIN, THE INFINITE VARIETY OF MUSIC (1966).
[27] BERNSTEIN, THE JOY OF MUSIC, *supra* note 26, at 105; *see also* BERNSTEIN, THE INFINITE VARIETY OF MUSIC, *supra* note 26, at 198.
[28] BERNSTEIN, THE JOY OF MUSIC, *supra* note 26, at 29.
[29] *Id*. at 105.
[30] HAROLD BLOOM, THE ART OF READING POETRY 36 (2004).
[31] *Id.* at 39.

scale of *The Gates*, I will use as my example the interesting case of what is called the "joy melody" in Beethoven's *Ode to Joy* in the Fourth Movement of the Ninth Symphony.[32]

The "joy melody" was the product of an enormous struggle over very many years for Beethoven. At the end of the struggle he wrote in the margin notes: "Ah! Here it is! It's been found . . . ."[33] The oddness of feeling that you have found something that could not have existed before you found it is a composer's sense of the inevitable. Despite clear documentary evidence to the contrary, the "joy melody" is frequently described by commentators as a drinking song that Beethoven must have heard somewhere.[34] And why would they think this? Because it seems that way: "The melody moves in stepwise motion, up and down the scale and not skipping keys the vast majority of the time; the whole range is within an octave and most of it stays within a fifth; and the rhythm is straightforward too, mostly it just moves with the pulse. All of this makes it easy to sing and the amazing thing is that it is doesn't sound trite."[35] Such is the character of Western folk songs, of course, the music of the people that defines a culture. The joy melody is thought to be a folk song because listeners hear in it something they think they already know; they "remember" the melody even when they have no memory of it. In other words, listeners find in the melody the same inevitability that Beethoven found. Beethoven, then, has not created the people's voice in the song. He has reminded them of it.

This extraordinary first example we have of a major composer using a vocal part in a symphony—as odd as placing drapes in a park—opens a world to us as did *The Gates*. We know it did from its preservers—those, for example, who selected it as the Anthem of Europe—for whom it is important and defining in their lives in a way that very little music is.

But what of the mystery, what of the uncertainty, of this? For this we leave the world uncovered in the joy melody and return to the earth upon which it rests. At bar #331 something odd happens in the Fourth Movement, the tone changes, and the melody of joy becomes a Turkish march in which we cannot help but be reminded of the turbulent struggle in which, and only in which, joy can be fully joy for us.[36] As arising out of struggle,

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[32] For this I have relied primarily on HARVEY SACHS, THE NINTH: BEETHOVEN AND THE WORLD IN 1824 (2010) and ESTEBAN BUCH, BEETHOVEN'S NINTH: A POLITICAL HISTORY (2003).

[33] BUCH, BEETHOVEN'S NINTH: A POLITICAL HISTORY, *supra* note 32, at 103.

[34] *Id.* at 101-02.

[35] E-mail correspondence with my son Dr. Lanier L. Sammons, a composer,(Mar. 7, 2011) (on file with author).

[36] Zizek has described this shift in a similar way for very different—one might say opposing--purposes. *See* SLAVOJ ZIZEK, IN DEFENSE OF LOST CAUSES 271 (2009). Recently Charles Rosen has described the Turkish march as depicting the struggle for freedom (which, he says, the Ninth is about). The variation, which follows the march, he says, is a musical representation of the starry heavens implying a spiritual view of freedom. Charles Rosen, *Freedom and Art*, THE NEW YORK REVIEW OF BOOKS 28 (May 10, 2012). Harvey Sachs, with credentials much superior to either Zizek or Rosen on such matters, describes the Turkish march as a "lighthearted introduction in 6/8 time and with the indication 'Allegro assai vivace,' fast and

joy now becomes something quite strange to us—a strangeness the movement attests to through the many subsequent mutations of the setting of the melody—and something we cannot fully account for as we thought we could before. It is something mysterious, uncertain, and even frightening in its Dionysian elements. In mythic terms, it displays the presence of absent gods. Such joy calls us to membership in a community that is beyond our communities, a seemingly transcendent community in this sense that could not possibly exist other than as an act of our imagination, and yet one we care about so deeply, *and one that is so real,* that this very caring offers meaning to those other communities in which we live.

Rather than undermining what has been uncovered for us in the melody, the truth of what joy is for us now shines forth in a tragic and yet transcendent affirming. In this truth, however we may now interpret it and interpretations abound, we are uncovered and our identity is displayed to us. We can say even now, one hundred and eighty-five years after its first performance, that we remain the people of the Ninth for better or for worse. We can honestly say, as people often do, that if we did not have Beethoven and the Ninth Symphony we would have to invent them or, in other words, they were inevitable.

Are there judicial opinions that work this way for us? There may be and that is the question before us here.

It is, however, not music, but poetry which is the crucial art form for us—as poetry was for the later Heidegger (for by now I may as well give credit to him within the text).[37] For it is in poetry that language, and, therefore law, most clearly becomes the opening through which truth is disclosed. And, of course, the ancient connections between the poet and the judge do not need rehearsing here.

The search here then is for judges who have been poets.[38] Those who possess Keats's "negative capabilities" that permit law to speak;[39] who

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very lively," and hears in it a simple "village band approaching from the distance, playing a syncopated, fragmented version of the 'Joy' theme." SACHS, THE NINTH: BEETHOVEN AND THE WORLD IN 1824, *supra* note 32, at 157. All of this is to suggest that the Fourth Movement uncovers a truth about us (and hides others) that has many aspects. It is a truth to be experienced in the listening.

[37] *See* HEIDEGGER, *The Origin of the Work of Art, in* POETRY, LANGUAGE, THOUGHT, *supra* note 8, at 70-72; *see also* HEIDEGGER, *What Are Poets For? in* POETRY, LANGUAGE THOUGHT, *supra* note 8, at 89.

[38] Although the case examined here, see *infra* notes 43 to 108, is a United States Supreme Court opinion, looking for cases that work the way described in the text, and for judges who are then poets, is not limited to such opinions. In fact, there may be reasons why it is more difficult to find inevitability, as it is described in the text, in Supreme Court opinions. The point of doing so, however, remains the same.

[39] *Letter from John Keats to George and Tom Keats* (Dec. 21, 1817), Selections from Keats' Letters, Poetry Foundation Org at http://poetryfoundation.org/learning/essay/23783-6?page=2 (last visited Feb. 12, 2012). Keats used this expression in a letter to his brothers, George and Tom, on December 21, 1817. *Id. See also* NATHAN A. SCOTT, JR., NEGATIVE CAPABILITY: STUDIES IN THE NEW LITERATURE AND THE RELIGIOUS SITUATION xi (1969).

"consent to be stupid";[40] and who have these capabilities not as an act of will, but as a product of living the questions that arise in the particularities of the cases presented to them. Or, and making Shelley quite literal, of judges who as poets really are the "unacknowledged legislators of the world,"[41] not so much by providing good decisions as by creating the conditions for them. These are judges who seek "to change the world," but only "to change it into itself."[42]

The law in the opinions of such poetic judges is, as I have been saying all along, not a law grounded in power, but in mystery. Such a law is very much a matter of a judge and a reader being overcome by a certain mood, a certain pathos prompted by the case itself—yet another of those immaterial fully external things that we find in our ordinary speech—and in this mood both judge and reader become poetically attuned to Law. And so, in this way of thinking law, we are to look for this inevitability in opinions as a way of thinking law without destroying it. Let me remind you, however, that this is an experiment. We, Linda and I, are very different people with very different lifetimes of thought about the law. One of us, me, seeks in the law traces of the gods who have fled, the ones known more now by their absence than their presence. The other, Linda, sees in this a potential threat to tolerance, diversity, and, perhaps most importantly, the humanistic values she finds in thinking of the world as rhetorical. It is her turn now to see what she can make of what I have said.

II. UNCOVERING AN INEVITABLE

In this section, Linda will explore whether it is possible to bring to the surface the tracings of a "great" judicial performance, using "great" in the sense suggested above. That is, she will describe her reading of a judicial opinion as an experiment to discover whether through the performance of the opinion, its author has uncovered something that is "of the essence" of our community.

The exploration will be loosely organized around these questions:

> a. Through the performance of the opinion, does the author become inconsequential, fading from the foreground as a truth (or an essential something) is revealed?
>
> b. Unlike the author, is the particular truth that is revealed consequential?

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[40] SCOTT, NEGATIVE CAPABILITY, *supra* note 39, at 67.
[41] PERCY B. SHELLEY, A DEFENCE OF POETRY AND OTHER ESSAYS 61 (2010).
[42] This is Rowan Williams' description of the artist. WILLIAMS, GRACE AND NECESSITY: REFLECTIONS ON ART AND LOVE, *supra* note 15, at 18.

> c. And finally, is the truth surprising but recognized almost immediately, close to a memory and seemingly unavoidable in retrospect?

This reading of an opinion as a judicial performance—in this case, Justice John Marshall Harlan's opinion for the court in *Cohen v. California*[43]—is (it goes without saying) incomplete, contemporary, and influenced by prior readings.[44]

Commentators are divided on why *Cohen v. California* is significant, but they agree that it is significant.[45] *Cohen*'s author, the second Justice Harlan, earned a reputation for practicing judicial restraint to an extent that was unusual on the Warren court; he found himself writing in dissent more often than not.[46] Before *Cohen*, in lawsuits raising seemingly related questions, Justice Harlan had voted to authorize the states to regulate obscenity in order to protect society from the effects of degrading speech.[47] And in 1968, in *United States v. O'Brien*, ruling against the First Amendment claim, Justice Harlan voted to uphold O'Brien's conviction partly on the basis that he "manifestly could have conveyed his message in many ways other than by burning his draft card."[48]

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[43] Cohen v. California, 403 U.S. 15 (1971).

[44] *See, e.g.,* JAMES BOYD WHITE, *Is the Judge Really a Poet? in* THE LEGAL IMAGINATION, supra note 9; Marianne Constable, *Reflections on Law as a Profession of Words*, *in* JUSTICE AND POWER IN SOCIOLEGAL STUDIES (Bryant G. Garth & Austin Sarat, eds., 1998); James Boyd White, *Legal Knowledge,* 115 HARV. L. REV. 1396 (2002); LINDA ROSS MEYER, *Before Reason: Being-in-the-World-with-Others, in* THE JUSTICE OF MERCY 26 (2010).

[45] The opinion in *Cohen* "is commonly considered the leading statement on the validity of prohibitions designed to protect people from involuntary exposure to offensive speech." Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of* Cohen v. California, 1980 DUKE L.J. 283, 283. Farber argued instead that rather than establishing "captive audience" principles, the opinion delineated another very important principle: "The government is not entitled to assume the role of moral guardian and to set the standards of acceptable discourse." *Id.* at 303. William W. Van Alstyne, *The Enduring Example of John Marshall Harlan: "Virtue as Practice" in the Supreme Court*, 36 N.Y.L SCH. L. REV. 109, 119 (1991), believed that Justice Harlan recognized that the case was about *the* political issue of the time and that its ruling was about political freedom: "By any fair measure, *Cohen* was not simply a small matter about a vulgar antic. It was, rather, a case about political freedom." *Id.* at 120.

At the time, the case was not included in the Harvard Law Review's survey of the most important cases of its term. Farber *supra*, at 283 n.2.

[46] *See, e.g.,* Van Alstyne, *supra* note 45, at 119; Henry J. Bourguignon, *The Second Mr. Justice Harlan: His Principles of Judicial Decision Making*, 1979 SUP. CT. REV. 251, 320 (characterizing Harlan as a firm believer in judicial restraint whose decisions were controlled by a framework of consistent legal principles: "The principles of judicial decision making provided a heuristic structure, a framework within which the judge must search for answers and ultimately decide.").

[47] *See* Farber, *supra* note 45, at 284 n. 11.

[48] U.S. v. O'Brien, 391 U.S. 367, 388-89 (1968) (Harlan, J., concurring).

Based on these glimpses, it is not surprising to learn that Justice Harlan first viewed *Cohen v. California* as a "peewee" case.[49] According to the account in *The Brethren* (reported by the authors to have been drawn from the recollections of Supreme Court clerks), Justice Black had argued for summary reversal of Paul Cohen's conviction. Cohen had been convicted of disturbing the peace and sentenced to jail for wearing a jacket bearing an offensive, but most likely political, message. Although Justice Harlan had disagreed with Justice Black's initial conclusion, he reluctantly agreed to hear arguments.[50] (Ironically, Justice Black eventually joined the dissenters in the 5-4 vote that reversed Cohen's conviction.)

Unlike several other justices, Justice Harlan did not seem disturbed by the use of the word "fuck" on Cohen's jacket—his opinion apparently was the first by the Supreme Court to contain the word.[51] Quoting the California Court of Appeal, Justice Harlan's opinion begins its recitation of the facts by stating: "On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse . . . wearing a jacket bearing the words 'Fuck the Draft.'"[52] In contrast, Justice Burger was said to have tried to persuade Cohen's attorney, Melville Nimmer, not to say the word at oral argument, by suggesting to him at the outset that "you may proceed . . . . it will not be necessary for you to dwell on the facts."[53] Again according to *The Brethren*, Nimmer thought avoiding the word would show that it was unacceptable, and so he kept his statement of the facts brief but concrete: "What this young man did was to walk through a courthouse corridor . . . wearing a jacket on which were inscribed the words 'Fuck the Draft.'"[54]

Also in contrast to the dissenters (Justice Blackmun called the wearing of the jacket "an absurd and immature antic") [55], Justice Harlan became convinced that the wearing of the jacket symbolized something of consequence. According to *The Brethren*, many of the young, male law clerks who worked at the court in 1970-71 sympathized with Cohen's message at a time of active anti-war protests. At his meeting with his clerks three days after the oral arguments, one of them apparently pointed out that based on Justice Harlan's earlier opinions, this "speech" was protected. Going through a list of the recognized exceptions to protected speech, the clerk demonstrated that none of them fitted Cohen's situation.[56]

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[49] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 152 (2005).
[50] *Id.*
[51] Farber, *supra* note 45, at 290 n. 47. A Westlaw search turned up eight subsequent uses of the word in Supreme Court opinions (search conducted in the All U.S. Supreme Court Cases database May 27, 2012).
[52] Cohen v. California, 403 U.S. 15, 16 (1971) (quoting the California Court of Appeal, People v. Cohen, 1 Cal. App. 3d 94, 97-98 (1969)).
[53] WOODWARD & ARMSTRONG, *supra* note 49, at 153.
[54] *Id.*
[55] 403 U.S. at 27 (Blackmun, J., dissenting).
[56] WOODWARD & ARMSTRONG, *supra* note 49, at 154-55.

The 19-year-old Cohen had "testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft."[57] Still, it apparently was an unknown artist, not Cohen, who drew a peace symbol and wrote the phrases "Stop War" and "Fuck the Draft" on a jacket Cohen owned.[58]

On April 26, 1968, while wearing the jacket, Cohen went to the Los Angeles County courthouse to testify in an unrelated matter. When he entered the courtroom, Cohen took off his jacket and stood with it folded over his arm. A policeman who had seen the jacket sent the judge a note suggesting that Cohen be held in contempt of court. The judge declined. When Cohen left the courtroom, the police officer arrested him for disturbing the peace.[59]

The California statute under which Cohen was charged provided that any person "who maliciously and willfully disturbs the peace . . . of any neighborhood or person . . . by . . . offensive conduct" or who uses "vulgar, profane, or indecent language within the presence or hearing of women or children" in a "loud and boisterous manner" was guilty of a misdemeanor.[60] Wearing the jacket could not be construed as "loud and boisterous," so Cohen was prosecuted on the basis that he had engaged in offensive conduct. Cohen was found guilty in Municipal Court and sentenced to thirty days in jail. The appellate division reversed, but the California Court of Appeal affirmed the conviction, and the California Supreme Court declined to review it.[61]

A. *THROUGH THE PERFORMANCE OF THE OPINION, DOES THE AUTHOR BECOME INCONSEQUENTIAL, FADING FROM THE FOREGROUND AS A TRUTH (OR AN ESSENTIAL SOMETHING) IS REVEALED?*

As he begins the opinion, Justice Harlan moves immediately, though obliquely, to reveal, suggesting that first impressions may be replaced by second thoughts. Here is his "before I begin" invocation, framing the problem, generating anticipation, and building credibility[62]:

> This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.[63]

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[57] 1 Cal. App. 3d at 97-98.
[58] Farber, *supra* note 45, at 286.
[59] *Id.*
[60] Cal. Penal Code § 415.
[61] 403 U.S. at 17-18. See Farber, *supra* note 45, at 286-88 for an expanded discussion of the review process in California.
[62] *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 113-14 (2002).
[63] Cohen v. California, 403 U.S. 15, 15 (1971).

Justice Harlan appears to be proposing that the audience should join him in the unveiling: "I agree with you (and the dissenters) that this case seems very small and insignificant. But you and I will soon find out just how large is its constitutional significance." In this early instance in which Justice Harlan appears to foreshadow the outcome, his statement is abstractly and modestly phrased, promising only that the issue will be revealed to be of no small constitutional significance.

Justice Harlan next recounts the facts—quoting in large part from the opinion of the California Court of Appeal and declining the opportunity to tell the story in his own words.[64] After a matter-of-fact account of the facts and the appellate review process, he concludes by stating: "We now reverse."[65]

Switching to a more assertive tone, he summarily clears the way of any issue of jurisdiction: Because Cohen had consistently claimed that the statute as applied to him infringed his rights to freedom of expression, "[t]he question of our jurisdiction need not detain us long."[66]

To "lay hands on the precise issue," Justice Harlan moves next to cut away and clear out the underbrush: it is useful to talk first about matters "which this record does not present."[67] In this first movement of the opinion, Justice Harlan proceeds by subtraction—excising from consideration what the case does not involve, including very quickly, exactly what the state of California said it did involve. The California Court of Appeal had held that Cohen's wearing of the jacket was offensive conduct, which it defined as "behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace." The California appellate court further held that the State had proved offensive conduct because it was "certainly reasonably foreseeable that [Cohen's] conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket."[68]

In reply, Justice Harlan states conclusively that Cohen's violation was not "conduct": instead, "[t]he conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public." His only conduct was "the fact of communication." Because wearing the jacket conveys a message, Justice Harlan writes, the conviction "rests squarely upon his exercise of the freedom of speech" and "can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom."[69]

Assuming that Cohen's wearing of the jacket is intended to convey a message, Justice Harlan establishes that "the State certainly lacks power to

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[64] *Id.* at 16-17.
[65] *Id.* at 17.
[66] *Id.* at 17-18.
[67] *Id.* at 18.
[68] People v. Cohen, 1 Cal. App. 3d 94, 99-100 (1969).
[69] Cohen v. California, 403 U.S. 15, 19 (1971).

punish Cohen for the underlying content of the message the inscription conveyed."[70] Justice Harlan then moves to the remaining obstacles.

First, the California statute is not a time, place, and manner restriction: the statute applies everywhere in the state, and it contains no language indicating its purpose is maintaining the decorum of the courthouse. Further, when Cohen entered a courtroom, the judge wasn't upset enough to hold him in contempt although a police officer suggested that he do so.[71]

Second, Cohen's message does not qualify as incitement: "the evident position on the inutility or immorality of the draft" Cohen's jacket reflected does not fall within the proscription of incitement because there is no showing of an intent to incite disobedience to or disruption of the draft.[72]

And the message is not obscenity because it's not erotic though it may be vulgar and the phrase has a sexual derivation.[73] And it's not fighting words (although "fuck you" might be if directed to a specific person).[74] And it's not an intentional provocation of a given group likely to have a hostile reaction because "there is . . . no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result."[75] And it's not enough that the message was thrust upon unwilling or unsuspecting viewers: they could look the other way, no one seemed to object, and the statute doesn't really seem concerned about the captive audience.[76]

Metaphorically and narratively, Justice Harlan has cut away the underbrush, then glimpsed and startled the real issue out into the clearing. As a result,

> the issue flushed by this case stands out in bold relief. It is whether California can excise, as 'offensive conduct,' one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.[77]

Justice Harlan dismisses the "theory of the court below": the California court's reasoning is "plainly untenable." He has already established that there is "no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen."[78]

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[70] *Id.* at 18.
[71] *Id.* at 19 and n. 3.
[72] *Id.* at 18.
[73] *Id.* at 20.
[74] *Id.*
[75] *Id.*
[76] *Id.* at 21-22.
[77] *Id.* at 22-23.
[78] *Id.* at 23.

So the question must be whether California can act as the police officer in Cohen's courthouse was in fact moved to act, as a guardian of public morality, arresting Cohen because the officer was offended by Cohen's jacket. Justice Harlan expresses somewhat more hesitancy about the second rationale: "it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic."[79] But Justice Harlan assures the audience that accompanying him farther on the path, through continuing "examination and reflection," will reveal the shortcomings of finding that California may punish the use of a word.

Assuming that having the author recede from the foreground would be a good thing for a great opinion in the sense we are talking about, how does Justice Harlan recede as he "flushes" into the clear, where it "stands out in bold relief," the essence of the case?[80]

First, Justice Harlan structures and writes the opinion as if it recounts a path through the working out of a problem rather than as a recitation of a foregone conclusion. Although this case may first seem silly, together we will find it is not. As we move along, some questions need not detain us. Others need to be addressed, but only long enough to be removed. We move together along the path, clearing the path of what is not at issue. Like those who hunt birds, we will through this process stumble upon and "flush out" the issue.

In the first movement, Justice Harlan neither shapes the fact statement to make the outcome appear foreordained nor announces the reasons for the holding early on. He predicts only that we will find this case to be of no small significance, and he tells us that the court will reverse Cohen's conviction. In this way, Justice Harlan involves the reader in the activity of the opinion, in the process of movement.

As he moves with the reader through the categories that are not in play, Justice Harlan makes brief assertions and expands on few arguments, providing a capsule summary of First Amendment law. When he does expand on an argument—the captive audience one—he makes claims in complex, interwoven phrases, and in less than certain terms:

> Given the subtlety and complexity of the factors involved, if Cohen's speech was otherwise entitled to constitutional protection, we do not think the fact that some unwilling listeners in a public building may have been briefly exposed to it can serve to justify this breach of the peace con-

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[79] *Id.*

[80] James Boyd White writes that there is "a difference between an opinion that reaches a decision and one that is aimed there." WHITE, THE LEGAL IMAGINATION, *supra* note 9 at 238. If the opinion is to express the process of decision making, the judge should keep the reader in suspense and expose the reader "one by one to the facts and arguments that seem important to the judge, until the reader has them all, at which point he should find himself agreeing with the judge." *Id.*

> viction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but instead, indiscriminately sweeps within its prohibitions all offensive conduct that disturbs any neighborhood or person.[81]

Matching the movement through the thinking out of the opinion, and in much the same way that a bird would be flushed from its hiding place by its hunter, Justice Harlan appears to recede into the background, step into the foreground, and then recede again. In the first movement, when he describes the facts and procedural history, Justice Harlan's sentences are often passively structured, a move that removes and distances the author. In the early going, the characters and actions chosen are remarkable for their lack of flesh and blood:

> This case may seem . . . too inconsequential . . .
>
> but the issue it presents is of no small constitutional significance.[82]
>
> Cohen was convicted . . . .
>
> He was given 30 days' imprisonment.[83]
>
> The facts upon which his conviction rests are detailed . . . .[84]

Previewing the argument, Justice Harlan becomes almost curt in his assertions and dismissals:

> The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used . . . .[85]
>
> [W]e deal here with a conviction resting solely upon 'speech' . . . .[86]
>
> [T]he State certainly lacks power to punish Cohen for the underlying content of the message . . . .[87]
>
> Appellant's conviction . . . rests squarely upon his exercise of the 'freedom of speech' protected . . . by the Constitution.[88]

In the ensuing discussion of what is not at stake, Justice Harlan chooses words and phrases that advance small or negative claims:

> It is useful first to canvass various matters which this record does not present.[89]

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[81] 403 U.S. at 22.
[82] *Id.* at 15.
[83] *Id.* at 16.
[84] *Id.*
[85] *Id.* at 18.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 19.

> We think it important to note that several issues typically associated with such problems are not presented here.[90]
>
> [A]s it comes to us, this case cannot be said to fall within those relatively few categories . . . .[91]

But when "the issue flushed by this case stands out in bold relief," Justice Harlan brusquely addresses the state's arguments:

> The rationale of the California court is plainly untenable.[92]
>
> [T]he principle contended for by the State seems inherently boundless.[93]
>
> Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.[94]
>
> [W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas . . . .[95]

As he approaches the holding, Justice Harlan's language is again negatively and almost hesitantly phrased, as if the author is not making a positive pronouncement, but rather is barely in control:

> It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because this is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be reversed.[96]

B. *Is the particular truth that is revealed consequential?*

Set aside for a moment what Justice Harlan told us the issue was—"whether California can excise . . . one particular scurrilous epithet from the public discourse"—and look instead at what is uncovered during his journey through the second movement.

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[89] *Id.* at 18.
[90] *Id.* at 19.
[91] *Id.* at 19.
[92] *Id.* at 23.
[93] *Id.* at 25.
[94] *Id.* at 25.
[95] *Id.* at 26.
[96] *Id.* at 26. Contrast this restrained language with Justice Blackmun's hostile declaration in dissent:

> Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. . . . Further, the case appears to be well within the sphere of *Chaplinsky* [the "fighting words" case]. . . . As a consequence, this Court's agonizing over First Amendment values seem[s] misplaced and unnecessary.

Id. at 27 (Blackmun, J., dissenting).

After flushing out the issue and dismissing the rationale of the California court, Justice Harlan sketches in the constitutional backdrop for the decision:

> [First,] we cannot overemphasize that . . . most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions [that we have already found do not apply here].
>
> [Second, the] constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[97]

Though the issue Justice Harlan posed calls for a straightforward and negative answer—no, California cannot do that, the Constitution restrains California—what he reveals in this movement, like the sentence at its core, is more expansive and harder to contain. Against the constitutional backdrop he sketches, freedom of expression is powerful, but the rationale for protecting it is almost indescribable in the ordinary sense of legal argument. Why should governmental restraints be removed from the arena of public discussion? In phrases that almost slide on top of one another, Justice Harlan says the decision about what can be said has been placed *into the hands* of each of us, *in the hope* that freedom will make citizens and governments better and *in the belief* that individual dignity and choice are foundational.

Although the immediate result of such freedom of expression may seem like chaos, Justice Harlan finds value that may have been hidden:

> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. . . . That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.[98]

In the community Justice Harlan reveals, verbal cacophony is a strength, not a weakness. Again, the reasoning is not so much explained, as taken for granted: "we cannot lose sight of the fact that . . . fundamental societal values are truly implicated."

In this setting, Justice Harlan highlights the emotional content of the speech, as important as the message it communicates, a benefit that he says

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[97] *Id.* at 24-25.
[98] *Id.* at 24-25.

> is well illustrated by the episode involved here, that much linguistic expression serves a dual communication function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.[99]

In sum, what Justice Harlan has uncovered is consequential, but it cannot be reduced to paraphrase "nor is it translatable into a series of propositions set forth as a theory."[100]

C. *Is the truth surprising but recognized almost immediately, close to a memory and seemingly unavoidable in retrospect?*

The expansive interpretation expressed in Justice Harlan's opinion in *Cohen* may seem surprising because the case could have been decided much more narrowly by a judge devoted to judicial restraint—all Justice Harlan had to hold was that Cohen's wearing of the jacket was not offensive conduct inherently likely to lead to violence and so the California statute could not constitutionally be applied to him. The decision might also be seen as surprising in a comparative sense: other liberal democracies have decided that they must regulate some offensive speech for the sake of other societal values. And it could be viewed as surprising simply because Justice Harlan had so recently acquiesced in punishing the burning of a draft card, an action like Cohen's that seemed to convey a message like Cohen's.[101]

But none of these perspectives is "surprising" in the sense in which we ask this question. The truth that is uncovered is not the holding, or the

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[99] *Id.* at 25-26.

Justice Brandeis had foreshadowed this principle as well:

> The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting in discussion of Fourth and Fifth Amendment rights).

In addition to these general principles, Justice Harlan also provides what he calls some "more particularized considerations": that the State cannot make principled distinctions between offensive words and that the State cannot forbid words without running a risk of suppressing ideas. *Id.* at 25-26.

[100] WHITE, LEGAL KNOWLEDGE, *supra* note 44, at 1427.

[101] Van Alstyne, *supra* note 45, at 119, notes that the result "belies the expectation one might otherwise have were one's impression based only on the frequency of Harlan's dissents . . . [that is,] that he must have taken a narrow measure of constitutional review."

message, of the opinion, but instead is the essential something about us as a community that the opinion reveals to have already been true. This truth is surprising not because it does not coincide with our expectations but because it does, at least in retrospect. Remember that in an opinion of the kind we hope to find, the judge "consents to be stupid," performing as if the truth will be revealed in the activity or the movements of the opinion and not because of the author's control over it.

In this sense, then, is *Cohen*'s truth surprising? All of the first part of Justice Harlan's opinion in *Cohen* is about what is not at stake. So we are surprised at the end, but we remember, that the opinion promised to reveal something of consequence.

Very late in the opinion Justice Harlan unveils the backdrop of the First Amendment against which the issue stands out: the First Amendment puts into the hands of each of us the decision as to what views shall be expressed, in the hope that using such freedom will make us better and in the belief that no other approach would comport with our faith in individual dignity and choice.[102] Rather than an extensive discussion of history and precedent, this backdrop is supported only by a glancing "*see*" citation to the concurrence by Justice Brandeis in *Whitney v. California*.[103] As the backbone of his holding, Justice Harlan thus relies only on what he calls the fundamental societal values that are implicated "in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege."[104]

This revelation is surprising in the sense we intend here because we recognize, when we see it, that we knew it all along. We already knew it because of what Justice Brandeis wrote decades earlier in the case that Justice Harlan cites but does not quote:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. They valued liberty both as an end, and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government.[105]

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[102] Cohen v. California, 403 U.S. 15, 24 (1971).
[103] *Id.*
[104] *Id.* at 25.
[105] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The Brandeis concurrence continues:
They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that

Justice Harlan relies as well on the belief that "an 'undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression,' " citing *Tinker v. Des Moines Independent Community School District*.[106] In *Tinker*, another Vietnam-era case in which students protested the war by wearing black armbands, Justice Harlan had dissented from the decision upholding students' free speech rights because of the need for school officials to have the authority to maintain discipline. But he also had imagined a case in which the workable Constitutional rule might be otherwise. That is, he "would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion."[107]

Although he was unable to find such a motive in *Tinker*, the decision in *Cohen* implies that he discerned such a motivation there, a desire to prohibit the expression of an unpopular point of view in the police officer's arrest of Cohen. Once it is described in this way, as an "undifferentiated fear or apprehension of disturbance,"[108] we recall that if free expression is so powerful, the fuzzy-edged, free-floating kind of fear Justice Harlan describes cannot be enough to overcome it.

And finally, having been reminded, we cannot dispute that the statement "fuck the draft" expresses an idea and, as its essence, an emotion. And because that is so, we recall that few alternative modes of expression would allow the speaker "to ventilate their dissident views"[109] in the same way.

When Justice Harlan clears away the underbrush, he poses the issue flushed by the case as whether California can excise as offensive conduct

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it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.
Id. at 375.
In discussing this concurrence, White comments on the structure of the sentences
as a string of clauses connected by semicolons, a style that gives a sense of connectedness and sequence among different thoughts, or different aspects of the same thought. Not as in a logical outline, in which one first asserts premises then deduces conclusions, nor in the usual inductive structure, in which one first presents factual details then asserts a conclusion that flows from them. Rather, Brandeis is showing what it is like to think, as a whole mind, all at once, the way we really do think.
White, *Legal Knowledge, supra* note 44, at 1426-27. According to White, Brandeis not only imagines, but enacts, an "idealized argumentative process," that is, "the activity of sustained, reasoned, careful, whole-minded argument by people of good will on crucial questions of the day." *Id.* at 1428-29.

[106] Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

[107] *Id.* at 526 (Harlan, J., dissenting).

[108] *Id.* at 508.

[109] *Cohen,* 403 U.S. at 23.

one particular word from the public discourse. This phrasing of the issue matches the image of the California police officer who arrested Cohen because Cohen's anti-war jacket offended him.

Yet, the essential something that is revealed through the opinion conjures a different image. For us, at this time, in this place (and perhaps because I'm reading *Cohen* again after the Arab Spring), the surprising, enduring, and remembered image is not one of state suppression, but instead is the powerful cacophony created by people choosing, based on hope and belief, to express ideas and emotions.

This result will resonate, if at all, with those who find something analogous to what Justice Harlan has done in *Cohen* in this description of the prehistoric cave artists of Chauvet:

> The artist knew these animals absolutely and intimately, his hands could visualize them in the dark. What the rock told him was that the animals—like everything else which existed—were inside the rock, and that he, with his red pigment on his finger, could persuade them to come to the rock's surface, to its membrane surface, to brush against it and stain it with their smells.[110]

III. WAYS OF GOING ON

What has happened then? Is there inevitability in the Harlan opinion and, if there is, is this a way of evaluating an opinion without destroying the law's mystery. And what of this mystery? Is that too to be found in the opinion? Linda has graciously asked me, Jack, to conclude briefly along these lines, lines that we hope might open up our work together for interested others to continue.

It would be common perhaps to think of what Justice Harlan was doing in *Cohen* as balancing; perhaps that is how he thought of it. And yet, it seems to me, after reading Linda's thoughts about the opinion and considering her reactions to it, that we could not possibly make sense of the opinion with a word like "balancing," (with its suggestion that this is something we somehow know how to do when issues get tough). It seems to me, instead, that he acts more upon what might be described as an intuition, one arising from his experience as all intuitions do, but still a rather obscure and quite different mode of thinking made available to him through the presentation of the case. What he then tries to do, I think, is communicate to us his experience of this, an experience of "the law" as I would describe it, through this case in a manner (a way of writing, that is) that permits us to share at least part of the experience for ourselves, including our sharing in the part of the experience remained mysterious to him. The silly little incident presented to him in the case was, for him and the Court, no longer within our ordinary social or political worlds. It was instead there within what I cannot help but describe as a truer *polis* than those are, one

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[110] JOHN BERGER, HERE IS WHERE WE MEET: A STORY OF CROSSING PATHS 135 (2005). Thank you to Michael Berger for bringing this insight to my attention.

in which even such small person-to-person matters necessarily open for us questions of our identity as a people.

It seemed to me, as I was first reading Linda's wonderful rhetorical analysis, that almost everything she said was at least consistent with this idea. Perhaps then the opinion is consequential in this way, working for us in a fashion similar to *The Gates* example perhaps, to open us to a horizon of our own existence. It may seem that the community which the opinion calls up is only imagined, but perhaps that is because we do not often view our world in this fuller—more fully in being as Heidegger would say—way.

Following along with this thought, and turning to Linda's third section, it did not seem to me that the opinion truly rests upon either human liberty or human dignity in the sense of relying upon these as principles, nor do I think Linda intends this. Harlan could argue from premises with the best of them when he wanted to, but I did not read him as doing that here. Instead, it seems to me, his opinion fully rests upon that which Linda described as her lasting image of the opinion: "the powerful cacophony created by people choosing, based on hope and belief, to express ideas and emotions." He gets these "people" from Brandeis, I think, in Brandeis' *Whitney* concurrence, the one Harlan quotes. Brandeis, as James Boyd White teaches us, attempts to capture the complexities of our identity as a people through a string of ideas about valuing speech held together by semi-colons.[111] It seems to me that these semi-colons work in that opinion like Emily Dickinson's dashes: they tell us that what is said is to be read against what cannot be said. They are, in other words, oblique references—the only kind available to judges—to the law's mystery.

Where then does this leave us? Somewhere between the two of us—Linda's humanism and my, well, poetic truths—there is a way, I think, of evaluating the quality—yes, the quality—of opinions without destroying the law's mystery. What would it mean—since this article is likely to be read by law professors and perhaps, we hope, a few law students, for there to be a form of legal education that starts in an appreciation of this mystery? What would it mean—if others read it—if we thought of judges as preservers of this mystery? What would it mean if readers of opinion started thinking in terms of their own experience of the opinion rather than as critics of it? And what would it mean—finally and most importantly—if lawyers saw their task as related to the word that upsets all of us, the two of us included, "truth"?

[111] White, *Legal Knowledge, supra* note 44, at 1426-27.

HOPE, FEAR AND LOATHING, AND THE POST-*SEBELIUS* DISEQUILIBRIUM: ASSESSING THE RELATIONSHIP BETWEEN PARTIES, CONGRESS, AND COURTS IN TEA PARTY AMERICA

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ABSTRACT

Are we at an important moment for (re)assessing legislative-judicial relations? This article examines recent website commentary by members of the U.S. House of Representatives pertaining to the judiciary, court cases, and judicial power. We consider lawmaker websites both before and after the historic 2011 Supreme Court term which included the landmark health insurance decision National Federation of Independent Business v. Sebelius. *With this unique data at our disposal, we test the proposition that distinctive features of today's political environment—the rise of the Tea Party, instability in traditional party allegiances to courts, and low voter ratings of the legislature's institutional performance—have combined to create a moment of disequilibrium with respect to Congress's public assessments of the judiciary. We sketch a picture of institutional, partisan, and ideological engagement with courts that departs from earlier pictures (and explanations) of court-Congress interaction. We end our analysis by considering the impact of* Sebelius, *speculating on whether our observed patterns will persist or fade, and discussing the wider significance of our findings for understanding and assessing relations between courts and the U.S. national legislature.*

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CONTENTS

I. INTRODUCTION

Over the past few decades, scholars in both law and political science,[1] not to mention journalists, judicial and political figures, and interest groups,[2] have examined purportedly increasing tension between courts and

[1] *See* MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE 42 (2011) (depicting the Supreme Court's median ideological preferences vis-á-vis the other federal branches); CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM (2006); MARK C. MILLER, THE VIEW OF THE COURTS FROM THE HILL: INTERACTIONS BETWEEN CONGRESS AND THE FEDERAL JUDICIARY (2009); JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (2012); J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM (2004); Stephen Burbank, Remarks at Fair and Independent Courts: A Conference on the State of the Judiciary (2006) (quoted in The Third Branch, "In-Depth: On The Importance of Having a Fair and Independent Judiciary," http://www.uscourts.gov/News/TheThirdBranch/06-10-01/In-Depth_On_The_Importance_Of_Having_A_Fair_And_Independent_Judiciary.aspx; Teresa Stanton Collett, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 LOY. U. CHI. L. J. 327 (2010); Keith Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 INT'L J. CONST. L. 446 (2003).

[2] CENTURY FOUNDATION, UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS, THE REPORTS OF THE TASK FORCES OF CITIZENS FOR INDEPENDENT COURTS (2000); Alfred P. Carlton, Jr., American Bar Association, *Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary*, i-iii (July 2003); Ming W. Chin,

elected officials. In particular, this discussion has often documented, explored the significance of, and attempted to account for, conflict between the U.S. Congress and the federal courts. These legislative-judicial conflicts have been spurred by current events, including responses to salient court rulings, prominent criticisms of the judiciary by members of Congress, and reaction and counter-critique from judges and institutions sympathetic to judicial power.[3] As Mark Miller succinctly contends, "there is more conflict today between Congress and the courts than there has been in a very long time."[4]

Being able to document and perceive the causes of clashes between the legislative and judicial branches is important not just for greater comprehension of our separation of powers, but to obtain analytic leverage on a number of important issue areas that preoccupy scholars and policymakers alike. Such a diverse group as those interested in judicial independence, students of congressional leadership and agenda formation, "good government" reformers, and the "governance as dialogue" movement all have a common stake in better understanding whether today's court-Congress relations represent a familiar, recurring interbranch dynamic or something new and potentially destabilizing to the U.S. system of separated powers.

Existing scholarly frames provide useful perspectives for analyzing some of these phenomena. For example, the documented rise of partisanship within Congress, such that there is greater party conflict inside Congress today than at any point over the past seven decades,[5] can help account for party leaders' targeting of judicial figures and rulings that are tethered to major ideological struggles of the day.[6] Alternatively, Charles Geyh, Keith Whittington, and others have suggested that we can comprehend today's institutional conflicts with courts as a reflection of electoral realignments, or at least tensions between ascendant political

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Judicial Independence: Under Attack Again? 61 HAST. L.J. 1345 (2010); Sandra Day O'Connor, *The Threat to Judicial Independence,* WALL ST. J., Sept. 27, 2006, *available at* http://online.wsj.com/article/SB115931733674775033.html.

[3] *See*, *e.g.*, THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS, AND THE PUBLIC (Bruce Peabody ed., 2010) (hereinafter THE POLITICS OF JUDICIAL INDEPENDENCE); O'Connor, *supra*, note 2; John M. Walker, Jr., *Current Threats to Judicial Independence and Appropriate Responses: A Presentation to the American Bar Association,* 12 ST. JOHN'S J. LEGAL COMMENT 45 (1996).

[4] MILLER, *supra* note 1, at 5.

[5] FRANCIS E. LEE, BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE 49-50 (2009); KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING 140-44 (1997); DAVID ROHDE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE 45 (1991); BARBARA SINCLAIR, PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING xvi (2006).

[6] MILLER, *supra* note 1, at 180-81.

coalitions and the older (and partly repudiated) ideological and policy preferences embodied in the judiciary.[7]

However satisfactory these paradigms have been in explaining criticisms of courts in the past, the American political scene of the early twenty-first century presents several new challenges for assessments of congressional-judicial relations. At least three factors suggest we need new analytic tools for understanding emerging relationships between lawmakers and judges. First, the rise of the "Tea Party" movement in 2009—and with it, a concentrated political emphasis on curbing government intervention, spending, and taxation—raises the prospect that some of today's members of Congress may be judging court behavior with a new yardstick. In lieu of the historical emphases on civil liberties, civil rights, and federalism as the decisive issues that define how federal lawmakers assess the judiciary, the ascendance of "Tea Party issues" may mean that on the contemporary political scene, judicial treatment of questions related to "national power" will serve as the vital touchstone for shaping the terms under which members of Congress target (and praise) courts.[8] We are conscious that the American elections of 2012 signaled, to many, the decline of the potency of the Tea Party.[9] But, the movement certainly played a prominent role on the American political scene for several years at the heart of this study and, more to the point, the issues and energy marshaled by the Tea Party movement have certainly not faded from the scene.

As a second basis for claiming that we stand at a distinct moment of court-Congress conflict, we point to preliminary evidence that traditional partisan and ideological relationships with courts are weakening. While liberals—and eventually Democrats—have been associated with allegiance to the judiciary since the New Deal,[10] conservatives and Republicans have a corresponding history of skepticism towards judicial power over the past half century or so.[11] To take just one example, since 1976, the Democratic Party's platforms have generally praised the judiciary and individual court decisions, while analogous Republican platforms have been overwhelmingly negative and even hostile.[12]

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[7] Whittington, *supra* note 1; Charles Geyh, *The Choreography of Courts-Congress Conflict*, *in* THE POLITICS OF JUDICIAL INDEPENDENCE, *supra* note 3, at 20-24.

[8] David Campbell and Robert Putnam question the degree to which self-identified Tea Party members in the general public favor a basket of policies and preferences distinct from "highly partisan" Republicans. David E. Campbell & Robert D. Putnam, Op-Ed., *Crashing the Tea Party*, N.Y. TIMES, Aug. 16, 2011, http://www.nytimes.com/2011/08/17/opinion/crashing-the-tea-party.html?_r=0.

[9] *See, e.g.,* Trip Gabriel, *Clout Diminished, Tea Party Turns to Narrower Issues,* N.Y. TIMES, Dec. 25, 2012, http://www.nytimes.com/2012/12/26/us/politics/tea-party-its-clout-diminished-turns-to-fringe-issues.html?pagewanted=all.

[10] MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 14-21 (2005).

[11] *See generally,* MILLER, *supra* note 1.

[12] *See* THE POLITICS OF JUDICIAL INDEPENDENCE, *supra* note 3, at 5-6.

In more recent years, however, some of the court cases most widely discussed by both pundits and political figures have confounded these historical affiliations. In such areas as affirmative action,[13] gun rights,[14] and campaign finance,[15] some of the most high-profile Court decisions over the past decade have simultaneously advanced longstanding conservative positions and agitated traditional ideological "progressives." Running parallel to the outcomes in these and other cases, we note the success of concerted strategies by conservatives to fill the courts with more ideologically sympathetic personnel, and to advance arguments and lines of litigation designed to produce favorable results.[16] These factors, combined with the conservatism of many state court systems as well as much of the federal judiciary,[17] invite speculation about whether we are at a historic moment for reevaluating the interplay of ideology, party, and the allegiance of members of Congress to the courts.[18]

Third, and finally, we note that today's understandings of the interactions between courts and Congress is likely to be flavored by the legislature's institutional standing with the public, especially vis-à-vis the judiciary. Congress almost always suffers in comparison with the Supreme Court when it comes to the public's assessments of institutional performance. But since 2004, the declining confidence in the U.S. national legislature has been especially dramatic and has offered historically low levels of popular support for Congress—an observation that would plausibly shape lawmakers' interactions with the judiciary.[19]

These observations are complicated somewhat by the Supreme Court's own recent low standing in the eyes of the public[20] and by the high percentage of voters who identify political (as opposed to legal) factors as

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[13] *See, e.g.,* Grutter v. Bollinger, 539 U.S. 306 (2003); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[14] District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. Chicago, 561 U.S. 3025 (2010).

[15] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Am. Tradition P'ship, Inc. v. Bullock, 132 S.Ct. 2490 (2012).

[16] *See, e.g.,* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008).

[17] THE POLITICS OF JUDICIAL INDEPENDENCE, *supra* note 3, at 5-6.

[18] *See, e.g.,* Tom S. Clark, *The Judiciary under Siege and the Court of Public Opinion, in* THE POLITICS OF JUDICIAL INDEPENDENCE *supra* note 3, at 145 (hereinafter Clark, *The Judiciary under Siege*).

[19] Lydia Saad, *At 13%, Congress' Approval Ties All-Time Low. Republicans and Democrats Give Identical Ratings to the Divided Congress*, GALLUP NEWS SERVICE, October 12, 2011, http://www.gallup.com/poll/150038/Congress-Approval-Ties-Time-Low.aspx.

[20] Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in New Poll,* N.Y. TIMES, June 7, 2012, http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html?pagewanted=all.

driving court decisions.[21] In this context, it becomes somewhat harder to argue that legislators will defer to the high bench, although we note that the recent 33 point gap between the percentage of the public approving of Congress's job performance (13%) and the comparable public approval of the Court (46%)[22] is still striking and impressive.

In this article, we argue that these three features of our recent political life—the abrupt rise of the Tea Party, instability in traditional party allegiance to the courts, and negative voter assessments of the legislature's institutional performance—have combined to offer (a perhaps temporary) moment of disequilibrium when it comes to Congress's assessments of courts, court power, and judicial independence. We contend, further, that several highly salient cases from the Supreme Court's 2011 term[23] (including the Court's sustaining of the Obama administration health insurance law[24] and its partial invalidation of Arizona's S.B. 1070 immigration law[25]) are exceptions that prove the rule. While both cases seemingly validated traditional liberal ideological positions, the muted and cautious responses of both parties to these rulings further corroborates our disequilibrium thesis.

Indeed, as discussed in greater detail below, our results show that for many Republican members of Congress there is, today, a positive perception of courts, especially as a result of ideologically and substantively favorable court rulings in several areas related to government powers. In a similar vein, with respect to legislators' evaluation of courts on traditional "social issues," we note less emphasis and less intensity with respect to these issues in comparison with earlier periods.

Overall, by examining the comments found on the government websites of members of the House of Representatives in the 111th (2009-2011) and 112th (2011-2013) Congresses, we are able to sketch a picture of institutional, partisan, and ideological engagement with the judiciary that departs from earlier paradigms of court-Congress interactions while corroborating many of our assumptions about the current political

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[21] Leigh Ann Caldwell, *Poll: Most Think Politics Will Influence Supreme Court Health Care Decision*, CBSNEWS.COM, June 7, 2012, http://www.cbsnews.com/8301-503544_162-57449249-503544/poll-most-think-politics-will-influence-supreme-court-health-care-decision/?tag=cbsnewsLeadStoriesArea; *Kaiser Health Tracking Poll*, KAISER FAMILY FOUNDATION (April2012), http://www.kff.org/kaiserpolls/8302.cfm. Interestingly, some recent research corroborates this view, finding empirical evidence that the Supreme Court has behaved more strategically and politically in recent decades. *See* BAILEY & MALTZMAN, *supra* note 1, at 3-4 (finding evidence that the Court's legal deference to Congress has been replaced by a more strategic deference when the Court finds itself as a political outlier relative to the rest of the national government).

[22] Jeffrey M. Jones, *Supreme Court Approval Ratings Dips to 46%*, GALLUP NEWS SERVICE, Oct. 3, 2011, http://www.gallup.com/poll/149906/Supreme-Court-Approval-Rating-Dips.aspx.

[23] The 2011 term ran from October 2011 until June 2012.

[24] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[25] Arizona v. United States, 132 S. Ct. 2492 (2012).

moment. Using a variety of demographic and political data, we explain which recent members of the House have been most active in both criticizing and praising judicial power.

We conclude our analysis by speculating on the likelihood that these patterns will continue or transform, and by discussing the wider significance of our findings for scholarly treatments of legislative-judicial relations. We believe our approach, while limited in its sweep and application, offers new explanations for Congress's interest in both critiquing and praising the judiciary, and has important implications for fields of study—and political problems—well beyond our immediate aspirations and focus.

II. EXISTING RESEARCH

Scholars in political science and law have long studied interactions between the U.S. Congress and the judiciary as a means of better understanding the operation of our separation of powers system and the decision making of judges and legislators.[26] This focus on legislative-judicial relations is certainly warranted given the power of American courts and the presence of constitutional rules and political traditions that allow for and even invite significant, recurring interbranch interaction, collaboration, and disagreement.[27]

Indeed, some scholarship has emphasized the enduring constitutional, institutional, and policymaking roots of tension between the judicial branches and legislative officials, and, therefore, the essential "normalcy" of conflict and critique between the departments of government.[28] More

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[26] *See, e.g.,* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2nd ed. 1986); LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATIONS AS POLITICAL PROCESS (1988); ROBERT A. KATZMANN, COURTS AND CONGRESS (1997); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); WILLIAM LASSER, THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS (1988); ROBERT MCCLOSKEY, THE AMERICAN SUPREME COURT (Sanford Levinson ed., 2010); JEFFERY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); Joseph Ignagni & James Meernik, *Explaining Congressional Attempts to Reverse Supreme Court Decisions*, 47 POL. RES. Q. 353 (1994); Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965).

[27] *See, e.g.,* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984 171 (Randall W. Bland, Theodore T. Hindson & Jack W. Peltason eds., 5th rev. ed.) (1984) (discussing how the constitution creates an "invitation to struggle" between the branches of government); GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER AND AMERICAN DEMOCRACY (2003); PICKERILL, *supra* note1; Bruce Peabody & John Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1 (2003); Patricia Wald & Neil Kinkopf, *Putting Separation of Powers into Practice: Reflections on Senator Schumer's Essay*, 1 HARV. L. & POL'Y REV. 41 (2007).

[28] *See, e.g.,* BAILEY & MALTZMAN, *supra* note 1, at 3 (2011) ("the legislative and executive branches may be able to push the Court in favored directions with threats and persuasion"); FISHER, CONSTITUTIONAL DIALOGUES, *supra* note 26; GEYH, *supra* note 1;

explicitly normative research in this tradition condemns or sanctions specific institutional checks or "court curbing" techniques on legal, policy, and other grounds.[29]

Other work, more closely related to the goals of this article, has attempted to outline and understand the conditions under which Congress is likely to question, challenge, or perhaps promote judicial power.[30] Stuart Nagel, for example, delineated periods of greater and lesser interest in congressional "court-curbing"[31] from 1789-1959, and attempted to isolate particular periods and political circumstances in which these efforts to limit court powers and decisions were more successful.[32] Following up on Nagel's work, Keith Whittington has outlined a model for understanding when "elected officials would either accept independent judicial review or seek to punish the Court and reduce its independence."[33] Somewhat similarly, Joseph Ignagni and James Meernik emphasize electoral and institutional influences in their empirical examination of factors that impel Congress to attempt to reverse judicial review.[34] Tom Clark explores the "electoral connection" between legislators and the public to show that prominent criticisms of the courts are tied to constituent opinion.[35] More recently, Michael Bailey and Forest Maltzman have shown how the Supreme Court shifts its statutory and constitutional rulings when it is a

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CHARLES O. JONES, THE PRESIDENCY IN A SEPARATED SYSTEM (2d ed. 2005); PICKERILL, *supra* note 1.

[29] JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY (1984); REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds. 2006); Mark Tushnet & Jennifer Jaff, *Why the Debate over Congress' Power to Restrict Jurisdiction of the Federal Courts is Unending*, 72 GEO. L. J. 1311 (1984); Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View,* 46 CATH. U. L. REV. 671 (1997).

[30] *See, e.g.,* EDWARD KEYNES & RANDALL K. MILLER, THE COURT VS. CONGRESS: PRAYER, BUSING, AND ABORTION (1989); C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT, 1957 -1960 (1961); WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS (1962); JOHN R. SCHMIDHAUSER & LARRY L. BERG, THE SUPREME COURT AND CONGRESS: CONFLICT AND INTERACTION, 1945-1968 (1972); Tom S. Clark, *The Separation of Powers, Court-Curbing and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971 (2009); Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337 (2006); Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992).

[31] We adopt Tom Clark's definition of a court-curbing bill as a congressional measure that seeks "to restrict, remove or otherwise limit judicial power." Clark, *The Judiciary under Siege*, *supra* note 18.

[32] Nagel, *supra* note 26.

[33] Whittington, *supra* note 1, at 448.

[34] Ignagni & Meernik, *supra* note 26.

[35] Clark, *The Judiciary under Siege, supra* note 18.

policy outlier relative to the executive and legislative branches in the United States.[36]

Our project complements and develops this rather expansive body of research by considering political developments in the early twenty-first century that may confound or revise traditional assessments of congressional-judicial relations. In particular, this study is driven by our sense that the individual and institutional factors inducing today's lawmakers to both criticize and bolster courts are distinctive relative to the preceding half century, a span which included a longstanding pattern of liberal support for courts as well as steady, and often highly concentrated and intense conservative congressional criticism. In short, we argue for (and explain the sources of) distinctive and significant dynamics in today's legislative-judicial relations.

III. HISTORICAL CONTEXT OF THE STUDY

Four broad historical observations help orient our analysis and discussion. First, as many scholars have noted, congressional critiques of courts are not new. Attacks on courts are as old as the writings of Anti-Federalists such as "Brutus," who predicted (and fretted about) the rise of judicial power even before constitutional ratification.[37]

Second, while criticism of courts in the second half of the twentieth century became associated with conservatives and Republicans, this alignment is historical and contingent. For example, as Barry Friedman has shown, political Progressives at the end of the nineteenth century and into the first few decades of the twentieth were highly critical of courts as impediments to legislative reform.[38] A few decades later, Franklin Roosevelt (in)famously clashed with the Supreme Court, posing what Jeff Shesol describes as Roosevelt's greatest political challenge prior to the Second World War.[39]

As a third point of historical orientation, we note that criticism of courts (and the often defensive calls for greater judicial independence and power) has some noticeable ebb-and-flow. That is, we associate some eras of U.S. politics with more attacks on courts than others. For example, Nagel and other researchers have observed that there is considerable variation in Congress's pursuit of proposals to restrict judicial power.[40] Indeed, Figure 1 presents the occurrence of court-curbing sponsorship by members of Congress over more than six decades, sketching a picture in

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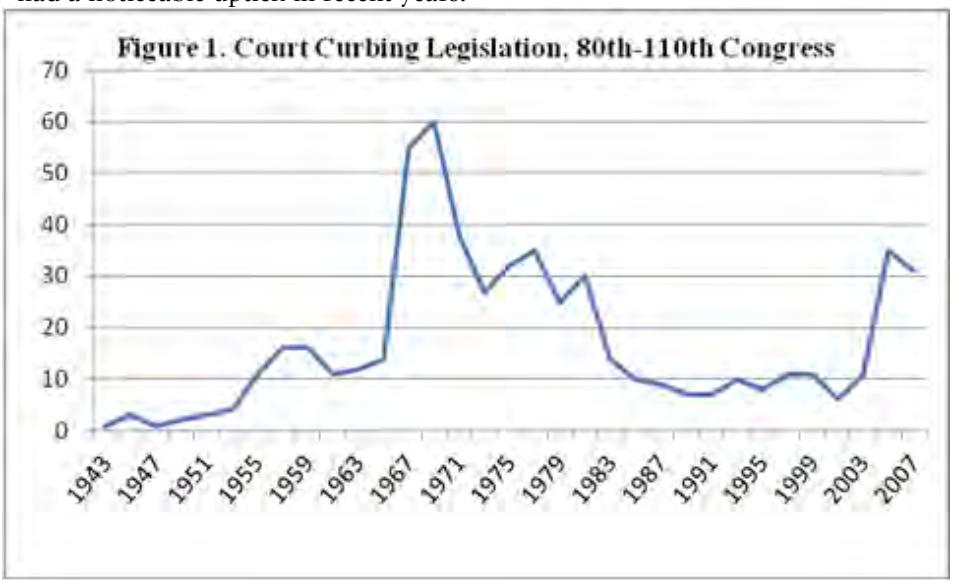
[36] BAILEY & MALTZMAN, *supra* note 1, at 95-120.
[37] THE POLITICS OF JUDICIAL INDEPENDENCE, *supra* note 3, at 4.
[38] BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); *see* also MILLER, *supra* note 1.
[39] JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010).
[40] GEYH, *supra* note 1; DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY (1966).

which this activity, while generally declining since its peak in the 1960s has had a noticeable uptick in recent years.



Source: Unpublished data set (Tom Clark, Emory University)

As an extension of this last observation we note, fourth, that there are reasons to think the early part of the twenty-first century ushered in a span in which criticism of courts increased in profile and intensity.[41] Thus, from 2003-2008, Congress averaged nearly three times as many court-curbing bills (over 13 such bills every year) compared to the period from 1984-2002 (an average of about 4.5 per year).[42] The spike in especially conservative critiques of courts in the early twenty-first century can be attributed, in part, to high-profile state and federal cases[43] and the emergence of entrepreneurial leaders in the U.S. Congress who targeted these decisions and the purportedly "activist" judges who wrote them.[44]

We believe the broad historical background encompassed by these four points provides both parameters and rationale for our investigation of today's congressional-judicial dynamics. Among other questions, we are interested in whether the increase in conservative critiques of the judiciary in the 2000s has continued, faded, or evolved by taking on distinctive

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[41] *Id.*

[42] THE POLITICS OF JUDICIAL INDEPENDENCE, *supra* note 3, at 7.

[43] *See, e.g.,* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004); Lawrence v. Texas, 539 U.S. 558 (2003); Goodridge v. Mass. Dep't of Pub Health, 798 N.E.2d 941 (Mass. 2003); In re Guardianship of Schiavo, 780 So. 2d 176 (Fla. App. Ct. 2001); Kelo v. City of New London, 545 U.S. 469 (2005).

[44] *See* Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185 (2007) (discussing "legislating from the bench" as a basis for criticizing judges).

dynamics in an environment in which the Obama administration, the Tea Party, voter dissatisfaction with the legislature, and high profile court cases are all prominent political features.

In order to probe these issues, we consider and analyze a unique data source, website commentary about courts from the 111th and 112th Congresses—with the latter including discussions both before and after the landmark health insurance cases of the 2011 term including *National Federation of Independent Business v. Sebelius* (*NFIB v. Sebelius*). We discuss our complete methodology in greater detail below, but for the moment, we simply note that we have chosen to focus on these two Congresses not out of a sense that they are representative in any special sense, but because they occur over a span in which the phenomena we are interested in (including the surge of support for the Tea Party and a continued negative shift in people's views about the legislature) are salient.

The 111th Congress (in operation from January 2009 to January 2011) represented a period of "unified" governmental rule, viz., where both houses of Congress and the presidency were all of one party. While Democrats held power in both houses in the previous Congress (110th), these majorities increased with the 2008 election.[45] The Tea Party Caucus received congressional approval in July of 2010,[46] and the main Tea Party push for congressional representation took place during the 2010 midterm elections when the balance of power in Congress changed, a shift many attributed to Tea Party efforts. The 112th Congress saw a return to divided government as Republicans in the House came to power and Democratic control of the Senate was maintained but weakened.

We explain our decision to scrutinize the 112th Congress twice—once in the winter of 2012 and again in the summer of 2012 (just after the conclusion of the Supreme Court's term)—as reflecting an interest in gauging congressional attitudes during both a relatively "normal" phase as well as in the context of the extraordinary, if not historic, media coverage and popular attention generated by the legal challenge to the Obama administration's health care reform, the Patient Protection and Affordable Care Act (PPACA).

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[45] As noted, the congressional sessions closely preceding the 110th Congress included a number of high profile standoffs between the judiciary and conservatives in the national legislature, fueled by such issues as gay rights and the *Goodridge* case, the *Newdow* Pledge of Allegiance controversy, and the salient interbranch dispute about Terry Schiavo, among other matters. These causes were taken up by both party leaders and ideological interest groups in ways that were likely to make court-curbing an attractive issue for garnering votes and publicity in the years that immediately followed.

[46] Stephanie Condon, *Bachmann's Tea Party Caucus Approved*, July 19 2010, http://www.cbsnews.com/8301-503544_162-20010958-503544.html.

IV. Research Design and Findings

A. General Hypotheses

So far, we have laid out the scholarly and historical context of this article, and in so doing, provided at least an initial rationale for the importance and relevance of our focus on recent congressional dialogue about courts. We next identify and defend a number of hypotheses that flow from our core assumptions about important features of two recent Congresses, elements that are likely to help explain lawmaker interest in the judiciary.

Relative Institutional Support: First, we speculate that when Congress is less supported by the public it is less likely to engage in institutional critiques of any kind, and especially towards the judiciary, which historically enjoys higher levels of at least "diffuse" (or general institutional) support than either the executive or legislative branches.[47] Thus, we contend, the 111th and 112th Congresses (subject to particularly low public approval ratings by the electorate) are less likely to engage in criticism of courts, especially critiques of courts as institutions (as opposed to criticisms targeting controversial individual decisions).

Partisan Uncertainty: Over the past four decades, the U.S. Congress has become increasingly internally polarized, perhaps reflecting greater party polarization in congressional districts and states.[48] According to David Rohde, growing ideological homogeneity within the parties has contributed to rank and file members giving party leaders additional powers to advance their agenda, a development that has further exacerbated partisan divisions.[49]

While we do not contend that this polarization has declined within Congress (or in the nation as a whole), we do speculate that the two major parties are in a period of greater uncertainty with respect to how their agendas map with the future rulings of the courts.

For decades, one could explain a great deal of congressional behavior towards the judiciary through the analytic framework of rising party polarization and the consequent ideological battles over prominent social, cultural, and rights disputes such as abortion, gun control, affirmative action (and race more generally), gay marriage, and the role of religion in

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[47] The notion of "diffuse" support is used to explain enduring institutional public approval, as opposed to reactions to "specific" decisions. *See generally*, Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court,* 36 Am. J. Pol. Sci. 635 (1992); James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts,* 92 Am. Pol. Sci. Rev. 343 (1998); Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court,* 85 Judicature 32 (2001).

[48] *See* Rohde, *supra* note 5; *see also* John H. Aldrich, Why Parties? The Origin and Transformation of Political Parties in America (1995).

[49] Rohde *supra* note 5.

public life.[50] But a number of factors have altered these longstanding relationships between the two major parties and the courts. To begin with, conservatives have effectively developed and executed litigation and personnel placement strategies to help them pursue cases and fill the ranks of the judicial system in ways that support their policy and jurisprudential goals.[51] Some of these developments reflect (and have been reinforced by) Republicans' success in securing the White House (with Republicans in control for 28 out of the past 45 years—and every Republican president having nominated at least one Supreme Court Justice). In addition, the later years of the Rehnquist Court (moving into the Roberts Court era) witnessed a number of high-profile rulings that represented defeats for liberals (and victories for conservatives). Taken together, these observations surface the possibility that we may be at a moment when we can no longer assume either that the Democratic party will unflinchingly defend the judiciary, or that Republicans will instinctively lash out at U.S. courts.[52]

As a consequence, we speculate that in the 111th and 112th Congresses we should find increased interparty distribution of both rebuke and praise, with party no longer as reliable a predictor of either conservative lawmakers' animus against judges or liberals' instinctual support of judicial power. As a corollary to this, we suspect, secondly, that the behavior of congressional leaders will serve as a good indicator of this postulated unsettled partisan orientation to courts. As our third "partisan uncertainty" hypothesis, we contend that when we do find critiques (and support) of courts advanced by members of Congress, we expect them to be more individual, case, and issue-based. Miller and others have argued that in an earlier era marked by clear ideological fault lines with respect to courts, the judiciary was taken to task as an institution, and its broad powers questioned.[53] In contrast, we contend that in today's climate of greater uncertainty about whose bread the courts are buttering, while individual decision critiques will persist, party driven attacks (and party driven defenses of) the judiciary as a whole are likely to diminish, especially by traditional Republican critics.

Tea Party Effects: Our third broad hypothesis flows from our assumption that the 111th and 112th Congresses were notably affected by the rise of the "Tea Party" and the movement's particular policy and political emphases. At a most rudimentary level, we postulate that the considerable sway of the Tea Party since 2009 means that for both Republicans as a whole (and for self-designated congressional Tea Party

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[50] MARK D. BREWER & JEFFERY M. STONECASH, DYNAMICS OF AMERICAN POLITICAL PARTIES (2008); Clark, *supra* note 30.
[51] TELES, *supra* note 16.
[52] Ryan Grim & Sam Stein, *A New Love Affair: Republicans Rally to Defend Judges,* HUFFINGTON POST, (Apr. 5, 2012, 4:01 PM), http://www.huffingtonpost.com/2012/04/05/republicans-judges-supreme-court_n_1406580.html.
[53] MILLER, *supra* note 1.

supporters in particular), court decisions that favor, support, or expand government powers (especially national powers tied to federal programs perceived as costly) will be the objects of criticism, while court decisions that limit, invalidate, or curb national powers and programs will be the object of praise from these groups.[54] We additionally predict that the Tea Party "effect" will diminish individual lawmakers' (and the parties') emphasis on civil rights, civil liberties, and so-called "culture war" issues as sources of either praise or criticism of courts.

Judiciary Committee: Miller has argued that the House Judiciary Committee was once known as the "Committee of Lawyers," with participants who emphasized substantive policy and were "traditionally highly protective" of the courts.[55] In more recent years, however (Miller identifies the period from 1995-2006), the committee has become an important platform for anti-court sentiment. As Miller puts it, "[t]oday, the attacks against the courts seem to be led by lawyer-legislators, especially—surprisingly—those who serve on the House Judiciary Committee"[56]

Consistent with some of these claims, we think it likely that, due to their policy interests in judicial matters, the websites of members on the House Judiciary Committee (HJC) are more likely than those of the "average" members of Congress to include comments, positive and negative, about courts. At the same time, we also hypothesize that the HJC is likely to have generally cooled as a crucible of court criticism because of what we have identified as greater party uncertainty over the judiciary's status as an ideological and partisan ally. In other words, like the House as a whole, we expect to find a more heterogeneous mix of criticism and praise from HJC members as they consider recent judicial activity and

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[54] We can imagine at least four central strategies adopted by lawmakers who praise courts, court decisions, and judges. First, these efforts may be part of a short-term affiliation strategy. In this view, members of Congress identify, say, court decisions they support to take positions for constituents, especially in an area of politics where an individual member's influence is attenuated and indirect. Second, lawmaker statements might be part of a communication and signaling strategy, especially directed at courts themselves. Third, members of Congress might "talk up" courts to bolster judicial independence, out of a recognition that lawmakers' political fortunes can change and, therefore, it can be beneficial to bolster an ideologically like-minded court or judge into an uncertain future. See Roger E. Hartley, *Judicial Independence as a Political Argument,* 21 LAW AND COURTS NEWSLETTER 22, 23 (2011) (contending that supporting courts and "judicial independence can be used to oppose efforts to change judicial institutions…and to support other rational interests such as protecting past, immediate, and future political gains from political challenges"). Finally, and related, legislators might support courts out of a belief that they can assist with trenchant, cross-cutting issues that threaten to divide and destabilize a partisan coalition and the claims to rule of superintending elites. *See* Graber, *supra* note 30 (discussing how courts and judicial review can be used by "elected officials" to "invite the judiciary to resolve those political controversies that they cannot or would rather not address").

[55] MILLER, *supra* note 1, at 135-36.

[56] *Id*. at 134.

attempt to position themselves relative to important present and future decisions. Finally, due to the presence of a number of Tea Party caucus participants on the House Judiciary Committee, we expect that court decisions negating or restricting government powers are likely to be a particular focus of the Committee's members.

B. METHODOLOGY

In our effort to plumb the extent and nature of recent congressional dialogue on courts, we considered all official "government" websites (identified by "house.gov" in their URL) of members of the House of Representatives in the 111th and 112th Congresses.[57] As indicated previously, we chose these two Congresses as a practical starting point for analyzing recent legislative activity and for developing our unique data set.[58] In addition, given our interest in "Tea Party" effects, these were the only two Congresses at the time of our research in which the contemporary Tea Party was active.

Our decision to focus on the U.S. House rather than the Senate carries some obvious benefits and drawbacks. On the one hand, given its role in judicial confirmation hearings, the U.S. Senate might seem to be especially useful for tracking important changes in lawmakers' attitudes and perspectives towards the courts. On the other hand, the House's two-year terms and smaller constituency size may yield a sharper and less lagging "signal" of contemporary attitudes towards courts than would the U.S. Senate.[59] We note, for example, that many Senators in the 111th Congress would have been elected before the "Tea Party" came into effect—a dynamic not in play for a House that faces elections for all its members every two years. Moreover, as Miller has argued, the House seems to have been more of a site of contemporary critiques of courts, making it a more suitable target for analyzing whether these dynamics are now evolving.

Setting aside these issues about choice of chamber, one might question why we have elected to look at website commentary on courts rather than other measures of congressional interest in (and possible hostility to) the judiciary. Tom Clark, for example, has examined the introduction of "court-curbing" bills by members of Congress, and argued that these

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[57] We did not, therefore, scrutinize members' campaign websites, usually identified with a .com suffix. In general, official government websites have more devoted staff and appear to be more specific and frequently updated than campaign websites. In other words, our assessment was that "government" websites would provide a more detailed and current signal of lawmakers' attitudes to any number of issues, including courts and recent judicial decisions.

[58] We recognize that our data set, while providing a useful and promising source for analyzing legislative-judicial relationships, will be even more profitable intellectually if we can develop it longitudinally. Therefore we intend to continue collecting information for subsequent Congresses (while conceding the difficulty, if not impossibility, of gathering data for Congresses before our starting point of 2010).

[59] MILLER, *supra* note 1.

initiatives serve as signals to the judiciary when it lacks public support.[60] Clark reasons that court-curbing legislation can impact the judiciary "independent of any threat of enactment" because such legislation serves as a "credible signal" to the court of "waning judicial legitimacy."[61] Commentaries about courts on member websites are, by contrast, somewhat diffuse and indirect, and often completely untethered to specific legislation or formal efforts to alter the Court's roles and powers. In these ways, therefore, websites could seem to be rather poor signals for exploring court-Congress interactions.

We concede that member websites are not likely to be direct influences on the judiciary. But we are not convinced co-sponsorship of court-curbing bills is much more effectual in this regard. More to the point, we think websites are likely to serve as valuable "catch-all" forums—sensitively picking up a range of lawmaker sentiments in a way that other measures (such as sponsorship of court-curbing bills) would not. If a member of Congress is sufficiently motivated to introduce or co-sponsor court-curbing legislation, we think it likely that this legislator would also introduce a comment or a corresponding press release on his or her governmental website for credit-claiming, advertising, or position-taking purposes.[62]

Moreover, member control over their personal websites is more autonomous, inclusive, and flexible than the authority found in bill co-sponsorship. A member considering supporting an existing bill (or introducing a new one) might worry about how a bill will be perceived in light of other co-sponsors, or how it will be amended through the legislative process—dangers not present in generating one's own web content. Additionally, lawmakers can register (and rapidly amend) any range of reactions to courts and cases in the context of a website in a way that would be much more difficult with other legislative instruments.

As a result of these points, we believe member website statements are especially likely to include positive as well as negative commentary on courts, case-specific statements, as well as more general institutional and substantive commentary.[63] In addition to these claims, we think member

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[60] *Id.*

[61] *Id.*

[62] DAVID MAYHEW, CONGRESS, THE ELECTORAL CONNECTION (1974). Thus, for example, Rep. Ralph Hall's 2012 website portion discussing the "Judiciary" outlines his support for "[t]raditional family values" and H.R. 875 the "Marriage Protection Act of 2011" a measure that "would prohibit federal courts to hear or decide any question pertaining to the interpretation under the Constitution of the provision of the Defense of Marriage Act." *See* Ralph Hall, *Judicial: Federal Marriage*, Ralphhall.house.gov/ (last visited April 11, 2012), http://ralphhall.house.gov/index.cfm?sectionid=53&sectiontree=5,53.

[63] We also suspect co-sponsorship of court-curbing measures, which only rarely leads to actual bill passage, may be a more specialized activity, directed at specific interest groups as opposed to constituents as a whole. *See generally*, Bruce G. Peabody, *Congress, The Court, and the "Service Constitution:" Article III Jurisdiction Controls as a Case Study of the Separation of Powers*, 2006 MICH. ST. L. REV. 269**,** 294, 299, 309, 313-14, 322, 325 (2006) (discussing congressional "court-curbing" strategies and interest groups).

websites should be one of the more responsive conduits between individual lawmakers and the public. Thus, to the extent we are interested in how legislators attempt to both reflect and guide constituent opinion on courts we believe our units of analysis are well-chosen and compatible with the goals of this research project.

In any event, for our analysis of legislative commentary on courts, we consulted member websites for the 111th Congress during June of 2010 and member websites for the 112th during February and March of 2012, and then, subsequently, during July of 2012 (after the Supreme Court's 2011 term had come to an end). We note that our July 2012 examination of websites for the 112th Congress was focused solely on member comments and reactions since June 1, 2012—in an effort to capture responses to some of the high-profile cases handed down at the end of the term.

We used the same basic search process for both Congresses. As indicated, we visited every available official member website.[64] Where member website search options or engines were provided,[65] we used the broad, over-inclusive truncated search terms "court" and "jud"—prompts that would trigger mentions of such terms as "courts," "court," "Supreme Court," "judiciary," and "judges." Complementing this search technique, we also examined "policy" and "news" portions of the websites which included issue statements and press releases.[66] When using press releases on member websites, we searched for references to courts and judges for a year prior to the date of our visiting of the website.[67]

After following these search parameters, we collected and tallied the number of positive and negative comments and recorded the nature and sources for these statements. We identified "positive" and "negative" following a list of evaluative terms (such as "oppose," "disappointed," and "disagree" for negative evaluations and "proud," "pleased" or "victory" for positive assessments). Both authors served as data coders and we cross-checked a number of our results to promote inter-coder consistency.

Overall, for our study, we included references to both state and federal courts, to individual decisions, to lines of cases, to debates about judicial reform, and to comments about individual judges. We excluded references to linked articles, op-eds, interviews, and other media commentary and stories in which the individual member of Congress was identified but he or she was not the actual author of a particular statement or reference to courts, judges, or the judiciary. If a member repeatedly praised or criticized

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[64] We did not visit websites for the six non-voting congressional delegates in the 111th Congress, an oversight we addressed in our later 112th data sets.

[65] Fewer than 20 lawmakers did not have an internal search engine on their website.

[66] Most members have a section of their websites, linked on their homepage, which identifies their stances on substantive issue areas or legislation. In addition almost every member has a "press" or "news" section that provides press releases and other media statements about the member's position on different issues or their legislative behavior.

[67] Again, as noted, in our second search involving the 112th Congress, we only looked at the period from June 1, 2012 through July 2012.

a particular decision or judge in different contexts, each distinct mention was counted as a respective criticism or praise unless these comments occurred within the same page, web entry, or press release.

C. *Results: Congressional Websites Before* NFIB v. Sebelius

We note first that discussions of the judiciary on member websites are now fairly common and, apparently, growing in frequency. Thus, in the 111th Congress, 42% of the House websites had some reference to the judiciary or court decisions, a figure that grows to 64% two years later (during the winter of the 112th Congress) before surging to a striking 81% in the immediate aftermath of the Supreme Court's 2011 term.[68] For both Congresses, Republicans made more overall comments (positive and negative) than Democrats. Thus, in the winter of 2012, Republicans in the 112th Congress offered 58% of all website comments on the courts; roughly five months later, just as the Supreme Court handed down a number of major decisions, the balance is more even, with Republicans representing only 53% of the total commentary on courts. Both figures contrast with the 111th Congress, where Republicans contributed 62% of all comments on the courts. While lawmakers in the past two Congresses surely did not reference and discuss courts as frequently as major domestic policy concerns such as, say, the economy and "jobs creation," the judiciary has hardly been a fringe issue over the past few years.

Table 1 offers a brief look at the descriptive statistics related to a basic comparison of the two Congresses.[69] The table provides both the overall and average number of positive and negative comments made about courts and judicial rulings for all members of Congress we surveyed—with the table further breaking down these figures for several important subgroups. Thus, the second column in Table 1 indicates 489 as the total number of positive comments made by all members of the 112th Congress, with 1.10 representing the mean number of positive comments made by this group. In other words, after taking all of the 440 House websites we examined in January and February of 2012 and dividing by the total number of positive comments identified, we find an average of slightly over one positive comment per lawmaker. In contrast, when looking at the average number of positive comments made by House leaders, we see (at the bottom of the same column of Table 1) a figure of 2.2—meaning that this small but important subset of the House was saying favorable things about the judiciary at double the rate of the overall "rank and file" membership. These

[68] In the 112th Congress (examined during the winter of 2012) 35% of all member websites examined did not post anything about courts one way or the other.

[69] For the moment, and in order to get a more "true" comparison of the two Congresses during "normal" political periods, we separate out our results from June and July 2012 when member commentary was so heavily focused on the important decisions handed down by the Supreme Court of the United States at the end of its 2011 term.

"average" figures provide at least a shorthand for gauging federal lawmakers' reactions to the judiciary and court decisions in recent Congresses.

Several aspects of Table 1 stand out. First, we note that for these two recent Congresses, Republican lawmakers offered substantially *more* positive comments about courts and judges than Democratic lawmakers.[70] Moreover, while Republican lawmakers in the earlier Congress also offered more negative comments than their partisan opponents, by 2012 that pattern has reversed. In the 112th Congress, House Republicans made almost twice as many positive comments about courts as Democrats—while also making fewer than three-quarters as many negative comments as their colleagues on the other side of the ideological aisle. Based strictly on this admittedly incomplete data, one might conclude that today's champions of courts and court decisions in the House of Representatives are as likely to be Republicans as Democrats, at least in the context of an important, public forum for communicating with constituents (member websites).

Table 1: Summary Descriptive Statistics: Rank and File House Member (111th-112th Congresses) Comments on the Judiciary and Judges*

Category	Positive comment average/member		Negative comment average/member	
	111th	112th*	111th	112th
House: Rank and File Membership** n=436/440***	.42 n=183	1.10 n=489	.50 n=220	.77 n=342
House Democrats n=258/198	.33 n=61	.86 n=171	.36 n=92	.91 n=181
House Republicans n=178/242	.69 n=122	1.32 n=320	.72 n=128	.67 n=161
House Leadership: Democrats n=5/4	.8 n=4	1.5 n=6	.8 n=4	.75 n=3
House Leadership: Republicans n=4/5	1.5 n=6	2.2 n=11	1.0 n=4	1.2 n=6

*Data for the 112th Congress in this Table are derived from member websites published in January and February of 2012.
**For the 112th Congress, total includes delegates without full floor voting power
***The two figures separated by a slash represent numbers for the 111th and112th Congresses respectively

In Table 2, we see a further breakdown of lawmakers' website commentary for the 112th Congress, at least before the dramatic Supreme Court

[70] As we will discuss below, this Republican support for courts looks a bit different when we examine lawmakers' websites following the health care decision and the Arizona immigration case. That said, however, we are not convinced that, on its own, this short-term reaction is indicative of the "true" sentiments of members of Congress towards the judiciary.

rulings of the summer of 2012. House Judiciary Committee Republicans and Tea Party Caucus members stand out as the two groups *most* inclined to weigh in with supportive statements towards courts in this period. At the same time, Judiciary Committee members of both parties were most likely to assess courts and court decisions adversely as well.

Table 2: Summary Descriptive Statistics: House Member (112th Congress) Comments on the Judiciary and Judges

Category	Positive comment average/member	Negative comment average/member
House: Rank and File Membership* n=440 *includes delegates	1.10 n=489	.77 n=342
House Democrats n=198	.86 n=171	.91 n=181
House Republicans n=242	1.32 n=320	.67 n=161
Judicial Committee membership n=39	2.15 n=84	1.79 n=70
Judiciary Democrats n=16	1.25	1.43
Judiciary Republicans n=23	2.7	2.04
Tea Party Caucus membership n=60	1.92 n=115	1.08 n=65
Data in this Table are derived from member websites published in January and February of 2012.		

With respect to substantive emphases, the websites we examined tended to center on specific, salient decisions, with the odd reference to state or more obscure court decisions. For Republicans, the focus of such commentary was overwhelmingly on the challenges to the federal health care law (including critiques of judges supporting the legislation, praise for those invalidating or setting aside aspects of the bill, and support for the Supreme Court for granting certiorari in the case). As we discuss in further detail later in this article, website commentary at the end of the Supreme Court's 2011 term was largely oriented around the *NFIB v. Sebelius* decision. A number of Republican websites also mentioned older civil liberties and government power court decisions such as *Roe v. Wade, Kelo v. City of New London, D.C. v. Heller,* and *McDonald v. Chicago,* and included references to state gay rights cases (generally related to same sex marriage). These cases, with the exception of the *Heller* and *McDonald* Second

Amendment decisions, reflected a more traditional view of the (generally hostile) relationship between Republicans and court decisions.

On the other hand, Democrats in the two Congresses we surveyed tended to train their substantive ire on the *Citizens United v. FEC* decision (allowing unlimited "independent" campaign expenditures by labor unions and corporations) as well as lower court health care decisions (praising rulings upholding the law, critiquing judges setting aside the law, and, interestingly, joining their Republican colleagues in supporting the Supreme Court for agreeing to hear challenges to PPACA). Other Democratic websites praised court decisions that gave the federal Environmental Protection Agency (EPA) greater authority, and those that allowed for expanded stem cell research funding. While Republican members were uniform in their disapproval of "Obamacare" (PPACA) and court rulings supporting the law, some Democrats broke with the rest of their party and also supported legal challenges to the health care legislation.[71]

These initial results confirm some of our hypotheses and cast others into doubt. Our assumption that declining public support for Congress might translate into greater deference from lawmakers is not generally substantiated. Lawmakers made *more* negative comments towards courts in 2012 than 2010, and even the 2010 results do not paint a picture of a legislature especially reticent to engage the judiciary. Our more recent data, showing that more than four out of five members of Congress commented on judicial issues at the end of the Supreme Court's 2011 term further corroborates this picture of active congressional engagement with judicial politics—even when facing low levels of popular support. While it is true that Republicans (at least before the *Sebelius* decision) were more forthcoming with praise for courts in 2012 (when Congress's dim public approval sank even lower), it seems strained to attribute this behavior to some kind of institutional fawning, especially given the abundance of critiques from both parties in Congress.

One obvious explanation for these observed developments is that members of Congress don't tend to think about (or act on) public opinion as it relates to their institution as a whole—they are, understandably, preoccupied instead with more local, and immediate constituent opinion related directly to their reelection fortunes.[72] Stated somewhat differently, at least for individual-level behavior, Congress's interbranch public relations "problem" seems to matter very little.[73]

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[71] Some of these opponents to the PPACA bill were so-called "Blue Dog" Democrats. *See* Barbara Barett, *Can Blue Dog Democrats survive the 112th Congress?* MCCLATCHYDC.COM, January 2, 2011 (discussing Blue Dogs and their opposition to the health care law).

[72] MAYHEW, *supra* note 62.

[73] As Table 1 suggests, party leaders (for both parties) seem to be more likely to praise courts, especially in the 112th Congress than their caucus party colleagues. Conceivably, this could reflect a strategy of institutional diplomacy that captures Congress's low public approval.

We find much greater support for our partisan instability thesis—our speculation that recent Congresses have seen some breakdown in longstanding relationships between party label and attitudes towards courts. As predicted, we see a greater diversity of praise and blame between the two parties in recent Congresses. As noted, if anything, by the winter of 2012, the Republican Party was more closely associated with defending judicial rulings, judges, and judicial power than Democrats.

Furthermore, our supposition about party leaders—that they would be emblematic of their parties' new and perhaps unsettled orientation towards courts, was largely corroborated. In the 111th Congress, Democratic leaders were much more likely to both praise and criticize courts and judges than Democrats generally—and Republican leaders reflected the same dynamic. Somewhat interestingly, by the 112th Congress, just two years later, Democratic leaders show slightly less inclination to criticize the courts than their "rank and file" colleagues. For the most part, House leaders reflected and perhaps exaggerated the sentiments of their respective parties.

In addition to these points, we predicted that lawmakers over the past two Congresses would show some movement away from institutional critiques (and praise) of courts to more individual case and personnel based commentary. As noted, our website analysis is consistent with this view. Member commentary on the courts is dominated by critiques and praise of particular decisions such as *Roe* and *Citizens United*. We did note several Republicans who invoked "judicial activism" as a general institutional failing, and a handful of Democrats decried the general (deleterious) influence of politics on court rulings.

As part of our hypothesized "Tea Party effect," we contended that the 111th and 112th Congresses would be more likely to engage courts (positively and negatively) on government power issues as opposed to the civil liberties, civil rights, and even federalism issues that have been central to at least the Supreme Court's docket in recent decades.[74] As already suggested, the most discussed judicial issue in the 112th Congress was the debate over health care, especially for Republicans. As Table 3 reveals, health care clearly was an important driver of many legislators' comments about courts in websites surveyed in the winter of 2012. Indeed, of all Republicans' positive website commentary about courts and judges, more than two out of five were directed at the health care debate—typically praising lower court decisions invalidating portions of the PPACA or the Supreme Court for agreeing to hear the challenges to the law. If one removes Republican "health care" commentary on judges and courts from the 112th Congress, Republicans suddenly shift from offering more praise than critique (320 positive comments and 161 negative comments) to the reverse (138 positive and 152 negative).

[74] LAWRENCE BAUM, THE SUPREME COURT (10th ed. 2009).

Table 3: Summary Descriptive Statistics: House Member (112th Congress), Pre-*Sebelius* Comments on Health Care and Other Areas (Feb.-Mar. 2012)

Category	Positive comment average/member			Negative comment average/member		
	Overall	Health Care	Non-health	Overall	Health Care	Non-health
House: Rank and File Membership* n=440	.10 n=489	.47 n=201	.67 n=290	.77 n=342	.07 n=30	.71 n=312
House Democrats n=198	.86 n=171	.10 n=19	.77 n=152	.91 n=181	.11 n=21	.81 n=160
House Republicans n=242	. .32 n=320	. .75 n=182	. .57 n=138	. .67 n=161	. .04 n=9	. .63 n=161
House Tea Party Caucus n=60	1 .92 n=115	1 .05 n=63	1 .87 n=52	1 .08 n=65	. .05 n=3	. .03 n=62
*For the 112th Congress, total includes delegates without full floor voting power						

For Democrats, on the other hand, the 2012 commentary on the judiciary remains slightly more negative than positive—whether health care is included or not. Again, this may point both to Democratic reticence about contemporary courts (an uncertainty still in place after the PPACA decision), as well as Democratic lawmakers' continuing (liberal) orientation to traditional civil liberties and rights issues—subjects on which the Court is no longer a steadfast ally.[75]

We also note that our speculation about the role of the House Judiciary Committee seems to have been largely supported by our member website data. HJC members were both more likely to criticize and support court decisions, personnel, and the judiciary as a whole compared with rank and file House membership, reflecting the greater importance of courts for these individuals.

D. RESULTS: CONGRESSIONAL WEBSITES FOLLOWING NFIB V. SEBELIUS *AND THE END OF THE 2011 TERM*

As already indicated, much commentary in the 112th Congress over the winter of 2012 was preoccupied with the question of how the judiciary would (and should) resolve various legal challenges to the PPACA—with many Democrats as well as Republicans projecting their hopes and fears

[75] *See* BAILEY & MALTZMAN, *supra* note 1, at 10.

about the Supreme Court's pending decision. In order to refine our understanding of legislative attitudes towards courts, and to see whether a high-profile, controversial decision would alter the previously expressed viewpoints of these lawmakers, we followed up on our "snapshot" of the early 2012 Congress with a second look from June 1 through July 31, 2012—a latter period covering a number of weeks in which the Court issued decisions on major decisions. Most notably on June 28, 2012, the Court issued *NFIB v. Sebelius*, upholding the PPACA under Congress's taxing power, while denying its authorization under the Commerce Clause, and limiting the law's tools for expanding Medicaid coverage in the states.[76] Three days earlier, the Court had also handed down *Arizona v. U.S.,* in which it struck down three provisions of Arizona's Senate Bill 1070, a law that defined new crimes (and gave state law enforcement new authority) with respect to illegal immigrants. At the same time, the *Arizona* decision left (at least temporarily) intact the law's so-called "papers please" provision which required police to determine the immigration status of anyone arrested or stopped if law enforcement officials had reasonable suspicion to believe detainees' residency status was illegal.[77]

In examining lawmaker commentary on these, and other cases handed down by the Supreme Court in 2012, our general methodology and coding followed our earlier efforts. At a surface level, our results, especially with respect to the health care decision, suggest Democratic satisfaction and Republican disappointment with some of the most important cases handed down during the 2011 term. As Table 4 depicts, of the 247 positive comments on courts and the judiciary advanced by lawmakers at the end of the Supreme Court term, 207 (about 84%) came from Democrats. Conversely, Republicans made 96% of the 292 negative comments during this span from June to July of 2012. Not surprisingly, the *Sebelius* health care decision dominated lawmakers' remarks; of all comments about the judiciary during this period, 81% related to the Court's decision to uphold PPACA under the congressional taxing power, One might reasonably wonder, therefore, whether the Court's high-profile decisions in 2012 weakened some of our earlier conclusions, including our speculation that recent Congresses may be experiencing some disequilibrium in their partisan attitudes towards courts—that is, some destabilization in the historic patterns of Democratic support (and Republican skepticism) towards the judiciary.

[76] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).
[77] *See* Arizona v. United States, 132 S.Ct. 2492 (2012).

Table 4: Summary Descriptive Statistics: House Member (112th Congress), Post-*Sebelius* Comments on Health Care and Other Areas (June-July 2012)

Category	Positive comment average/member				Negative comment average/member			
	Overall Positive	Health Care/ *Sebelius*	*Arizona v. U.S.***	Other	Overall Negative	Health Care/ *Sebelius*	*Arizona v. U.S.***	Other
House: Rank and File Membership* n=441	.56 n=247	.43 n=190	.06 n=25	.07 n=31	.66 n=292	.56 n=246	.02 n=11	.08 n=36
House Democrats n=200	1.04 n=207	.86 n=171	.05 n=10	.13 n=26	.23 n=46	.06 n=11	.03 n=5	.15 n=30
House Republicans n=241	.17 n=40	.08 n=19	.06 n=15	.02 n=5	1.02 n=246	.98 n=235	.02 n=6	.02 n=6
House Tea Party Caucus n=60	.18 n=11	.08 n=5	.08 n=5	0 n=0	1.15 n=69	1.13 n=68	.02 n=1	0 n=0

*For the 112th Congress, total includes delegates without full floor voting power

**Figure does not include 34 "mixed" comments on the Arizona immigration decisions

On closer inspection, however, the post-*Sebelius* results may be less telling than first meets the eye, and can even be reasonably construed as the proverbial exception that proves the rule. To begin with, if one removes health care and reaction to the *Sebelius* case as a stimulus for congressional comments (admittedly a big "if" given the prominence of "Obamacare" related discussions on websites), we find a much more mixed and ambiguous record of reactions, more in accord with our prior observations. Thus, on all court-related remarks that did not have to do with health care or the Arizona immigration decision, Democrats offered more negative remarks (30) than positive remarks (26). In a similar vein, on the *Arizona* decision, we found more supportive comments coming from Republicans (15) than Democrats (10), with an additional 26 Democrats and 8 Republicans expressing "mixed" views on the decision—viz., expressing both praise and concern for the immigration ruling. In other words, setting aside reaction to the health care decision, by the end of the Supreme Court's 2012 term we have again a picture of partisan ambiguity and considerable interparty

uncertainty with respect to the judiciary. If anything, one can make a plausible case that Democrats, in this environment, were more skeptical about judicial power, with a good number of liberal lawmakers decrying the results in *Arizona* and otherwise taking issue with Court decisions such as the *Bullock* decision, setting aside the state of Montana's efforts to limit corporate campaign expenditures.[78]

Perhaps even more revealing were the specific commentaries about the PPACA ruling. The aggregate numbers—indicating widespread G.O.P. disapproval of the *Sebelius* decision and Democratic lauding of the same—are a bit misleading. A finer grained analysis of lawmakers' commentary points to a wider range of views, and greater continuum of reactions with respect to the ruling on "Obamacare." A sizable minority of Republicans offered broad condemnations of the Court's health care decision, decrying the "precedent" set by the Court and the impact of the decision on American citizens.[79] But many other critics were more tempered, expressing their "disappointment" with the ruling and indicating that it made them "unhappy," but then quickly passing on to focus on the law as "bad" policy, and training blame on President Obama rather than the Court. Take, for example, the remarks of Representative Steve Stivers (a Republican from Ohio) who made the following statement in a press release issued on the date of the *Sebelius* decision:

> The U.S. Supreme Court's decision to uphold the President's health care law is a disappointment. The health care law is a huge burden that has hurt our economy by driving up costs and making it less likely that businesses will hire new employees, as well as placing a crushing financial burden onto future generations. We need to fully repeal this law and move forward with a deliberate, thoughtful approach that reduces the cost of health care across the board.[80]

Still other Republicans, who expressed disapproval with *NFIB v. Sebelius,* were even more cautious, at times going out of their way to express support for the Court even while expressing disappointment with the ruling.

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[78] Am. Tradition P'ship, Inc. v. Bullock, 132 S.Ct. 2490 (2012).

[79] *See* Press Release, Congressman Walter Jones, *Jones Calls Supreme Court's Obamacare Decision a Sad Day for America* (June 28, 2012), http://jones.house.gov/press-release/jones-calls-supreme-court's-obamacare-decision-sad-day-america. For example, the website of Congressman Walter Jones (North Carolina's Third Congressional District) who identified the *Sebelius* decision as a ruling that "decreed that the federal government can use the power of taxation to force Americans to do whatever it wants…This should be a wake-up call for Americans. Their freedoms are rapidly being stripped away by an increasingly socialist government. We are headed down a dangerous path, and the only hope for reversing this course is through the ballot box in November."

[80] *See also* Press Release, Congresswoman Cynthia Lummis, *Obamacare Now Largest Tax Increase in U.S. History*, (June 28, 2012), http://lummis.house.gov/news/documentsingle.aspx?DocumentID=301569. Rep. Cynthia Lummis opposed the "unfortunate court decision" but also identified it as "far from the final word on Obamacare.").

Rep. Pete Olson (a Republican from the 22nd district of Texas) offered the following mixed judgment in a press release issued on his website:

> I am carefully reviewing this decision in its entirety, and I encourage all to do so as well. The Court seems to have rightly ruled that the individual mandate is not constitutional under the Commerce Clause of the Constitution. The Court confirmed what Republicans have said from the beginning, that this is a tax…I look forward to voting—once again—in the House of Representatives to repeal it, and ObamaCare in its entirety…The Supreme Court, which has the responsibility of interpreting the law, found this overreach acceptable as a tax. While I do not agree, I respect its authority to make this interpretation.

Indeed, over a dozen Republican lawmakers expressed their simultaneous unhappiness with the ruling, while also indicating their "respect" and support for the Court and its role in addressing constitutional disputes. The somewhat mixed and adumbrated statements of many G.O.P. lawmakers is also reflected in their House leadership; remarkably, Speaker of the House John Boehner made no website comments on the PPACA, and while Majority Leader Eric Cantor called the Court decision "a crushing blow to patients," Republican Conference Chairman Jeb Hensarling stated that while he was "extremely disappointed" with the *Sebelius* ruling, "I respect the Court's ruling."

Members of the congressional Tea Party Caucus were, not surprisingly, much more consistently and strongly negative in their assessments of the Court's 2012 health care decision. Almost every member of the Caucus made a negative remark about the decision, sometimes in stark and sweeping terms.

On the other side of the aisle, qualitative reaction to the *Sebelius* decision seems to be more uniform—most Democratic lawmakers stated how "pleased" they were with the decision and many "applauded" the Court's upholding of the health insurance expansion, calling it a "victory." But again, this widespread praise should be placed in the wider context of considerable Democratic and liberal displeasure with other rulings—with a number of lawmakers stating their opposition to the Court's *Arizona* decision (citing the "devastating consequences" of the "show me your papers" provision) and chiding the Court for upholding *Citizens United* in the Montana campaign finance decision.

V. Discussion and Future Research: Funhouse Mirrors or Canaries in the Coal mine?

Our conclusions, based on website commentary from two recent Congresses, are necessarily preliminary and contingent. We do not know if we have identified somewhat anomalous phenomena, perhaps registering activity in Congress that is limited to a historical moment (bounded by the recent

power of the Tea Party movement[81] or the fervor over the health care debate).

At the same time, we are fairly confident that, at least for the short term, something notable has changed in how many American legislators are talking about courts. As our results indicate, more and more federal lawmakers are referencing courts on their websites—with as many as four out of five members of the House of Representatives weighing in, either positively or negatively, during a recent Congress. Moreover, in contrast with what has been the prevailing general image over at least the past few decades (a picture of Republican skepticism towards courts and, generally speaking, Democratic defense of judicial prerogatives), our more recent snapshot suggests a more complex and evolving milieu. Over the past two Congresses, Republicans and conservatives have often been outspoken defenders of state and federal court decisions, while Democrats and liberals have voiced skepticism and dissatisfaction.

Again, these and our other observations invite inquiry into whether what we have observed represent short-term developments with perhaps little enduring significance or point instead to a deeper transition. Stated somewhat differently, are the 111th and 112th Congresses more like funhouse mirrors, temporarily distorting our perceptions of court-Congress relations, or canaries in the coal mine, leading indicators of forthcoming, vital change?

One might believe that the gravitational force exerted by the health care litigation supports the "anomaly" thesis. This is likely to be especially true for the 112th Congress, since the Supreme Court's granting of certiorari in *NFIB v. Sebelius* in the late fall of 2011 dramatically raised attention on the issue. Now that the Supreme Court of the United States has upheld the PPACA, are we likely to experience a Republican "backlash"[82] and the undoing of the previously observed conservative "good will" towards the judiciary? Will *Sebelius* uncork a bottle of venom and return us to the *status quo ante* (or perhaps a state of even greater Republican hostility)? Stated slightly differently, based on the array of findings presented in this article, one might conclude that the behavior of recent Congresses has been a relatively superficial posturing reflecting lawmakers' hopes (and fears) about how the judiciary will resolve the status of the Obama administration's signature legislation, rather than representing a fundamental statement about (and realignment of) lawmakers' attitudes towards courts and judicial power.

While we concede there is some power to this skeptical view—the Obama health care legislation and its status vis-à-vis the U.S. courts was clearly an important, if not definitive issue for many lawmakers—we believe this perspective should not be extended too far. To begin with, conversation about courts was fairly robust in the 111th Congress when the legal fate of

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[81] *But cf.* Jennifer Steinhauer, *Down-Ballot Races Provide Much of Season's Election Theater*, N.Y. TIMES, Aug. 9, 2012, at A16 (discussing the "continued influence" of the Tea Party on congressional elections and candidates).

[82] *See* Jack Citrin et al., PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 8 (2008).

the PPACA was still emerging as an issue. Moreover, even in the 112th, Republicans were clearly interested in both praising and critiquing the judiciary on other issues besides health care, and Democrats seemed to have little appetite for critiquing court decisions inhospitable to the PPACA. In addition, as noted in our previous discussion, the seemingly dramatic and cohesive Republican opposition to *Sebelius* may be less than meets the eye when one appreciates the considerable range and nuance of actual lawmaker commentary about the decision and the Court's role.

Finally, we think many previous transformations in Congress's attitudes towards courts probably *are* facilitated by important, high-profile cases. As many commentators noted, the last time the Supreme Court conducted oral argument as lengthy as that experienced during the PPACA debate was during oral argument for *Miranda v. Arizona*, a case that attracted a great deal of public and congressional commentary, and criticism. Observing that many (Republican) members of Congress linked their praise of courts with their attitudes towards health care could still signal a broader shift in legislative-judicial relations. And despite the instant sense that *NFIB v. Sebelius* was a clear policy victory for Democrats and the Obama administration, the ruling's rejection of the Commerce Clause as a source of authority and its limitations on Congress's spending power are both factors that cast the case's longer term legacy in some doubt. Even after the decision, partisans of a variety of stripes have continued reasons for experiencing anxiety as well as hope when thinking about the Court as an ideological and policy partner.

Stated somewhat differently, we don't know from our data whether we are at a seminal moment for redefining the interplay of party and congressional attitudes towards courts. The results from 2010 and 2012 are teasingly suggestive, but they could, ultimately, be nothing more. Still, given both the evidence at hand and the general rightward shift of courts since the 1980s[83] (a shift that would seem to weaken historical perceptions of the courts as trenchant Democratic allies), it is reasonable to pursue the question further: *Are* we in the first stages of a new political environment in which the judiciary's support by key Democratic allies may be coming to an end, and in which we will find a new surge of Republican support?

The banal but honest response is that more research is needed to answer this question. One set of queries future scholars might explore involves drilling down further on what sorts of lawmakers are more and less inclined to praise and critique courts in the twenty-first century. Is ideology a more helpful correlate for understanding court commentary than party? How about the partisanship (or competitiveness) in a member's district? Are lawmakers who receive more campaign funding from (and perhaps pay more attention to) interest groups motivated by court issues more likely to use

[83] BAILEY & MALTZMAN, *supra* note 1.

website commentary about courts as strategic fodder?[84] These questions could be answered, in part, with complementary qualitative research as well as district level analyses of the relationships between website comments and a range of potentially revealing political and demographic information.

Our study treats U.S. courts as largely fungible. In other words, we aggregate a lawmakers' criticism of *Roe v. Wade* with another's claim that state judges are being corrupted by today's judicial elections process. It certainly bears investigation whether this conflation is too crude. Do (certain?) American lawmakers' regularly distinguish (and make different evaluations of) state and federal decisions and judges? Given the recent history of court critiques—in which members of Congress have, for example, simultaneously singled out state court decisions for rebuke while calling for regulations or curbs on *federal* judges—we think it is plausible that courts *are* unrealistically and crudely amalgamated in many legislators' eyes.[85] But the case needs to be made and demonstrated more systematically. Further scrutiny of member websites could help in this regard.

As indicated previously, commentary on the websites of members of Congress is not the only mechanism through which lawmakers register their (dis)pleasure with the judicial branch. Scholars[86] have noted myriad ways in which lawmakers communicate important information to courts, the public, the executive branch, and others. Do published website remarks differ in important respects from these other instruments? Given the personal, informal, and "unofficial" nature of these sites—as well as the ease with which they are modified—it seems reasonable to posit that they carry their own special dynamics; websites may, for example, be more responsive reflections of members' views than, say, court-curbing bills, "Dear colleague" letters, or other more formal means of communication. But, again, this subject requires additional work.

VI. CONCLUSION

Broadly speaking, we think the project pursued in this article, and the broader research agenda we have just sketched, can contribute importantly to three major fields beyond our immediate aspirations and focus. First, we note that a copious literature has emerged exploring the interaction between elected officials (including members of Congress) and the courts as a way of comprehending both how law and policy are fashioned and the overall determinants of judicial and legislative behavior.[87] We believe the

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[84] As a related inquiry, future work might profitably investigate the interaction between lawmaker websites and prominent interest groups both supportive of and opposed to judicial powers, personnel, and decisions.

[85] PEABODY, *supra* note 3.

[86] *See generally,* Clark, *supra* note 30; FISHER, *supra* note 26; GEYH *supra* note 1, MILLER *supra* note 1; PICKERILL *supra* note 1.

[87] *See generally*, Robert Dahl, *Decisionmaking in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. LAW 279 (1957); DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); FRIEDMAN, *supra* note 38; KEITH WHITTINGTON, POLITICAL

preliminary research presented here can help leverage a relatively neglected aspect of this important discussion: how are courts, and even individual judges, "branded" and "sold" as political commodities, especially in the context of new media?

Second, our study has a number of implications for scholars engaging various questions about judicial independence, and courts' capacity to exercise their historic powers (and see their judgments enforced), especially in inhospitable political climates. Commenting upon recent critiques of courts, both scholars and political figures have concluded that a central purpose of these attacks is to delegitimize courts and "reflect the view of judges as policy agents."[88] Our study suggests that while some of this strategic undermining is still in play, for a group of lawmakers it has become (temporarily at least) expedient to refrain from eliding judicial authority and credentials—and in some cases legislators are (perhaps unexpectedly) bolstering court powers and autonomy. In general then, this article is pertinent to scholars interested in questions of court legitimacy and public perceptions of the Supreme Court in particular, as well as the circumstances under which ordinary citizens, including those opposed to important court decisions, will still abide by the judiciary's rulings and support its institutional prerogatives.[89]

Third, and perhaps least obvious, we think this project can contribute to the politics of judicial reform. Over the past few decades, a number of pundits, academicians, and political figures (often of diverse ideological backgrounds) have proposed various mechanisms and ideas for altering (and supposedly improving) American courts.[90] Our study does not address

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FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 1991); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

[88] MILLER, *supra* note 1.

[89] *See* Jeffrey Rosen, *The Supreme Court Has a Legitimacy Crisis, but Not for the Reason You Think,* THE NEW REPUBLIC, (June 11, 2012), http://www.newrepublic.com/article/politics/103987/the-supreme-court-has-legitimacy-crisis-not-the-reason-you-think# (discussing the criteria through which Americans evaluate the Court).

[90] SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)123-140 (calling for an end to "life tenure" for Supreme Court justices) (2006); LARRY SABATO, A MORE PERFECT CONSTITUTION: WHY THE CONSTITUTION MUST BE REVISED: IDEAS TO INSPIRE A NEW GENERATION, 23 PROPOSALS TO REVITALIZE THE U.S. CONSTITUTION, 108-120 (2008) (making the case for five separate reforms of the judiciary);
Richard Brust, *Supreme Court 2.0: From Term Limits to Circuit Riding to Cameras in the Courtroom, Rethinking, Reforming and Re-Engineering the Top Bench,* ABA JOURNAL (Oct. 1, 2008) http://www.abajournal.com/magazine/article/supreme_court_20/ (providing an overview of recent judicial reform proposals); Tony Mauro, *Profs Pitch Plan for Limits on Supreme Court Service*, LEGAL TIMES, Jan. 3, 2005, at 1 (outlining a proposal to limit life tenure of Supreme Court justices);

the substance of any of these proposals. But it does offer some promise for better understanding whether we are at a moment when longstanding conservative critics of courts might ally with increasingly dubious liberals to enact "hedge your bets" controls over an American judicial system that suddenly appears—to both parties and a range of other politically invested groups—to be in play as a policy force and ideological ally.

Bruce Peabody, *'Supreme Court TV': Televising the Least Accountable Branch?* 33 J. LEG. 144 (2007) (discussing the constitutionality of a proposal to require the Supreme Court to televise its open sessions).

TEXTUALISMS

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ABSTRACT

This article concerns "Textualism," or rather, "Textualisms," and interpretation of the United States Constitution. Uncountable numbers of scholars and commentators use the term "textualism" as a singular noun, implicitly or explicitly, suggesting that one "textualism" exists. Sometimes commentators support "textualism" as the one true interpretational methodology. Those who support "textualism" argue that interpretation of the United States Constitution should rely on "textualism" because of that interpretational methodology's virtue of limiting the discretion of the interpreter. "Textualism," so supporters argue, keeps judges and justices from each creating his or her own version of the Constitution. This article seeks to demonstrate the existence of a multitude of different "textualisms." The article notes the dozens of different types of "textualism," each version of which can be chosen by any judge or justice as a methodology for interpreting the Constitution. If different types of "textualism" do indeed exist, then (any particular version of) "textualism" becomes nothing more than a personal choice for a constitutional interpreter. "Textualism," so the article urges, becomes "texualisms," and loses all power to constrain the personal choice of justices as to the meaning of the Constitution.

CONTENTS

I. INTRODUCTION TO THE FEARS BEHIND AND THE PROMISE OF TEXTUALISM

A. CONSTITUTIONAL FEARS

Fearful of validating creation of a "personalized constitution"[1] a wide variety of commentators have demanded or perhaps hoped, "that the Constitution cannot be said to support innumerable, unlimited readings … that the Constitution … cannot fairly be read to mean all things to all people."[2] Even Akhil Reed Amar, discussing his version of an unwritten Constitution, warns of the danger of the "unwritten Constitution [ ] swallow[ing]

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[1] Stephen M. Durden, *Animal Farm Jurisprudence: Hiding Personal Predilections behind the Plain Language of the Takings Clause*, 25 PACE ENTVL. L. REV. 355, 390 (2008). *See also* Stephen M. Durden, *Plain Language Textualism: Some Personal Predilections Are More Equal Than Others*, 26 QUINNIPIAC L. REV. 337 (2008) ("Justice Baldwin would deem it inappropriate to personalize the Constitution"); Ray Forester, *Truth in Judging: Supreme Court Opinion as Legislative Drafting*, 38 VAND L. REV. 463, 474 (1985) ("[Justice White] would not pretend to decide [a] case by claiming to discover the answer in a personalized Constitution; …"); Thomas S. Schnook & Robert C. Welsh, *Reconciling the Constitutional Common Law*, 91 HARV. L. REV 1117, 1154 (1978) ("realism personalizes Constitution-related adjudication").

[2] Steven M. Cooper, *Judicial Creativity, Unenumerated Rights, and the Rule of Law* 1 TEX. WESLEYAN L. REV. 169, 170 (1994) (reviewing LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION (1991)).

up our written one and becom[ing] all things to all people."[3] Michael Klarman suggests, however, that the Constitution already "represents all things to all people,"[4] noting, for example, that "both the North and the South claimed the fundamental charter on their side during the Civil War."[5] Others have suggested that various provisions of the Constitution have become, or are at risk of becoming all things to all people. Luis Fuentes-Rohwer has made the claim about the Guarantee Clause,[6] while John P. Cole has said the same about The First Amendment.[7]

Amar gives his warning while suggesting that "a vast unwritten Constitution exists."[8] This existence of the unwritten constitution requires asking:

> [W]here and how should we start? When and why should we stop? What rules, if any should guide our reading of American Constitution? How can unwritten constitutionalism be squared with fidelity to the written text?[9]

Textualists answer this question for Amar simply: only textualism squares with fidelity to the text.[10] Textualism prevents the Constitution from becoming all things to all people, or at least textualists would so argue. [11]

B. TEXTUALISM'S (FALSE)[12] PROMISE

While Klarman may correctly claim that the Constitution already means all things to all people, textualists urge that the Constitution's meaning cannot be all things to all people, i.e., cannot consist of "private

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[3] Akhil Reed Amar, *America's Constitution, Written and Unwritten*, 57 SYRACUSE L. REV. 267, 269 (2007).
[4] Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 FORDHAM L. REV. 1739, 1747 (1997).
[5] *Id.*
[6] Luis Fuentes-Rohwer, *Emptiness of Majority Rule*, 1 MICH. J. RACE & L. 195, 248 (1996).
[7] John P. Cole, Jr., *Cable Television "Press" and the Protection of the First Amendment—A Not So "Vexing Question"*, 28 CAL. W. L. REV. 347, 385; *see also*, David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L. J. 2619, 2656-57 (quoting Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 468-70 (1991) (discussing the demand that Courts be all things to all people)).
[8] Amar, *America's Constitution, Written and Unwritten*, *supra* note 3.
[9] *Id*.
[10] *See* Durden, *Animal Farm Jurisprudence*, *supra* note 1, at 357.
[11] *See* Sheldon D. Pollack, *Constitutional Interpretation as Political Choice*, 48 U. PITT. L. REV. 989, 1018 (1987) "The historical irony of grafting a limited rights document [i.e., The Bill of Rights] onto an institutionalist blueprint for limited government has a Constitution which is potentially all things to all judicial ideologies."
[12] This Article seeks to demonstrate the falseness of textualism's promise. This section actually introduces the promise and says little about its falseness. So, in a real way, the Article misleads with this choice of title for this section.

assignments of meaning"[13] They seek to prevent justices from "adopt[ing] and assign[ing] their own private, subjective, idiosyncratic meanings to the words and phrases of the Constitution."[14] "Textualists … contend that textualism constrains judicial discretion."[15] According to David Aram Kaiser, Justice "Scalia's central theoretical claim is that textualism is the only method that constrains … illegitimate interpretation."[16] "There is," according to Michael Stokes Paulsen, "only one correct way to interpret the Constitution, and that is original public meaning textualism."[17] The purported legitimacy or personal desire for textualism stems from the goal of constraining judges in their interpretation of the Constitution. William Michael Treanor agrees that, "textualists contend that textualism constrains judicial discretion and thus is superior to other forms of constitutional interpretation."[18] Other textualists believe that the "chief purpose" of textualism is "to properly constrain a judge's constitutional interpretation."[19] Mark Tushnet notes that a textualist could argue or might believe that "rigorous textualism … works better than any other method to constrain

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[13] Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History,* 91 GEO. L.J. 1113, 1130 (2003).

[14] Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 881 (2009). In contrast to Paulsen's ideal, "liberals after the New Deal viewed textualism as 'idiosyncratic.'" *See* Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 58 n.188 (1994) citing to George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1316 (1990).

[15] William Michael Treanor, *Against Textualism*, 103 NW. U. L. REV. 983, 983 (2009). As stated by Daniel C. K. Chow textualists "seek to constrain, not eliminate judicial discretion" (Daniel C.K. Chow, *A Pragmatic Model of Law*, 67 WASH. L. REV. 755, 807 (1992)). *See also* Ilya Somin, *"Active Liberty" and Judicial Power: What Should Courts do to Promote Democracy?*, 100 NW. U. L. REV. 1827, 1859 (2006) ("Textualism … impose[s] tighter … constrains on judicial discretion than does Justice Breyer's consequentialism"); Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 10 n.24 (1998) ("The textualists would undoubtedly reply that by constraining judicial discretion, textualism's advantages over purposivism mirror the advantage of rules over standards.").

[16] David Aram Kaiser, *Entering onto the Path of Inference: Textualism and Contextualism in the Bruton Trilogy*, 44 U.S.F. L. REV. 95, 103 (2009).

[17] Michael Stokes Paulsen, *Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL'Y 991, 991 (2008); *but see*, Eduardo M. Peñalver, *Restoring the Right Constitution?*, 116 YALE L.J. 732, 761 (2007) (reviewing RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) ("[T]he Constitution's writtenness, … does not, by itself, compel us to accept original-meaning textualism as the only possible interpretive method")).

[18] William Michael Treanor, *Original Ideas on Originalism: Against Textualism* 103 NW. U. L. REV. 983, 983.

[19] Daniel S. Goldberg, I Do Not Think It Means What You Think It Means: How Kripke and Wittgenstein's Analysis of Rule Following Undermines Justice Scalia's Textualism and Originalism, 54 Clev. St. L. Rev. 273, 275 (2006).

judges."[20] Textualism constrains, so textualists believe, "judges' contemporary concerns and personal biases from injecting their judicial decision."[21] Frank C. Cross notes that textualists commonly claim that textualism "is necessary to restrain willful judicial decision-making based on personal preferences."[22] Michael Stokes Paulsen argues that textualism, at least his personal version of it,[23] "excludes subjective, idiosyncratic, personal interpretation."[24] Andrew B. Coan believes that "a textualist interpretation" will ameliorate or eliminate constitutional interpretation "driven … by the personal views of the justices."[25]

Vasan Kesavan and Michael Stokes Paulsen warn, however that invalid textualisms exist, as they argue that a "hermeneutic of textualism that permits individuals to assign their own private, potentially idiosyncratic meanings to the words and phrases of the Constitution" clashes "with the idea of the Constitution as binding law."[26] Paulsen, at least, solves this conundrum by declaring that "the text of the Constitution" … prescribe[s]" his personal idiosyncratic and preferred "methodology: original meaning textualism,[27] which he later describes as "original public meaning textualism."[28] Certainly, Paulsen's methodology provides interpretational certainty, at least certainty for Paulsen. Through a well-crafted, well-reasoned argument, Paulsen ordains "original meaning textualism … [as] the only legitimate method of constitutional interpretation."[29] One could certainly agree with Paulsen, as to the existence of the one true methodology; however, most likely do not. Paulsen's semi-personal conclusion, "semi-personal" because some do agree with Paulsen, provides certainty of correctness which only supports the notion that textualism is all things to all textualists[30]. Others have urged other versions of textualism. And no person to date appears to have argued for a different form of textualism and then concluded, "I had fun with this argument, but really, I don't buy it and would prefer that you agree with Paulsen's version of textualism."

Textualism has merit and yet no meaning. Each textualist uses assumptions, logic, and reasoning. Often the textualist provides sound argu-

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[20] Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1301 n.342 (1999).
[21] Stephen Reinhardt, *Life to Death: Our Constitution and How It Grows*, 44 U.C. DAVIS L. REV. 391, 394 (2010).
[22] Frank B. Cross, *Significant of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1974 (2007) (discussing textualism as a statutory interpretation methodology).
[23] *See* Stephen Durden, *Partial Textualism*, 41 U. MEM. L. REV. 1 (2010).
[24] Paulsen, *Does the Constitution, supra* note 14, at 882.
[25] Andrew B. Coan, *Text as Truce: A Peace Proposal for the Supreme Court's Costly War over the Eleventh Amendment*, 74 FORDHAM L. REV. 2511, 2512 (2006).
[26] Kesavan & Paulsen, *supra* note 13, at 1130.
[27] *Id.* at 861.
[28] *Id.* at 862.
[29] *Id*. at 863.
[30] Stephen Durden, *I Am Textualism*, 59 CLEV. ST. L. REV. 431, 433 (2011) ("I [Textualism] am all things to all my disciples.").

ment. This article does not seek to disprove or attack one or another version of textualism. Instead, this article makes a simple point: If writers have created dozens of versions of textualism, then textualism has no meaning other than the one chosen by each textualist.[31] The article identifies many versions of textualism, some of which conflict with each other in order to challenge the purported purpose of textualism, i.e., to cabin judicial discretion.

C. *Methodology for Analyzing Textualisms*

This article does not purport to rely on statistics, making no effort to demonstrate the popularity or value of one form of textualism as against the others, nor does the article seek to validate or invalidate any particular version of textualism. These arguments provide no facts relevant to this article. This article relies on proving two different facts: (1) that numerous types of textualism exist and (2) that different versions of textualism per se, i.e. by definition, take different approaches including relying on different methodologies of determining the meaning to the words and clauses of the Constitution. The proof of each fact relies on anecdotal evidence. In this case, anecdotal evidence sufficiently proves the facts necessary.

This anecdotal evidence, I suggest, falls into two categories. "Advocacy" anecdotal evidence includes statements from those who purport to be or purport to advocate for one form or another of textualism. "Descriptive" anecdotal evidence includes those who describe one form or another of textualism. No bright line exists between the two, and those who write about textualism do not always state with clarity or particularity whether they seek to advocate for a form of textualism or simply seek to describe it in one way or another. Certainly, advocacy would often include, if not necessarily include, description.

The article relies on "advocacy anecdotal evidence" because such evidence undeniably proves that at least one person advocates for using a particular version of textualism for which the textualist advocated, proving the fact essential to this article, the existence of the advocated-for textualism. This conclusion follows from the following. That, if Textualist A advocates for the use of Textualism A, then Textualism A exists. This conclusion follows from the assumption that belief by Textualist A in the existence of Textualism A sufficiently proves the existence of Textualism A. Put another way, if Textualist A is a justice on the Supreme Court and uses Textualism A, then necessarily Textualism A must exist. If Textualist A sufficiently describes Textualism A and then advocates for the use of Textualism A, then Textualism A necessarily exists as a choice Justice B could use to interpret the Constitution. Indeed, the very point of Textualist A's advocacy is to create Textualism A so that Justice B or any other justice might use Textualism A. Using painting as a metaphor, once Textualist A

[31] *Id.*

paints a picture of Textualism A, i.e., describes Textualism A, then Textualism A exists. Others may denigrate the quality of the painting, but no words can actually take away its existence. Consequently, this article takes the position that any advocacy anecdotal evidence of Textualism A simultaneously creates, and proves the existence of, Textualism A.

For similar reasons, this article relies on descriptive anecdotal evidence. As explained above, once Commentator C describes Textualism C, then Textualism C exists. Once described, Textualism C can be relied upon or can be used by any constitutional interpreter, therefore, Textualism C exists. This is not an ontological argument as to the actual existence of a supreme being, i.e. an idea or thought or description of a supreme being does not prove, or at least may not prove, that such a supreme being exists. If, for example, this Article describes an imagined purple-skinned, turquoise-haired human-like creature with power to create life, an artist might paint such a being and such painting would exist. Such painting would be a visual manifestation of proof of the existence of the idea of a purple-skinned, turquoise-haired being, but the painting provides no more proof of existence of the creature than the words describing the creature. The words describing, and the painting of, the creature prove the existence of the idea of the creature, but they do not prove the existence of the creature. Conversely, the description of Textualism C proves its existence, as much as advocacy of Textualism C. In either case, any interpreter of the Constitution may use Textualism C.

Some might challenge the validity of this article's method of proof, i.e., description of a textualist methodology proves its existence, on the ground that the article does not prove that anyone ever used one of the discussed versions of textualism. In other words, the argument would be that this article sets up various Straw Man Textualisms that no one uses. One response is, of course, the description of Straw Man Textualism sufficiently creates that version of Textualism. Second, this article does not attack the validity of any particular version of textualism.

Finally, this article will attempt to find multiple sources for any particular version of textualism. While the mere repetition of a Straw Man Textualism does not make it less a Straw Man, the article is based on the premise of good faith. A commentator might discuss a version of textualism advocated by another, or a commentator might discuss a Supreme Court opinion and conclude the Supreme Court used a version of textualism. In either case, the commentator may have misunderstood the textualism discussed. In either case the textualism exists. Moreover, misunderstanding a text seems hardly a fair complaint by a textualist, who on one level or another suggests that text provides answers. Alternatively, the commentator may have intentionally misrepresented the textualism discussed. While this seems highly unlikely, this article hopes to alleviate that concern by discussing a multitude of different versions of textualism and in each case seeks to provide multiple sources of proof of existence of each discussed version of textualism.

The approach outlined above, which approach presumes existence of a discussed version of textualism and relies on the words of others, pro-

vides the foundation for the first important point this article makes, i.e., that different versions of textualism exist. Second, this approach permits the article to rely on the words of others in determining the existence of the various versions of textualism. The reader could skip the discussion of various versions of textualism and accept the reality of different versions. Alternatively, the reader could skip the discussion because the reader does not believe the article has a sound approach to proving the existence of different versions of textualism. Either of the readers above might decide to read the discussion for the intellectual joy of reading about what others have said about textualism, even if all of what has been said is irrelevant to proof of, or unable to prove the existence of different versions of textualism.

D. THE TEXTUALIST DIFFICULTY[32]

Textualism has a storied tradition in the history of constitutional interpretation. At least as far back as 1833, Justice Story, in his Commentaries on The Constitution of the United States, wrote, " 'It is obvious, that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text.' "[33] During the nineteenth century the New York,[34] Texas,[35] and Illinois[36] courts resorted to a similar statement, also from Justice Story, "The people adopted the constitution according to the words of the text in their reasonable interpretation, not according to the private interpretation of any particular men."[37] This quote suggests a regularly discussed justification for choosing textualism, i.e., that the people adopted the words written[38] and indicates a commonly discussed value of textualism, that in Justice Story's words, textualism eliminates "private interpretation of a particular [person]," i.e., textualism eliminates personal predilections in constitutional interpretation.[39] The idea that the text, or fidelity to the text, eliminates

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[32] *See* Durden, *I Am Textualism*, *supra* note 30.
[33] Philip Bobbitt, *Constitutional Fate*, 58 TEXAS L. REV. 695, 707(1980) (quoting from JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §407, at 390 n. 1 (1833)).
[34] Purdy v. People, 4 Hill 384 (N.Y. 1842).
[35] Smith v. Brown, 3 Tex. 360 (1848).
[36] City of Beardstown v. City of Virginia, 76 Ill. 34 (1875).
[37] Story, *supra* note 33 at §392.
[38] *See, e.g.*, Richard B. Saphire, *Constitutional Predispositions*, 23 U. DAYTON L. REV. 277, 284-285 (1998) (quoting Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW at 133 (1997) ("The question whether life-tenured judges are free to revise statutes and constitutions adopted by the people and their representatives is not merely … a question of some "importance," but a question utterly central to the existence of democratic government.").
[39] *See, e.g.*, Durden, *I Am Textualism*, *supra* note 30; Stephen M. Durden, *Textualist Canons: Cabining Rules or Predilective Tools*, 33 CAMPBELL L. REV. 115 (2010); Durden, *Animal Farm Jurisprudence*, *supra* note 1; Durden, *Plain Language Textualism*, *supra* note 1; *see also* William Michael Treanor, *Taking Text Too Seriously: Modern Textual-*

from constitutional interpretation the personal[40] and the private[41] resonates within a discussion of Textualism.

Textualism, within constitutional interpretation dates back, to at least as far back as *Chisholm v. Georgia*,[42] wherein Justice Wilson relied on "the direct and explicit declaration of the Constitution."[43] A mere five years later, Justice Chase, in his opinion in *Calder v. Bull*, rejected a literal interpretation of the Ex Post Facto Clause,[44] by relying on the "technical" meaning of the phrase "ex post facto" rather than the literal meaning and pointing out just one of the multitude of problems with the pretense of objectivity because the Constitution does not (except in magic, invisible ink) suggest that the Court should choose "technical textualism" as opposed to "literal textualism." *Chisholm* and *Calder* present within a five-year period the problem presented by this paper. Textualism seeks to eliminate personal predictions from constitutional interpretation, but the text, the Constitutional text, gives no clues as to which brand of textualism, the interpreter may personally prefer. The two cases expose the Textualist difficulty

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ism, Original Meaning, and the Case of Amar's Bill of Rights, 106 MICH. L. REV. 487, 495 (2007) (discussing textualism as an interpretive methodology rose in prominence as a response to "the perception that Warren and Burger Court decisions reflected the justices' personal values"); George Thomas, *The Tensions of Constitutional Democracy*, 24 CONST. COMMENT. 793, 799 n.23 (2007) (reviewing WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER (2007) (wherein Robert Bork and Justice Antonin Scalia support "originalism and textualism" "as the only way to obviate" " '[t]he main danger in juridical interpretation of the Constitution … that judges will mistake their own predilections for the law'")); Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2414-15 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)) (arguing that Justice Breyer believes that "exponents of textualism and originalism 'hope that language, history, tradition, and precedent will provide important safeguards against a judge's confusing his or her personal, and undemocratic notion of what is good for that which the Constitution or statute commands'").

[40] *See, e.g.*, Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1974 (2007) (suggesting that some "claim that textualism … restrain[s] willful judicial decision making based on personal preferences"); Peter J. Smith & Robert W. Tuttle, *Biblical Literalism and Constitutional Originalism*, 86 NOTRE DAME L. REV. 693, 749 (2011).

[41] *See, e.g.*, Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 184 (2011)); Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1189 (2008) (suggesting that "new originalists" believe that "interpreting the constitution" means understanding "the textual meaning of the document, not the private subjective intentions, motivations or expectations of its author" (quoting from Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB POL'Y 599, 602 (2004)); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 587 (2003).

[42] Chisholm, Ex'r v. Georgia, 2 U.S. (2 Dall.) 419, 466 (1793) (Wilson, J., concurring).

[43] *Id.*

[44] Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 397 (1798).

-- proclaiming elimination of personal predictions while using personal predictions to choose a personal textualism.

II. ADJECTIVE TEXTUALISMS

A. "PLAIN" ADJECTIVE AND NO-ADJECTIVE TEXTUALISMS

Of the many forums and varieties of the species "textualism," "plain meaning" and "plain language" textualisms stand out. Presumably, they have almost the same meaning while having at two meanings on their face, "plain" as in "obvious" or "plain" as in "simple."[45] Either way, commentators regular discuss the "plainest" of the textualisms, sometimes referring to "plain meaning textualism"[46] other times referring to "plain meaning of the text"[47] Others prefer to refer to the "plain language of the text."[48]

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[45] Durden, *Textualist Canons*, *supra* note 39, at 130 ("plain meaning textualism, … is based on the plainness and obviousness of the meaning of the words, …").
[46] *Id.*; see *also*, Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1132 (1996); Thomas Y. Davies, *The Fictional Character of Law-and-order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE F. LAW REV. 239, 254 (2002); Stephen Durden, *I Am Textualism*, *supra* note 30; Durden, *supra* note 1, at 355 (2008); Ali Khan, *The Evolution of Money: A Story of Constitutional Nullification*, 67 U. CIN. L. REV. 393, 416 n.107 (1999); Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 LAW & SOC. INQUIRY 533, 535 (1999); Erik G. Luna, *The Models of Criminal Procedure*, 2 BUFF. CRIM. L. REV. 389, 425 (1999).
[47] Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1376 (2000); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1043 (2007); Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2306 (1999); Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 4 n.20 (2009); Saul Cornell, *The People's Constitution vs. the Lawyer's Constitution: Popular Constitutionalism and the Original debate Over Originalism*, 23 YALE J.L. & HUMAN. 295, 333 (2011); Durden, *Plain Language Textualism*, *supra* note 1, at 343; Michael J. Gerhardt, *Ackermania: The Quest for a Common Law of Higher Lawmaking*, 40 WM. & MARY L. REV. 1731, 1741 (1999); Michael J. Gerhardt, *Why the Catholic Majority on the Supreme Court May Be Unconstitutional*, 4 U. ST. THOMAS L. REV. 173, 185 (2006); Gary S. Gildin, *Coda to William Penn's Overture: Safeguarding Non-Mainstream Religious Liberty under the Pennsylvania Constitution*, 4 U. PA. J. CONST. L. 81, 115 (2001); Dale E. Ho, *Dodging a Bullet: McDonald v. City of Chicago and the Limits of Progressive Originalism*, 19 WM. & MARY BILL RTS. J. 369, 374 (2010); Julie Jai, *The Interpretation of Modern Treaties and the Honour of the Crown: Why Modern Treaties Deserve Judicial Deference*, 26 NAT'L J. CONST. L. 25, 41-42 (2009); Kesavan & Paulsen, *supra* note 13, at 1125; Alex Kozinski & Harry Susman, *Original Mean(der)ings*, 49 STAN. L. REV. 1583, 1600 (1997); Toni M. Massaro, *Constitutional Law as "Normal Science"*, 21 CONST. COMMENT. 547, 587 (2004); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 737 (2000); Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681, 1688-89 (1996); Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475,

This article designates plain *meaning* textualism as the belief in, or advocacy for, the plain meaning of the text, while describing as plain *language* textualism the belief in, or advocacy for, plain language of the text. In other words, the article classifies plain meaning textualism and plain language textualism as versions of textualism. Some commentators, however, simply describe textualism, i.e., without-modifying-adjective-in-front textualism (or no-adjective textualism),[49] as reliance upon the plain meaning of the text[50]or plain language of the text.[51]

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484 (2004-2005); Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815, 871 (2004); Jonathan Turley, *Too Clever by Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 GEO. WASH. L. REV. 305, 340 (2008.

[48] Anil S. Karia, *A Right to a Clean and Healthy Environment: A Proposed Amendment to Oregon's Constitution*, 14 U. BALT. J. ENVTL. L. 37, 48 (2006); Joan Meyler, *A Matter of Misinterpretation, State Sovereign Immunity, and Eleventh Amendment Jurisprudence: The Supreme Court's Reformation of the Constitution in Seminole Tribe and Its Progeny*, 45 HOW. L.J. 77, 86 (2001); David Schultz, *Democracy on Trial: Terrorism, Crime, and National Security Policy in a Post 9-11 World*, 38 GOLDEN GATE U.L. REV. 195, 227 (2008); Hugh D. Spitzer, *New Life for the Criteria Tests in State Constitutional Jurisprudence: Gunwall is Dead—Long Live Gunwall*, 37 RUTGERS L.J. 1169, 1187-88 (2006); John A. Sterling, *Above the Law: Evolution of Executive Orders (Part One)*, 31 UWLA L. REV. 99, 107 (2000); Robin West, *Human Capabilities and Human Authorities: A Comment on Martha Nussbaum's Women and Human Development*, 15 ST. THOMAS L. REV. 757, 773 (2003).

[49] This article recognizes the irony of the term "no-adjective textualism," which includes the adjective "no-adjective," an adjective that seeks to modify the word "textualism." The author's intent, as if that would matter to a textualist, is to distinguish the word "textualism," which does not have an adjective in front, from the multitude of terms that place an adjective in front of "textualism."

[50] *See, e.g.*, Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 256 n.532 (1999) ("Textualism, . . . means that the Constitution should be narrowly construed so as to remain within the confines of the plain meaning of its text, …"); Debra Lyn Bassett, *Statutory Interpretation in the Context of Federal Jurisdiction*, 76 GEO. WASH. L. REV. 52, 61 n.42 (2007) ("A textualist approach looks solely at the plain meaning of the constitutional text."); Robert E. Drechsel, *The Declining First Amendment Rights of Government News Sources: How Gracetti v. Ceballos Threatens the Flow of Newsworthy Information*, 15 COMM. L. & POL'Y 129, 136 (2011) ("Plain meaning or textualism dictates that the meaning of the Constitution … should be construed from the 'plain meaning of the words.'"); Carlos E. Gonzalez, *The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms*, 80 OR. L. REV. 447, 490 n.78 (2001) (Justice Black "advocates the plain meaning of the words of constitutional textual norms as the primary barometer of meaning"); Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DEPAUL L. REV. 469, 489 (2007) ("Textualists decided cases based upon the plain meaning of the words of the constitution[] . . . ").

[51] *See, e.g.*, Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 113, 146 (2008) ("Text-focused approaches to judicial review seek answers to Constitutional questions from the plain language of the Constitution").

Consequently, textualism, plain meaning textualism and plain language textualism may be indistinguishable in as much as each relies on plainness. It seems odd, however, that an approach to words that suggest that they have obvious or simple meaning would have three different ways of writing terms with identical meanings. Instead, one can conclude that plain meaning textualism and plain language textualism are varieties of textualism. Neither conclusion, however, eliminates the wide variety of textualisms that do not rely upon plainness.

B. LITERAL TEXTUALISM

Literalism or literal textualism, perhaps indistinguishable from the plain textualisms referred to above,[52] relies on, well, the literal meaning of words.[53] Just as some equate plain language textualism with textualism, others equate textualism with literalism.[54] As explained by Aileen Kavanaugh, relying on an article by Mark Tushnet,[55] "in some quarters, 'textualism' in constitutional law is taken to be a type of literal approach to interpretation."[56] Indeed, Saby Goshray states, simply "[T]he textualist seeks the most literal meaning, free from the perceptive idealism of broader social purpose."[57] Joseph Gracie states, "Textualism holds that the literal text of the Constitution, … must be the standard for interpreting the Constitution."[58] Daniel Webster and Donald L. Bell describe textualism as "deriving the meaning of the Constitution from the pure and literal meaning of its text."[59] Others equate literalism and textualism via the disjunctive, i.e.,

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[52] *See, e.g.*, John F. Manning, *The Absurdity Doctrine,* 116 HARV. L. REV. 2387, 2458 (2003) ("[T]he plain meaning school [] emphasiz[es]...literal meaning.").

[53] *See* James Willard Hurst, *Alexander Hamilton, Law Maker*, 78 COLUM. L. REV. 483, 498 (1978); discussion of literalism in James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646 n.2 (2004).

[54] Robert Lowry Clinton, *Classical Legal Naturalism and the Politics of John Marshall's Constitutional Jurisprudence*, 33 J. MARSHALL L. REV. 935, 960 (2000); Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 NOTRE DAME L. REV. 1135, 1145 (2009); Peter J. Smith & Robert W. Tuttle, *Biblical Literalism and Constitutional Originalism*, 86 NOTRE DAME L. REV. 693, 720 n.109 (2011); Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1607 (1988-1989).

[55] Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 686 (1985).

[56] Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 297 n.117 (2002).

[57] Saby Ghoshray, *Charting the Future of Online Dispute Resolution: An Analysis of the Constitutional and Jurisdictional Quandary*, 38 U. TOL. L. REV. 317, 335 n.59 (2006).

[58] E. Martin Estrada, *The Rise and Fall of the Constitutional Knock and Announce Rule*, 54 FED. LAW. 52, 54 (2007) (concluding that textualists believe that textualism should be relied upon because it guarantees "the rule of law" and "control[s]" "unwarranted judicial activism.").

[59] Daniel Webster & Donald L. Bell, *First Principles for Constitution Revision*, 22 NOVA L. REV. 391, 409 (1997).

"or," strongly suggesting the interchangeability of the words.[60] Some commentators prefer to use one term to modify the other, inventing terms such as "literalistic textualism"[61] "textual literalism,"[62] suggesting that textualism and literalism have different meaning. Adding to the complexity of the seemingly simplistic concept of literalism, some commentators have suggested sub-categories of literal(ist(ic)) textualism, including but certainly not limited to (1) ahistoric literalist textualism,[63] (2) Anglo-American, traditional, eighteenth-century, literalistic textualism,[64] (3) severe and literal-

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[60] *See, e.g.*, David J. Bederman, *Admiralty and the Eleventh Amendment*, 72 NOTRE DAME L. REV. 935, 937 (1997); Thomas Y. Davies, *The Fictional Character of Law-and-order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Immunity*, 84 NOTRE DAME L. REV. 1135, 1145 (2009) ("literal or textualist"); H. Kwasi Prempeh, *Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa*, 35 HASTINGS CONST. L.Q. 761, 811 (2008) ("textual or literal"); Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67, 76 (2006) ("'textualist' or 'literalist'"); Solum, *Originalism as Transformative Politics*, *supra* note 54, at 1607 ("textualism or literalism").

[61] *See, e.g.*, John P. Figura, *Against the Creation Myth of Textualism: Theories of Constitutional Interpretation in the Nineteenth Century,* 80 MISS. L.J. 587, 596 n. 40 (2010); Saby Ghoshray, *To Understand Foreign Court Citation: Dissecting Originalism, Dynamism, Romanticism, and Consequentialism*, 69 ALB. L. REV. 709, 720 (2006) ("literal textual"); J. Stephen Kennedy, *How a Bill Does Not Become a Law: The Supreme Court Sounds the Death Knell of the Line Item Veto – Clinton v. City of New York*, 20 MISS. C. L. REV. 357, 372 (2000) ("literal textual"); James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 157 (1999) ("literal textualism"); Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67, 76 (2006) ("literal textualist"); Thomas C. Weisert, *Timing Isn't Everything: The Supreme Court Decides that a Presidential Cancellation Does Indeed Walk, Swim, and Quack Like a Line-Item Veto*, 29 SETON HALL L. REV. 1618, 1657 (1999) ("literal textual").

[62] *E.g.*, Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology and the Fourth Amendment*, 72 MISS. L.J. 5, 7, 16, 17 (2002); Frances R. Hill, *Putting Voters First: An Essay on the Jurisprudence of Citizen Sovereignty in Federal Election Law*, 60 U. MIAMI L. REV. 155, 164 (2006); Richard B. Saphire, *Doris Day's Constitution*, 46 WAYNE L. REV. 1443, 1467 (2000); Robert Lowry Clinton, *Classical Legal Naturalism and the Politics of John Marshall's Constitutional Jurisprudence*, 33 J. MARSHALL L. REV. 935, 961 (2000).

[63] Jeffrey D. Jackson, *Be Careful What You Wish For: Why McDonald v. City of Chicago's Rejection of the Privileges and Immunities Clause May not be Such a Bad Thing for Rights,* 115 PENN. ST. L. REV. 561, p. 567 n. 41 (citing to Bret Boyce, *Heller, McDonald and Originalism*, 2010 CARDOZO L. REV. DE NOVO 2, 11-12 (2010) (in which the authors refer to *Slaughter-House* as "an example of ahistorical literalist textualism")).

[64] John P. Figura, *Against the Creation Myth of Textualism: Theories of Constitutional Interpretation in the Nineteenth Century,* 80 MISS. L.J. 587, 596 (2010) 96 n. 40 citing to and quoting from Seth Barrett Tillman & Steven G. Calabresi, *Debate, The Great Divorce: the Current Understanding of the Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENNUMBRA 134, 150 (2008) (character-

istic textualism,[65] (4) overly-literal textualism,[66] (5) highly literal textualism,[67] (6) narrowly literalistic textualism,[68] (7) literal-minded textualism,[69] (8) Justice Scalia's brand of literal textualism,[70] and (9) hardcore literal textualism.[71]

The terms "literal textualism" and "literalistic textualism" suggest the existence of different forms of textualism, i.e., that "literal textualism" is a specialized version of textualism, and that "literal textualism" and "textualism" have different meanings. "Literalistic textualism" simultaneously suggests, a pure form of textualism. Reversing the order of the terms, however, seems to create a different connotation. Indeed, the term "textual literalism,"[72] suggests an absurd redundancy demonstrated by what could be considered the opposite term, i.e., "nontextual literalism," which raises the question of the meaning of attempting a literalistic approach to something nontextual. Rephrased, a judge or other person could hardly explain an effort to take literalistic approach to the sky or a painting. Literal, by its definitions, refers to words or, in the case of constitutional interpretation, text. Consequently, "textual literalism" at best suggests a redundancy. Commentators, then, have used the terms interchangeably, and they have used the terms "literal" and "textualism" and their permutations to create a variety of different textualisms and a variety of different views of textualism.

C. *WOODEN TEXTUALISM*

Plain meaning textualism, plain language textualism and literalistic textualism may have indistinguishable meanings; they may each in their

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izing Joseph Story's interpretive method as a "very 'wooden' (i.e., Anglo-American, traditional, eighteenth-century, literalistic) textualism").

[65] Steven G. Gey, *The Procedural Annihilation of Structural Rights,* 61 HASTINGS L.J. 1, 57 (2009).

[66] John C.P. Goldberg, *Judging Reputation: Realism and Common Law in Justice White's Defamation Jurisprudence,* 74 U. COLO. L. REV. 1471, 1506 (2003).

[67] Pfander, *Supplemental Jurisdiction supra* note 61 at 125 n. 68 (1999).

[68] Daniel A. Farber & Suzanna Sherry, *Beyond All Criticism,* 83 MINN. L. REV. 1735, 1757 (1999).

[69] Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution,* 68 S. CAL. L. REV. 289, 314 (1995).

[70] Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques,* 67 N.Y.U. L. REV. 419, 435 n. 114 (1992). *See also*, George Kannar, *The Constitutional Catechism of Antonin Scalia,* 99 YALE L.J. 1297, 1343 (1990).

[71] Bryan H. Wildenthal, *The Right of Confrontation, Justice Scalia, and the Power and Limits of Textualism,* 48 WASH. & LEE L. REV. 1323, 1351 n. 148 (1991).

[72] Clinton, *supra* note 62, at 961 (2000); Frank Goodman, *Mark Tushnet on Liberal Constitutional Theory: Mission Impossible*, 137 U. PA. L. REV. 2259, 2315 (1989); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 21 (2009); Frances R. Hill, *Putting Voters First: An Essay on the Jurisprudence of Citizen Sovereignty in Federal Election Law*, 60 U. MIAMI L. REV. 155, 164 (2006).

own way modify the root term "textualism." Certainly, some commentators suggest that each term or version returns the textualist to the literal or plain meaning of words. As suggested by one commentator, "[T]he textualist seeks the most literal meaning… ."[73] Justice Scalia, renowned for his purported allegiance to textualism,[74] disagrees with that connection with his contrary assertion that "the good textualist is not a literalist."[75] As Richard A. Allen explains, that "[a] good textualist" avoids or perhaps rejects "literalism" that "conflict[s] with the evident general purpose of the text.[76] John F. Manning appears to agree, that "[m]odern textualists, …, are not literalists."[77] A number of other commentators note Manning's distinguishing "modern textualists 'from' their literalist predecessors"[78] Many others agree that "textualists need not be literalists."[79] As explained by Abbe R. Glick, "Pure textualists are not literalists."[80] Making the point with a different letter at the end of the words, some, for example, Paul Brest, "use[d] 'strict textualism' as a synonym for literalism,"[81] whereas

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[73] Saby Ghoshray, *Charting the Future of Online Dispute Resolution: An Analysis of the Constitutional and Jurisdictional Quandary*, 38 U. TOL. L. REV. 317, 335 n.59 (2006).
[74] *See, e.g.*, Eileen A. Scallen & Andrew E. Taslitz, *Reading the Federal Rules of Evidence Realistically: A Response to Professor Imwinkelried*, 75 OR. L. REV. 429, 434 (1996).
[75] *See, e.g.*, Richard A. Allen, *What Arms – A Textualist's View on the Second Amendment*, 18 GEO. MASON. U. C.R. L.J. 191, 199 (2008) (quoting from Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, 24 (1997)).
[76] *Id*.
[77] John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 108 (2001).
[78] *E.g.*, Eric A. Johnson, *Does Criminal Law Matter – Thoughts on Dean v. United States and Flores-Figueroa v. United States*, 8 OHIO ST. J. CRIM. L. 123, 140 (2010); *see* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 34 n.147 (2006); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 733 n.5 (2010); Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 43 n.77 (2008).
[79] Gregory Bassham, *Justice Scalia's Equitable Constitution*, 33 J.C. & U.L. 143, 155 (2006); *see also*, Brendan Beery, *When Originalism Attacks: How Justice Scalia's Resort to Original Expected Application in Crawford v. Washington Came Back to Bite Him in Michigan v. Bryant*, 59 DRAKE L. REV. 1047, 1052 n.21 (2011).
[80] Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1835 (2010) (Interestingly in support [consider revision] of her student "Pure textualists are not literalists" she cites to Justice Scalia's statement concerning "good textualist[s]," presumably equating "pure" and "good" and simultaneously, perhaps, demonstrating an example of her version of textualism "modified textualism," which might more assuredly be explained "modifying textualism" if "good" and "pure" have the same meaning).
[81] C. Edward Fletcher III, *Principlist Models in the Analysis of Constitutional and Statutory Texts*, 72 IOWA L. REV. 891, 926 n.182 (1987); *see also*, Steven Kropp, *Collective Bargaining in Bankruptcy: Toward and Analytical Framework for Section 1113*, 66 TEMP. L. REV. 697, 709 (1993); Jane S. Schacter, *Text or Consequences*, 76 BROOK. L.

some "[t]extualists … seek to distance their version of 'textualism' from 'literalism.'"[82] As explained by Daniel A. Farber, and Brett H. McDonnell, "[t]extualism does not equal literalism…, ."[83] Johnathon R. Siegel goes further and speaks for all textualists saying that they all "argue that textualism should not be confused with literalism."[84] Anthon P. Pecoia distinguishes textualism from literalism's "'mindless[ness].'"[85] Similarly, many commentators describe literalism as a wooden approach to interpretation[86] as "boneheaded[ness]."[87] Literalism, then, might be distinguished as "wooden-textualism,"[88]

The foregoing discussion provides insight into the textualists' conundrum. Textualists must take one of at least two irreconcilable positions, (1) textualism equals literalism and (2) textualism never equals literalism. The discussion also demonstrates the multitude of textualism's monikers, names which may or may not have same meaning, e.g., textualism, literal textualism, and wooden textualism. The textualist difficulty is picking a moniker without demonstrating a personal predilection.

III. MODIFYING ADJECTIVE TEXTUALISMS

The discussion above, concerning textualism, plain meaning language textualism, literal textualism, literalism, and wood textualism introduces one of the fundamental difficulties of trying to discuss textualism logically and rationally. Writers often use adjectives in front of the word "textualism," e.g., plain meaning textualism, literal textualism, and wooden textu-

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REV. 1007, 1015 n.46 (2011); Peter J. Smith & Robert W. Tuttle, *Biblical Literalism and Constitutional Originalism*, 86 NOTRE DAME L. REV. 693, 720 n.109 (2011).

[82] Durden, *Plain Language Textualism*, *supra* note 1, at 342.

[83] Daniel A. Farber & Brett H. McDonnell, *Is There a Text in This Class – The Conflict between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 628 (2004-2005).

[84] Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1028 (1998).

[85] Anthony P. Pecora, *The Unyielding Miranda Requirement of the Fair Debt Collection Practices Act: Strict Textualism or Statutory Myopia*, 99 COM. L.J. 231, 256 (1994).

[86] *See, e.g.*, John P. Figura, *Against the Creation Myth of Textualism: Theories of Constitutional Interpretation in the Nineteenth Century,* 80 MISS. L.J. 587, 596 n. 40 (2010); Richard Primus, *Constitutional Expectations*, 109 MICH. L. REV. 91, 97 (2010); Tillman & Calabresi, *Debate, The Great Divorce*, *supra* note 64, at 150; Michael Slade, *Book Review*, 36 HARV. J. ON LEGIS. 259, 260 (1999) (reviewing Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)).

[87] Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1041 (1998).

[88] *See, e.g.*, Akhil Reed Amar, *Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1502 (1990); Vasan Kesavan, *The Very Faithless Elector*, 104 W. VA. L. REV. 123, 135 (2001); Steven G. Calabresi, *Vesting Clauses as Power Giants*, 88 NW. U. L. REV. 1377, 1401 (1993-1994); Gary Lawson, *Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction*, 49 ST. LOUIS U. L.J. 885, 886 (2005); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 NW. U. L. REV. 751, 799 (2009).

alism. Writers often leave the reader to guess, (perhaps more fairly) to discern, the effect of the adjective. This author hesitates to use the phrase "intended effect of the adjective," out of respect to textualists, many of whom, perhaps most of whom, reject the use of an author's desired meaning, i.e., intended meaning, in order to interpret such author's words inasmuch as textualism suggests that the text tells the meaning of the text. Consequently, the reader of the term "adjective textualism" must choose whether, in the term "adjective textualism," "adjective" modifies "textualism" thereby suggesting that "textualism" and "adjective textualism" have different meanings or whether "adjective textualism" simply states with two words, i.e., "adjective textualism," what others say with one word, i.e., "textualism." For example, if textualism means using the literal meaning of the words, then "literal textualism" suggests a redundancy inasmuch as "literal" and "textual" have virtually indistinguishable meanings. This also suggests that "textualism" and "literal textualism" are synonyms. Alternatively, the term "literal textualism" could suggest that "literal" modifies "textualism" suggesting a distinction between "textualism" and "literal textualism," i.e., that "literal textualism" is a form or subset of "textualism."

A. REDUNDANT ADJECTIVE TEXTUALISMS

For lack of a better term, this article will refer to the above-described "adjective textualisms" as "redundant adjective textualisms." This term distinguishes these textualisms with other types of adjective textualisms, those which undeniably suggest modifications to textualism and therefore different forms of textualisms, e.g., "modern textualism." This author recognizes that any categorization has flaws, and leaves it to the reader to decide or investigate whether a particular textualism describes a redundancy or a new form of textualism.

Authors have discussed or created a number of possibly redundant textualisms similar to plain language textualism and literal textualism. Ofer Raban, for example, refers to "[H.L.A.] Hart's explicit textualism."[89] This "explicit textualism" appears to be an "assert[ion] that the law requires what its literal text requires."[90] Other possible examples of "explicit textualism" in constitutional interpretation might include:

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[89] Ofer Raban, *Real and Imagined Threats to the Rule of Law: On Brian Tamanaha's Law as a Means to an End*, 15 VA. J. SOC. POL'Y & L. 478, 492 n.66 (2008).
David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 926 (1996).

[90] Robert F. Blomquist, *The Presidential Oath, the American National Interest and a Call for Presiprudence*, 73 UMKC L. REV. 1, 43 (2004) (quoting from Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 261 (1994)); *see also*, K.G. Jan Pillai, *In Defense of Congressional Power and Minority Rights under the Fourteenth Amendment*, 68 MISS. L.J. 431, 505 (1998) ("explicit textual constitutional command").

1. "explicit textual right;"[91]
2. "explicit textual source;"[92]
3. "explicit textual command;"[93]
4. "explicit textual language;"[94]

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[90] Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1333 (1992); *see also* Pamela M. Madas, *To Settlement Classes and Beyond: A Primer on Proposed Methods for Federalizing Mass Tort Litigation*, 28 SETON HALL L. REV. 540, 564 n.144 (1997). A more repetitive redundant term could hardly be imagined. Explicit textual seems redundant enough, in that it is hard to imagine implicit text. Certainly, writing, i.e., text, can imply ideas, but implied text is an oxymoron as is implicit text. Text is words on paper (or screen, etc.). More to the point, the Constitution contains only words, i.e., language, even if a textbook (a.k.a. text) might contain pictures. Undoubtedly, the only possible textual aspect to the Constitution is language. So, whereas the term "textual language" seems redundant, the term "explicit textual language" seems repetitively redundant.

[90] Roger K. Picker, *Police Liability in High-Speed Chases: Federal Constitution or State Tort Law; Why the Supreme Court's New Standard Leaves the Burden on the State and What This Might Mean for Maryland*, 29 U. BALT. L. REV. 139, 151 n. 64 (1999).

[90] John Harrison, *Richard Epstein's Big Picture*, 63 U. CHI. L. REV. 837, 926 (1996) (reviewing Richard A. Epstein, SIMPLE RULES FOR A COMPLEX WORLD, (1995)).

[90] Rachel E. Barkow, *More Supreme than Court – The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 253 (2002).

[90] Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1329 (2010).

[90] Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 VILL. L. REV. 181, 207 (2009) (relying on the absolutely non-textual ideas of "foundational principles" and "constitutional regime" to support his desire to limit the Court to "clear textual authority." [90] *Id.* at 491-92.

[91] Jack Tuholske, *Going with the Flow: The Montana Court's Conservative Approach to Constitutional Interpretation*, 72 MONT. L. REV. 237, 253 (2011).

[92] Roger K. Picker, *Police Liability in High-Speed Chases: Federal Constitution or State Tort Law; Why the Supreme Court's New Standard Leaves the Burden on the State and What This Might Mean for Maryland*, 29 U. BALT. L. REV. 139, 151 n.64 (1999); *see* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 926 (1996).

[93] Robert F. Blomquist, *The Presidential Oath, the American National Interest and a Call for Presiprudence*, 73 UMKC L. REV. 1, 43 (2004) (quoting from Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 261 (1994)); *see also*, K.G. Jan Pillai, *In Defense of Congressional Power and Minority Rights under the Fourteenth Amendment*, 68 MISS. L.J. 431, 505 (1998) ("explicit textual constitutional command").

[94] Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1333 (1992); *see also* Pamela M. Madas, *To Settlement Classes and Beyond: A Primer on Proposed Methods for Federalizing Mass Tort Litigation*, 28 SETON HALL L. REV. 540, 564 n.144 (1997). A more repetitive redundant term could hardly be imagined. Explicit textual seems redundant enough, in that it is hard to imagine implicit text. Certainly, writing, i.e., text, can imply ideas, but implied text is an oxymoron as is implicit text. Text is words on paper (or screen, etc.). More to the point, the Constitution contains only words, i.e., language, even if a textbook (a.k.a. text) might contain pictures. Undoubtedly, the only possible textual aspect to the Constitution is language. So, whereas the term "textual lan-

5. "explicit textual source;"[95]

David A. Strauss suggests a subset or mutation of "explicit textualism" when referring to "relatively explicit textual[ism]."[96]

Similar to explicit textualism, express textualism relies on concepts or things such as:

1. "express textual commitment;"[97]
2. "express textual reference;"[98]

Andrew C. Spiropoulos may be relying on "clear textualism" when he suggests that the Supreme Court must rely on "clear textual authority" in order to invalidate the "popular will" as expressed in "decisions of the people's elected officials."[99] Other potential references to "clear textualism" include:

1. "clear textual clues;"[100]
2. "clear textual commitment;"[101]
3. "clear textual command;"[102]
4. "clear textual warranty;"[103]
5. "clear textual meaning;[104]
6. "clear textual footing."[105]

Finally, Andrew C. Spiropoulos relying on "foundational principles of our constitutional regime,"[106] argues that the judiciary must rely on "clear

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guage" seems redundant, the term "explicit textual language" seems repetitively redundant.

[95] Roger K. Picker, *Police Liability in High-Speed Chases: Federal Constitution or State Tort Law; Why the Supreme Court's New Standard Leaves the Burden on the State and What This Might Mean for Maryland*, 29 U. BALT. L. REV. 139, 151 n. 64 (1999).

[96] John Harrison, *Richard Epstein's Big Picture*, 63 U. CHI. L. REV. 837, 926 (1996) (reviewing Richard A. Epstein, SIMPLE RULES FOR A COMPLEX WORLD, (1995)).

[97] Rachel E. Barkow, *More Supreme than Court – The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 253 (2002).

[98] Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1329 (2010).

[99] Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 VILL. L. REV. 181, 207 (2009) (relying on the absolutely non-textual ideas of "foundational principles" and "constitutional regime" to support his desire to limit the Court to "clear textual authority."

[100] Joseph Blocher, *Amending the Exceptions Clause*, 92 MINN. L. REV. 971 (2008).

[101] John Bryan Williams, *How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress*, 48 WM. & MARY L. REV. 1025, 1068 (2006).

[102] Daniel C.K. Chow, *A Pragmatic Model of Law*, 67 WASH. L. REV. 755, 812 (1992).

[103] Richard Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1200 (1987).

[104] Douglas Laycock, *Nonpreferential Aid to Religion: A False Claim about Original Intent*, 27 WM. & MARY L. REV. 875, 883 n.44 (1986).

[105] James W. Nickel, *Uneasiness about Easy Cases*, 58 SO. CAL. L. REV. 477, 479 (1985).

textual authority" in order to "trump" the "popular will" as expressed by "decisions of the people's elected representatives."[107]

So, textualism may be clear, explicit, or express as well as "simple"[108] or "simplistic."[109] "Simple" or "simplistic" may each or both be synonyms for "no frills textualism;"[110] a form of textualism that Victoria Nourge and Gregory Shaffer accuse Adrian Vermeule of "ultimately favor[ing]."[111] Mark Tushnet suggests perhaps a similar version of textualism that he designates as "straight-forward textualis[m],"[112] a textualism, Tushnet asserts, that "ordinary people," i.e., non-lawyers use.[113] If "ordinary" people" use

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[106] Spiropoulos relies on words not in the Constitution, e.g., "foundational," "principles," and "regime," before demanding a "clear textual" basis for courts declaring invalid the acts of legislatures and executives. The obverse approach might require that the executive and legislative branches demonstrate "clear textual authority" before taking away or impinging upon the foundational principles (arguably set forth in the Declaration of Independence, the absolute foundational document for this country) of inalienable (but not enumerated) rights individuals have as against any government. Additionally, and more importantly for a discussion of textualism, Spiropoulos' statement demonstrates a classic example of "partial textualism," an approach to textualism wherein an interpreter uses textualism for one part of the Constitution while using another approach, e.g., foundational principles, to interpret another part of the Constitution wherein each part is relevant to the final interpretation of a constitutional question. For a full discussion of partial textualism, see, Durden, *Partial Textualism*, SUPRA note 23.

[107] Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 VILL. L. REV. 181, 207 (2009).

[108] *See, e.g.*, Ward Farnsworth, *Women under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1235 (2000) (referring to "a simple textual argument"); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1788 (1996) (referring to "simple textualism").

[109] Thomas Ross, *Taking Things Seriously*, 80 NW. U. L. REV. 1591, 1598 (1985-1986); *see also*, Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037, 1072 (2000); Ronald J. Krotoszynski, *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1579 (2004).

[110] William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041 (2006) (reviewing ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006)).

[111] Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 103 (2009).

[112] Mark Tushnet, *Citizen as Lawyer, Lawyer as Citizen*, 50 WM. & MARY L. REV. 1379, 1380 (2009). *See also*, Vincent J. Samar, *The Treaty Power and the Supremacy Clause: Rethinking Reid v. Covert in a Global Context*, 36 OHIO N.U. L. REV. 287, 290 (2010) (referring to a "straight-forward textual interpretation").

[113] *Id.* Tushnet defines "ordinary people" as non-lawyers, a definition to which Amy Gutman agrees (*Can Virtue Be Taught to Lawyers?*, 45 STAN. L. REV. 1759 (1993)). Lani Guinier defines "ordinary people" as those "who form the backbone of social movements," apparently distinguishing those from "social and cultural elites." Lani Guinier, *Foreword: Demosprudence through Dissent,* 122 HARV. L. REV. 4, 48 (2008). This very brief reference to "ordinary" provides one of innumerable examples as to how complex words, i.e., text, can be.

"straight-forward textualism," then perhaps that brand of textualism might mimic "ordinary textualism," i.e., an "ordinary textual interpretation," [114] or perhaps "ordinary textual analysis."[115] Other synonyms for these "plain" and "ordinary" textualisms could, perhaps, include "pure textualism"[116] or perhaps "close textualism."[117]

Textualism, then, may be the same as, or perhaps, instead, different from, a variety of textualisms including, but not limited to, "Plain," "Simple," "Explicit," "Clear," "Literal," and "No Frills." The names of these textualisms suggest synonymity of textualism or, at least similarity to, "dictionary-based"[118] or "dictionary-bound textualis[m]."[119] At the same time, if words have meaning, in particular if words have distinct[120] and objective[121] meaning, then differently-named textualisms should have differ-

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[114] *See*, John F. Manning, *Separation of Powers as Ordinary Interpretation,* 124 HARV. L. REV. 1939, 1958 (1936).
[115] Clark v. Martinez, 543 U.S. 371, 385 (2005).
[116] *E.g.*, Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 366, n.37 (2007); *see, e.g.*, Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 960 (1998); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1344 (1989).
[117] Paul D. Carrington, *Law as the Common Thoughts of Men: The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 STAN L. REV. 495, 539 (1997) (describing Thomas Cooley as a close textualist).
[118] Edward A. Zelinsky, *Text, Purpose, Capacity and Albertson's: A Response to Professor Geier*, 2 FLA. TAX REV. 717, 734 (1996); Edward A. Zelinsky, *Travelers, Reasoned Textualism, and the New Jurisprudence of ERICA Preemption*, 21 CARDOZO L. REV. 807, 870 (1999).
[119] Kathleen M. Sullivan & Pamela S. Karlan, *The Elysian Fields of the Law*, 57 STAN. L. REV. 695, 720 (2004) (describing "Justice Scalia as a dictionary-bound textualist").
[120] *See*, *The Muswell Hill Murder*, 8 GREEN BAG 2D 399, 401 (1896); Gary Lawson & Patricia B. Granger, *The Proper Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 272 (1993); Jamie Norman, *Accepting the Unacceptable: How Jama v. Immigration and Customs Enforcement Affects Deportation Policies with Non-Accepting Governments*, 26 J. NAT'L ASS'N ADMIN. L. JUDICIARY 159, 189 (2006); *but see*, Joel Edger Anderson, *Civil Procedure – Depositions and Discovery: Punishing Little Suzy for Daddy's Bad Behavior – North Dakota Affirms Rule 37 Sanctions Affecting Child Support*, 76 N.D. L. REV. 633, 640 (2000) (noting that the Supreme Court held that the "use of . . . two different words implie[s] no distinct meaning").
[121] *See, e.g.*, Mark Moller, *Class Action Lawmaking: An Administrative Law Model*, 11 TEX. REV. L. & POL. 39, 86 n.171 (2006) ("Textualism presupposes" an "objective meaning of the text"); *but see, e.g.*, Durden, *Animal Farm Jurisprudence*, *supra* note 1, at 355 n.5 (citing to and quoting from Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750 (1995)); *see also*, Tom Levinson, *Confrontation, Fidelity, Transformation: The Fundamentalist Judicial Persona of Justice Antonin Scalia*, 26 PACE L. REV. 445, 445 n.3 (2006) ("Textualism" requires "interpret[ing] a document … according to its plain, objective meaning"); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347 (2005), ("textualists care only about the 'objective' meaning"); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1557 (2002) ("modern textualis[m] … focuses on the objective meaning of the particular words and phrases appearing in the

ences, even if only subtle differences. Certainly, an interpretational methodology based on the meaning of words strongly suggests that different words have different meanings. These differently-named textualisms, then, either suggest different textualisms or suggest a fundamental flaw in the premise of textualism, i.e., the premise that words provide DEFINITIVE definitions or at least definitive clues as to meaning. Rephrased, each adjective suggests the existence of an original and a modified version of the original, and each different adjective suggests a distinction between adjectives and therefore a distinction between each of the various "adjective textualisms." At a minimum, each "adjective textualism" suggests the existence of, and distinction between, "textualism" and "adjective textualism."

B. PEJORATIVE ADJECTIVE TEXTUALISMS

The above-discussed "adjective textualisms" create problems due to their often being "redundant adjective textualisms," i.e., adjectives that could be perceived as redundant to the term "textualism." Other writers use pejorative adjectives to modify the word "textualism." As with the other adjectives discussed above, a pejorative adjective textualism also suggests, with even more force, at least two forms of textualism, "proper textualism,"[122] and, presumably, "improper textualism."[123] This article alluded to the idea of improper textualisms within its discussion of "wooden textualism" which seemed to suggest either that "Textualism's effect is wooden" or that a distinct, but inappropriate version of textualism is "wooden textualism." "Wooden," to some, suggests "inflexible"[124] Writ-

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Constitution as they would have been understood at the time and in the context of its adoption.").

[122] *See e.g.*, Treanor, *Taking Text Too Seriously*, *supra* note 39, at 491 wherein Treanor concludes that "leading conservatives" (later referencing inter alia Michael Paulsen, Gary Lawson, Justice Clarence Thomas and Justice Antonin Scalia) have "enthusiastically and repeatedly embraced" Akhil Amar's Textualism "as the preeminent embodiment of proper textualist methodology." Amar himself describes as "proper textualist" with the self-referential definition: one who "seek[s]" meaning of the Fourteenth Amendment "in the words of Amendment itself," (*An(other) Afterword on The Bill of Rights*, 87 GEO. L.J. 2347, 2349 (1999)), whereas John O. McGinnis and Michael B. Rappaport urge "the proper[] textualist approach" "recognizes that the meaning of legal terms is often informed by historical understandings incorporated into the text and that textual ambiguities are fairly resolved by resort to constitutional structure, purpose or intent" (*Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 NW. U. L. REV. 751, 794 (2009)). *See also* Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 11 (2011) (referring to "proper textualist interpretations of the Constitution").

[123] *See*, Martin H. Redish, *Federal Common Law and American Political Theory: A Response to Professor Weinberg*, 83 NW. U. L. REV. 853 (1988-1989) (referring to "a form of improper textual analysis" related to statutory construction).

[124] *E.g.*, Stephen G. Kunin & Kenneth M. Schor, *The Reissue Recapture Doctrine: Its Place among the Patent Laws*, 22 CARDOZO ARTS & ENT. L.J. 451, 548 (2004) (using "wooden textualism" to imply a more proper version of textualism exists seems ironic). Using "wooden" rejects the principle definition of "wooden," i.e., made out of wood, and

ers use "wooden" at least two different ways, somewhat the way other writers use the words "literal." Some use "wooden" to launch a per se attack on "textualism" as if only one textualism exists describing that textualism as a "wooden" or inflexible interpretational methodology.[125] "Textualism, Professor Geier tells us, is the process of consulting a dictionary to determine the meaning of particular words and then applying these dictionary-based meanings in a wooden fashion."[126] Edward J. Imwinkelried claims, "Most commentators have desired a textualist construction of the Federal Rules … as being 'wooden.'"[127] For these commentators, "wooden textualism" serves a synonym to "textualism." Others believe differently, believing that "[t]extualism is not 'wooden.'"[128] Many of these others use "wooden textualism" to distinguish the author's preferred version of textualism from "wooden textualism."

John O. McGinnis and Michael B. Rappaport explain, for example, that "[o]ne[129] can imagine a textualism that refused to look outside a con-

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embraces a colloquial, albeit acceptable, meaning of wooden, i.e., inflexible. This alone proves that words have meaning only in context, i.e., no one believes that "wooden textualism" refers to textualism made out of wood, although the meaning or inference of "inflexible" does not arrive from the use of the word "wooden" alone. Additionally, the colloquial use of wooden relies on a "wooden" understanding of the characteristics of wood. For example, wood lagging is light and flexible. Some wood expands and contracts with temperatures and moisture level. Indeed, Chapter 5 of General Technical Report FP2 – GRT-190 contains more than 40 pages the author cannot possibly understand regarding the "Mechanical Properties of Wood," U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE, FOREST PRODUCTS LABORATORY, GENERAL TECHNICAL REPORT FPL-GTR-190 (2010). The idea of the report is to demonstrate the wide variety of characteristics of wood in order to allow or encourage creation of a variety of wooden structures. The textualist, not wanting to be bound by the actual and multiple characteristics of "wood" simply declares, by implication, that word's most accurate, most descriptive, most apt, or, perhaps, only characteristic is inflexibility. This certainly makes understanding the term "wooden" simple. Or perhaps the textualist is simply recognizing that in the context of discussing literary interpretation, i.e., in light of the words and methods used by other interpreters of literary and other texts, that "wooden" has a contextual meaning, outside the context of the Constitution, of inflexible.

[125] *See, e.g.*, Zelinsky, *Text, Purpose, Capacity, supra* note 118 at 730.

[126] *Id.* (citing Deborah A. Geier, *Interpreting Tax Legislation: The Role of Purpose*, 2 FLA. TAX REV. 492, 510, 518 (1995)).

[127] Edward J. Imwinkelreid, *Moving Beyond Top Down Grand Theories of Statutory Construction: A Bottom Up Interpretive Approach to the Federal Rules of Evidence*, 75 OR. L. REV. 389, 391 (1996).

[128] Siegel, *Textualism and Contextualism, supra* note 87, at 1029.

[129] McGinnis & Rappaport, *Original Methods Originalism, supra* note 122 at799. Interestingly, these authors use the literary device "one" rather than simply saying "we." Of course, law review article authors regularly use "one" instead of "we" (or "I") or instead of "the author(s)." The sentence "one can imagine" seems, first, to suggest that, indeed, "the authors" can and have imagined what follows. Having imagined an idea, they suggest that others might imagine the same thing. Indeed, this article suggests as much, i.e., that the imagining of a form of textualism strongly suggests or virtually proves the existence of such textualism. Second, the authors' use of their or "one's" imagination seems, well,

stitution, but that textualism would be flawed, because it would not be faithful to the actual meaning of the text."[130] Rephrased, whatever textualism McGinnis and Rappaport describe in their article provides a meaning faithful, or at least more faithful, to the textual meaning. It follows that McGinnis and Rappaport distinguish "wooden," i.e., bad textualism, from good, or at least, better textualism. Others seem to agree, also serving to distinguish "wooden textualism" from other, better textualisms.[131]

In the end, many use "wooden" in a pejorative way, either (a) describing "Textualism" (capitalizing the first letter to suggest (1) inclusion of all versions of textualism or (2) the existence of only one textualism, neither of which conclusion seems to make much sense) as "wooden" or (b) distinguishing one version of textualism, i.e., wooden textualism from other textualism. Others use adjectives in lieu of "wooden" to describe textualism. As with "wooden" the following adjectives appear to suggest a negative view, i.e., a pejorative. In addition, these pejoratives could suggest (1) Textualism's failures or (2) the existence of the pejorative textualism contradistinguished from some "better" textualism. The pejorative adjective textualisms that seem akin to "wooden" textualism include:

(1) "rigid" textualism;[132]

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unnecessary. As noted before, some believe and assert that textualism limits meaning to literal or dictionary definitions of words, and such an approach would not include "one's imagination."

[130] *Id.* McGinnis and Rappaport do not define "look[ing] outside a constitution," but inferentially (and only inferentially) "outside" suggests an "inside" to a constitution, which inside might include blank space or the words (or text) of the piece of paper, but likely includes only the words. So according to McGinnis and Rappaport, looking only at the constitution's words, i.e., text, is not "faithful to the actual meaning of the text."

[131] *See, e.g.*, Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2059 n.42 (2006) (reviewing Akhil Reed Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY (2006) and Jed Rubenfeld, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW (2005)) (noting the "difficult[y] [of] conceiv[ing] a more wooden and misleading formulation of original meaning textualism" thereby strongly suggesting the existence of a better, less-wooden version); Richard Primus, *Constitutional Expectations*, 109 MICH. L. REV. 91, 97 (2010) (distinguishing between "a soft textualism" and a "literal or wooden" reading of Article I, Section 2 of the Constitution); John M. Walker, Jr., *Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge*, 58 N.Y.U. ANN. SURV. AM. L. 203, 237 (2001-2003) (distinguishing "new textualism" from "wooden and mindless textualism). *See also*, Slade, *supra* note 86, at 260 (noting that Justice Scalia "takes pains to distinguish . . . [t]extualism [from] a 'simpleminded … wooden, unimaginative [or] pedestrian' . . . literal reading of the text that operates ignorant of the law's broader social purpose.").

[132] *E.g.*, Steven G. Calabresi, *Vesting Clauses as Power Grants*, 88 NW. U.L. REV. 1377, 1401 (1993-1994) (suggesting, by word placement, synonymity between "rigid" and "wooden"). *See*, Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1162 n.193 (1989) (same); Rudolph J. Gerber, *Survival Mechanisms: How America Keeps the Death Penalty Alive*, 15 STAN. L. & POL'Y REV. 363, 376 (2004) ("Scalia's rigid textualism"); Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 217, n.78 (2004) ("rigid textual-

ism"); Stephen Reinhardt, *The Role of Social Justice in Judging Cases*, 1 U. St. Thomas L. Rev. 18, 20 (2003) (originalists' "rigid textualism"); James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 816 (1995) (same); Eric J. Segall, *The Black Holes of American Constitutional Law*, 17 CONST. COMMENT. 425, 429 (2000) (reviewing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 3d ed., Vol. I (1999)) (Professor Laurence Tribe's "rigid textualist – formalist approach"). *See also*, Stephen Reinhardt, *Life to Death: Our Constitution and How It Grows*, 44 U.C. DAVIS L. REV. 391, 394 (2010) (suggesting, by word placement, the synonymity between "a rigid, . . . interpretation of the Constitution textual analysis"); Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1151 (1977) ("close textual analysis of constitutional language"); Stephen F. Smith, *Clarence X: The Black Nationalist behind Justice Thomas's Constitutionalism*, 4 N.Y.U. J.L. & LIBERTY 583, 620 (2009) ("close textual … analysis"); Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 TEX. L. REV. 1265, 1329 (2005) ("Close textual analysis").

[132] Eric M. Freedman, *The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 YALE L.J. 142, 161 (1978) ("close textual ties to the corresponding provisions of the Articles").

[132] Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 779 (1999) ("Narrow, clause bound textualism"); Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1779 (2003) ("a narrow form of textualism"); Roger Pilon, *Into the Pre-Emption Thicket: Wyeth V. Levine*, 2009 CATO SUP. CT. REV. 85, 99 (2008-2009) ("so narrow a textualism"); Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1337 (2010) (the Supreme "Court's narrow textualism"); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the the White House*, 105 COLUM. L. REV. 1681, 1694 (2005) ("narrow textualism").

[132] McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 129 at 799.

[132] John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 101 and n.111 (2006) (quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59, 65 (1988)) (discussing in depth, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006). *See also*, Steven M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115, 2143 ("hypertextualism, the theory of the Article V literalists who believe the only way the Constitution can be changed is through Article V (or perhaps Supreme Court precedent)"); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750-52 (1995); L.A. Powe, Jr., *Ackermania or Uncomfortable Truths?*, 15 CONST. COMMENT. 547, 568 (1998) (reviewing Bruce Ackerman, WE THE PEOPLE: TRANSFORMATIONS (1998)); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1460 (2005); Gerald N. Rosenberg, *The Unconventional Conventionalist,* 2 GREEN BAG 2D 209, 213 (1999) ("'hypertextualists' argue that either the constitution is followed to the letter or there is lawlessness").

[132] James J. Varellas, *The Constitutional Political Economy of Free Trade: Reexamining NAFTA-Style Congressional-Executive Agreements*, 49 SANTA CLARA L. REV. 717, 743, 790 (2009) (describing Laurence Tribe's version of hypertextualism, but not distinguishing it from any other version of hyper-textualism)." and "a . . . textualist interpretation of the Constitution); Patrick McKinley Brennan, *Law and who We Are Becoming*, 50 VILL. L. REV. 189, 203 (2005) (suggesting existence of multiple "rigid forms of textualism" contradistinguished from other forms of textualism).

(2) "close-reading" textualism;[133]
(3) "close textualism," which bears close relationship to close-reading textualism;[134]
(4) "close (as in similarity of words) textualism;"[135]
(5) "narrow" textualism;[136]
(6) "super strict" textualism;[137]

(7)(a)"hypertextualism," as in being too "faithful [an] agent" of the drafter of a document such as a statute, "by trying to 'hear the words … as they would sound in the mind of a skilled, objectively reasonable user of words,'" but then carry[ing] this approach too far."[138]

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[133] Treanor, *Taking Text Too Seriously*, *supra* note 39, at 494, 500, 530 cited to in Durden, *Textualist Canons*, *supra* note 39, at 116 n.7; Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J. L. & PUB. POL'Y 907, 912 n.20 (2008).

[134] *See, e.g.*, James J. Brudney, *Supreme Court as Interstitial Actor: Justice Ginsberg's Eclectic Approach to Statutory Interpretation*, 70 OHIO ST. L.J. 889, 900 (2009) ("close textual analyses"); Philip C. Kissam, *Alexis De Tocquecville and American Constitutional Law: On Democracy, the Majority Will, Individual Rights, Federalism, Religion, Civil Associations, and Originalist Constitutional Theory*, 59 ME. L. REV. 35, 55 (2007) ("close textual analysis"); Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL RTS. J. 1037, 1042 (2009) ("close textual analysis of . . . words and structure"); Sanford Levinson, *Why the Canon Should Be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 250 (2000) ("techniques of close textual analysis"); Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1151 (1977) ("close textual analysis of constitutional language"); Stephen F. Smith, *Clarence X: The Black Nationalist behind Justice Thomas's Constitutionalism*, 4 N.Y.U. J.L. & LIBERTY 583, 620 (2009) ("close textual … analysis"); Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 TEX. L. REV. 1265, 1329 (2005) ("Close textual analysis").

[135] Eric M. Freedman, *The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 YALE L.J. 142, 161 (1978) ("close textual ties to the corresponding provisions of the Articles").

[136] Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 779 (1999) ("Narrow, clause bound textualism"); Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1779 (2003) ("a narrow form of textualism"); Roger Pilon, *Into the Pre-Emption Thicket: Wyeth V. Levine*, 2009 CATO SUP. CT. REV. 85, 99 (2008-2009) ("so narrow a textualism"); Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1337 (2010) (the Supreme "Court's narrow textualism"); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the the White House*, 105 COLUM. L. REV. 1681, 1694 (2005) ("narrow textualism").

[137] McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 129 at 799.

[138] John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 101 and n.111 (2006) (quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59, 65 (1988)) (discussing in depth, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006). *See also*, Steven M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115, 2143 ("hypertextualism, the theory of the Article V literalists who believe the only way the Consti-

(7)(b) Laurence "Tribe's hypertextualism;"[139]
(8) "doctrinaire textualism;"[140]
(9) "obsessional textualism;"[141]
(10) "clause bound textualism;"[142]
(11) "stringent textualism;"[143]
(12) "[s]trict textualism;"[144]

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tution can be changed is through Article V (or perhaps Supreme Court precedent)"); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750-52 (1995); L.A. Powe, Jr., *Ackermania or Uncomfortable Truths?*, 15 CONST. COMMENT. 547, 568 (1998) (reviewing Bruce Ackerman, WE THE PEOPLE: TRANSFORMATIONS (1998)); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1460 (2005); Gerald N. Rosenberg, *The Unconventional Conventionalist,* 2 GREEN BAG 2D 209, 213 (1999) ("'hypertextualists' argue that either the constitution is followed to the letter or there is lawlessness").

[139] James J. Varellas, *The Constitutional Political Economy of Free Trade: Reexamining NAFTA-Style Congressional-Executive Agreements*, 49 SANTA CLARA L. REV. 717, 743, 790 (2009) (describing Laurence Tribe's version of hypertextualism, but not distinguishing it from any other version of hyper-textualism).

[140] *See, e.g.*, Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 347 n.3 (2005) (quoting Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring)).

[141] George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1316 (1990) (describing obsessional textualism that would be founded seemingly on the principle that knowing a term is "to know the thing"). *See also*, David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1390 (1999).

[142] *See, e.g.*, Shannon Stewart, *The Art of Constitutional Interpretation*, 17 J. CONTEMP. L. 91, 100 (1991) (describing "[c]lause-bound textualism" as the "most literal and direct technique of constitutional interpretation" which "purports to construe words and phrases very narrowly and precisely") (quoting Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980)).

[143] *E.g.*, Robert F. Utter & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective*, 54 OHIO ST. L.J. 559, 568 (1993). *See also*, William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 95 (2002) (referring to "[s]tringent textualists such as Justice Scalia and Justice Thomas"); Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 151 n.185 (2009) (referring to "stringent textualists").

[144] *E.g.*, Garrick B. Pursley, *Dormancy,* 100 Geo. L.J. 497, 536 (2012). *See also*, Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2710 (2003) (suggesting that "[c]orrectly read, Marbury [v. Madison 5 U.S. (1 Cranch) 137 (1803)] … implies strict textualism as a controlling method of constitutional interpretation"). Michael Stokes Paulsen's conclusions fascinatingly rely on a reading of Marbury different than apparently most have of Marbury. Additionally, he infers from "constitutional supremacy" strict textualism as "a controlling method" and finds Marbury standing for constitutional supremacy while many others do not. Rephrased, Paulsen, rather than relying on the words or text of Marbury, relies on what he infers from his admittedly idiosyncratic reading of Marbury in order to assert supremacy of "strict textualism"; Silas J. Wasser-

(13) "superstrict textualism," which, apparently, "relies only on meanings expressly stated in the text without reference to history, intent, or purpose;" and[145]
(14) "radical textualism;"[146]
(15) "naïve textualism."[147]

Perhaps not all these textualisms necessarily indicate a negative or pejorative view of textualism. In many ways these textualisms suggest the possibility of dual meaning. As with "wooden textualism," these textualisms suggest either (1) the existence of (at least) two textualisms, i.e., "textualism" and "adjective textualism" or (2) the conclusion that textualism (whatever it may be to the author) is properly described by the adjective, i.e., "wooden textualism" simply states that textualism is wooden. Not all of the preceding versions of textualism easily fall into each of the above two categories, but they each suggest, at a minimum, the possibility of two (or more) versions of textualism.

C. *Other Judgmental Adjective Textualisms*

While some use adjectives that suggest, or at least arguably suggest, a pejorative of textualism, others use adjectives that, at a minimum, suggest some sort of judgment about one version of textualism and by doing so suggest at least one other version of textualism, for example words such as weak and strong, honest and objective suggest judgment of some sort even if they do not necessarily suggest good or bad. Additionally, those types of adjectives strongly suggest other versions of textualism. For example, "weak textualism" may not be a negative or positive description, but it does suggest a textualism other than weak. These various versions include, but are not necessarily limited to, the following textualisms discussed below.

Walter Benn Michaels describes "weak textualism," as relying on "what the authors said as the best evidence of what they meant."[148] More than 25 years before Michaels, Sanford Levinson, relied on the work of

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strom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 71 n.207 (1988); *but see*, William N. Eskridge, Jr., *All about Words: Early Understandings of the Judicial Power in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1087 (2001) (asserting that "the Framers" did not expect courts to rely on "strict textualism").

[145] McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 129, at 794.

[146] John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489 (2001).

[147] *E.g.*, Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 180 (1985); *see also*, Jonathan R. Siegel, *Naïve Textualism in Patent Law*, 76 BROOK. L. REV. 1019 (2011). *But see*, Tillman, *supra* note 134, at 1368 (suggesting that " 'naïve' textualism . . . serves modern jurisprudence well.").

[148] Walter Benn Michaels, *A Defense of Old Originalism*, 31 W. NEW ENG. L. REV. 21, 33-34 (2009).

Richard Rorty[149] to describe John Hart Ely as a " 'weak' textualist," i.e., someone "who claims to have gotten the secret of the text, to have broken its code"[150] or someone who wants "to imitate science" or who wants "a *method* of criticism."[151] Francis J. Mostz, III, explains, "the 'weak textualist' argues that through a properly formulated methodology, jurists can extract the essential meaning of a legal text even though this meaning is neither plain on its face nor immediately comprehensive in light of historical research."[152] For Levinson and others relying on Rorty, the term "weak" "refers to the power of the critic."[153] To Rorty and others, weak textualists do no more than seek meaning in words. Michaels, on the other hand, describes Rorty's weak textualist as a strong textualist, i.e., a person committed to finding meaning in "what the text says."[154] Others seem to agree with Michaels.[155] Whichever meaning the reader (or author intended)[156] for "strong" or "weak" each is used to delineate at least one version of textualism, distinguishable from at least one other.

D. OTHER DICHOTOMOUS ADJECTIVE TEXTUALISMS

Legal literature (an apropos, perhaps ironically apropos, term for an article concerning writings that often dismiss the similarity between inter-

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[149] Richard Rorty, *Nineteenth Century Idealism and Twentieth Century Textualism,* in CONSEQUENCES OF PRAGMATISM, 152 (1982), reprinted from 64 MONIST 155 (1981).
[150] Sanford Levinson, *Law as Literature*, 60 TEX L. REV. 373, 379-380 (1982) (internal quotation marks omitted).
[151] *Id.* at 380.
[152] Francis J. Mootz III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricouer*, 68 B.U. L. REV. 523, 558 (1988).
[153] Levinson, *supra* note 150, at 382.
[154] Walter Benn Michaels, *A Defense of Old Originalism*, 31 W. NEW ENG. L. REV. 21, 33-34 (2009).
[155] *See, e.g.*, Larry Alexander & Saikrishna Parakash, *Is That English You're Speaking? – Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967, 979 (2004) ("a person back[s] away from . . . strong textualism by bringing in authorial intentions"); Lackland H. Bloom, Jr., *Interpretive Issues in Seminole and Alden*, 55 SMU L. REV. 377, 380 (2002) ("One might expect a strong textualist, . . . , to prefer the text to precedent . . . "); John L. Flynn, *Mixed-Motive Causation under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 Geo. L.J. 2009, 2026 ("A strong textualist would … place greater weight on the inherent meaning" of words); Abner J. Mikva & James E. Pfander, *On the Meaning of Congressional Silence: Use Federal Common Law to Fill in the Gap in Congress's Residual Statute of Limitations*, 107 YALE L.J. 393, 418 (1997) ("[A] strong textualist might quibble with any attempt … to fill gaps in federal legislation by borrowing . . . from another source"); Jane S. Schacter, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 107, 149 (1995) (describing "strong textualism" as "an approach that takes seriously the notion that plain . . . meanings exist").
[156] A philosophical question arises here. Can an author, or should an author, arguing the use of textualism ask the reader to rely on the author's intended meaning of words such as "weak" or "strong"?

preting legal texts and fictional texts, i.e., poems and other literature)[157] contains references to and discussions of other dichotomous adjective textualisms. For example, as noted by a number of others, "Douglas Kendall has founded a progressive think tank, … devoted to 'honest textualism and principled originalism.'"[158] Gregory C. Sisk asserts that an "honest textualist" would hesitate before using "rules of construction that had the dice for or against a particular result."[159] Justice Scalia, "who speak[s] for the 'honest textualist'" agrees that textualists should not rely on "'dice loading' rules of interpretation that favor one substantive outcome over another."[160] Ralph H. Brock's "honest textualist" would "stop" interpreting a constitutional provision once finding (at least in Brock's view) "a literal reading."[161]

John F. Manning has declared the existence of "appropriate textualist methodology."[162] Others discuss the existence of "objective textualism," which, according to Thomas M. Mackey, "posits a hypothetical, highly informed, and disinterested reader of [a statutory] provision, other pertinent law, and other textual sources who seeks meaning from semantic context, considering both ordinary meaning ("plain meaning") and specialized meaning understood [within the] parlance" of a particular statutory

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[157] Durden, *Plain Language Textualism*, *supra* note 1, at 377 ("It is said, however, that the Constitution is neither a novel, an essay, nor a poem"). *But see*, Steven D. Smith, *Law without Mind*, 88 MICH. L. REV. 104, 111 ("Viewed one way, a . . . constitutional provision is just a collection of words . . . not all that different from the words one might find in . . . a law review article, or even a science fiction novel").

[158] Pamela S. Karlan, *Constitutional Law as Trademark*, 43 U.C. DAVIS L. REV. 385, 399 (2009). *See also*, Dale E. Ho, *Dodging a Bullet: McDonald v. City of Chicago and the Limits of Progressive Originalism*, 19 WM. & MARY BILL RTS J. 369, 386 (2010); Pamela S. Karlan, *What Can Brown Do for You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1051 (2009).

[159] Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity*, 50 WM. & MARY L. REV. 517, 575 n.268 (2008) (internal quotation and citation omitted).

[160] Jonathan Z. Cannon, *Words and Worlds: The Supreme Court in Rapanos and Carabell*, 25 VA. ENVTL. L.J. 277, 293-294 (2007). *See also*, James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 10 n.37 (2005); Stephan E. Oestreicher, Jr., *Effectual Interpretation and the Content-Neutrality Inquiry: On Justice Scalia and Hill v. Colorado*, 12 GEO. MASON U. C.R. L.J. 1, 22 (2001) (referring to "[t]he string-form textualism that Justice Scalia champions"); Andrew C. Spiropoulos, *Making Laws Moral: A Defense of Substantive Canons of Construction*, 2001 UTAH L. REV. 915, 947 (2001).

[161] Ralph H. Brock, *The Ultimate Gerrymander: Dividing Texas into Four New States*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 651, 662 (2008). Admittedly, whereas Brock discussed only the Admissions Clause, this Article extrapolates Brock's conclusion to include all constitutional provisions, making that extrapolation on the assumption that an "honest textualist[s]" would not use different rules for different constitutional provisions.

[162] John F. Manning, *Textualism and the Role of the Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1355 (1998).

field.[163] Adding "meaning" to "objective textualism," Steven G. Calebresi and Gary Lawson "learned" "the principles of object-meaning textualism" from Justice Antonin Scalia.[164] Thomas B. Colby also refers to "object-meaning textualists" rather than "objective textualists."[165]

Authors have used a variety of other adjectives that do little more than create a dichotomy, i.e., the adjective tells the reader little about the textualism. Adrian Vermeule describes, for example, "universal textualism" as "an equilibrium[] in which legislative coalitions will place all their instructions in the text."[166] While Vermeule later describes universal textualism, the word universal has no meaning in relation to textualism until described. Edward J. Sullivan invents, and supports use of, "progressive

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[163] Thomas M. Mackey, *Post-Footstar Balancing: Toward Better Constructions of Sec. 365(c) (1) & Beyond*, 84 AM. BANKR. L.J. 405, 407 (2010). *See also*, William N. Eskridge, Jr., *Fetch Some Soupmeat*, 16 CARDOZA L. REV. 2209, 2211 (1995) (referring to "an objective textualist methodology").

[164] Steven G. Calabresi & Gary Lawson, *Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1009 (2007).

[165] Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism* textualism, this dichotomy falls into a subset of dichotomous adjectives that seek to describe the substance of a version of textualism. To explain by example, objective textualism suggests more of a value judgment than objective meaning textualism which describes, at least in part, the methodology of textualism described.

[165] Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4, 47 (2009).

[165] Edward J. Sullivan & Nicholas Cropp, *Making It up – Original Intent and Federal Takings Jurisprudence*, 35 URB. LAW. 203, 280 (2003).

[165] Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233 (1989) (reviewing Mark Tushnet, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988)).

[165] Gluck, *supra* note 80, at 1837-38.

[165] Chad Flanders, *The Possibility of a Secular First Amendment*, 26 QUINNIPIAC L. REV. 257, 280 (2008).

[165] William N. Eskridge, Jr., *All about Words, supra* note 144, at 998 (2001).

[165] Ward Farnsworth, *Women under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1335 (2000).

[165] Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2287 (1998) (reviewing AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997)).

[165] Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1788 (1996).

[165] Harvard University Press (2006)., 108 COLUM. L. REV. 529, 584 (2008). Object meaning textualism belongs in a subset of dichotomous adjective textualisms. While certainly objective-meaning textualism creates a dichotomy between textualism based on some version or another of what authors declare to be "objective meaning" of words and all other versions of textualism, this dichotomy falls into a subset of dichotomous adjectives that seek to describe the substance of a version of textualism. To explain by example, objective textualism suggests more of a value judgment than objective meaning textualism which describes, at least in part, the methodology of textualism described.

[166] Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4, 47 (2009).

textualism," which "take[s] a commonsense approach to the meaning of words [thereby] confin[ing] judges within definite boundaries *and* allows for the dynamic quality that words like 'liberty,' 'justice,' and 'freedom' *must* engender" and which places "no value whatsoever in attempting to bind the Constitution to its meaning as it was first drafted."[167] Phillip Bobbitt, referring to Justice Black's jurisprudence, used the term "simple textualism" as far back as 1989.[168] Abbe R. Gluck followed suit in 2010 referring to Supreme Court decisions in 2008 and 2009 as being "driv[en]" by simple textualism, i.e., which included using "plain text," "ordinary reading," "dictionary definitions," "precedent," somewhat richer analysis of "dictionaries," "grammar," "statutory structure" and "canons" of construction.[169] However described, this version of "simple" textualism uses far more tools than the much less complex textualisms, plain meaning textualism and literal textualism. Others that refer to, but do not necessarily advocate, "simple textualism" include: Chad Flanders,[170] William N. Eskridge, Jr.,[171] Ward Farnsworth,[172] Louis Michael Seidman,[173] and Martin S. Flaherty.[174] In an article discussing Adrian Vermeule's book, Judging under Uncertainty: An Institutional and Theory of Legal Interpretation,[175] William Eskeridge describes Vermeule's textualism as "No Frills Textualism."[176]

Certainly, other forms or versions of meaningless[177] adjective textualisms exist. They include, but are not limited to,

1) "conservative textualism,"[178]

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[167] Edward J. Sullivan & Nicholas Cropp, *Making It up – Original Intent and Federal Takings Jurisprudence*, 35 URB. LAW. 203, 280 (2003).
[168] Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233 (1989) (reviewing Mark Tushnet, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988)).
[169] Gluck, *supra* note 80, at 1837-38.
[170] Chad Flanders, *The Possibility of a Secular First Amendment*, 26 QUINNIPIAC L. REV. 257, 280 (2008).
[171] Eskridge, *All about Words, supra* note 144, at 998 (2001).
[172] Ward Farnsworth, *Women under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1335 (2000).
[173] Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2287 (1998) (reviewing AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997)).
[174] Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1788 (1996).
[175] Harvard University Press (2006).
[176] Eskridge, *No Frills Textualism*, *supra* note 110, at 2041.
[177] Meaningless means adjectives that have little or no meaning without some explication. Meaningless means an adjective that fails to facially give a clue as to an interpretive methodology identified by the adjective.
[178] Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 25 n.2 (1994); Tushnet, *supra* note 55, at 686. Others contradistinguish these articles and their use of the term "conservative textualism" as a form of textualism by suggesting things such as "conservatives" (an undefined term) "endorse textualism" (quoting Gura, *Heller and the Triumph of Originalist Judicial Engage-*

2) "conservative formalist-textualism"[179]
3) "unsophisticated textualism;"[180]
4) "careful textualism;"[181]
5) "superficial textualism;"[182]
6) "principled textualism;"[183]
7) "narrow textualism;"[184]
8) "moderate textualism;"[185]
9) "more moderate textualism;"[186] and

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ment: A Response to Judge Harvie Wilkinson, 56 UCLA L. REV. 1127, 1147 (2009)), "conservatives"-identified, at least generally, with "textualism" (quoting Daniel P. O'Gorman, *Construing the National Labor Relations Act: The NLRB and Method of Statutory Construction*, 81 TEMP. L. REV. 177, 179, n.8 (2008)), and "conservative doctrine" [that] includes, inter alia, "textualism" (quoting Andrew N. Adler, *Translating & (and) Interpreting Foreign Statutes*, 19 MICH. J. INT'L L. 37, 82 (1997)). These latter three suggest that textualism has a "conservative" bent, however conservative may have been defined in the article.

[179] *E.g.*, Jeffrey W. Stempel, *Class Actions and Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class*, 83 WASH. U. L. Q. 1127, 1265 n.443 (2005).

[180] Tushnet,, *supra* note 55, at 686; *see also*, Kavanagh, *supra* note 56, at 297 n.117.

[181] *E.g.*, Rachel E. Barkow, *Tribute to Justice Antonin Scalia*, 62 N.Y.U. ANN. SURV. AM. L. 15, 21 (2006); Peter S. Menell, *Forty Years of Wondering in the Wilderness and No Closer to the Promised Land: Bilski's Superficial Textualism and the Missed Opportunity to Return Patent Law to Its Technology Mooring*, 63 STAN. L. REV. 1289, 1303 (2011).

[182] Menell, *supra* note 181, at1303.

[183] Paulsen, *How to Interpret the Constitution*, *supra* note 131, at 2059 n.42; *see also*, Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1738 (2002) (advocating "principled textual interpretation"); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1546 n.71 (2011) ("principled textualist"). John F. Manning argues "the principled textualist" must rely on "contextual evidence" including "the thoroughness evident in [the] consideration [of the contextual evidence], the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." Manning, *Textualism and the Role, supra* note 162, at 1339 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)) (internal quotations omitted). Rephrased, this version of the "principled textualist relies on far more than the words of the text. Interestingly, no one seems to discuss "unprincipled textualism," although, presumably the existence of "principled textualism" strongly suggests the existence of "unprincipled textualism."

[184] *E.g.*, Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 483 (1989); Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1337 (2010).

[185] *E.g.*, Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 71 n.207 (1988) (suggesting that "modern textualism" "reads the language of provisions in their social and linguistic contexts"); George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 336 n.63 (1995) (summarizing LESLIE FRIEDMAN GOLDSTEIN, IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY (1991)) (stating that Goldstein argues that those using "moderate textualism" should "inquir[e] into . . . what principle of law the text suggests").

[186] *E.g.*, Eskridge, *All about Words, supra* note 144, at 1090 (comparing Justice Antonin Scalia's version of textualism with that "defended in John Manning, *Textualism as a Non-*

10) "acceptably moderate textualism."[187]

For the most part, the textualisms delineated in this part have the commonality of creating dichotomies. They note or describe a version of textualism, with an adjective that has little or no inherent relation to textualism or its application. Terms such as "simple," "objective," "progressive," "conservative," and "superficial" say very little about that version of textualism. Certainly, those who use the terms may disagree, and some who use such terms undeniably seek to define the term. In any event, each of these terms when used as modifiers to the word "textualism" suggest, or even demand recognition of, at least two versions of textualism.

E. TEMPORAL ADJECTIVE TEXTUALISMS

Authors on textualism regularly seek to distinguish one or more versions of textualism by using temporal adjectives, i.e., adjectives which seek to distinguish versions of textualism based on some sense of time, e.g., "new" or "modern." According to James E. Ryan, "William Eskridge introduced the phrase" "new textualism" more than two decades ago,[188] making "new textualism" one of the oldest versions of textualism, other than "unmodified textualism." While Eskridge may have introduced the term "new textualism" to law review articles, Sheldon D. Pollack predates Eskridge in discussing, for example, "new methods of textual interpretation."[189] Jeffrey Malkan describes "deconstruction" as similar to New Criticism which he describes as a "methodology [that] enables the critic to find new readings of old texts by identifying predetermined textual traits or characteristics."[190] Perhaps New Criticism and New Textualism have different meanings, but certainly Paul A. Freund might have concluded that "New Criticism," which sounds "new," is a version of textualism, inasmuch as Freund critiques "New Criticism" as "simply old hat in constitu-

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delegation Doctrine, 97 COLUM. L. REV. 673, 731-39 (1997) and finding greater cogency in [Manning's] more moderate textualism"); Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 569 (1997-1998) (concluding that in Evans v. United States, 504 U.S. 255, 272-278 (Kennedy, J. concurring) "Justice Kennedy applied a more moderate textualism" that included the use of "traditional canons of construing statutes.").

[187] Manning, *What Divides Textualists, supra* note 138, at 101, n.111 Acceptable to whom this Article cannot answer. Perhaps "moderate textualism" becomes "acceptable" when "accepted" by any one . . . certainly, the constitution provides no clues as to the acceptability of a version of textualism much less of a moderate textualism.

[188] James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1552 (citing William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990)).

[189] Pollack, *supra* note 11, at 992.

[190] Jeffrey Malkan, *Law on a Darkling Plain*, 101 HARV. L. REV. 702, 711 n. 19 (1988) (reviewing JAMES BOYD, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985)).

tional law" due to "New Criticism's" rigor of textual analysis.[191] Even if these predating articles do not predate the term "new textualism" as used by Eskridge, the District Court for the Eastern District of Virginia comes close, referring as it does to "a new 'textualist' school,"[192] the year before Eskridge published his article. Finally, two decades before Eskridge, Burns H. Watson referred to a "'neo-textualist' school" of interpretation.[193] Again, it matters not whether any or all of these different versions of "new" and "textualism" have different meanings. The significance comes from the fact that legal commentators have discussed some or another version of "new" "textualism" for more than four decades. Indeed, a Westlaw review of legal literature has the first mention of "textualism"[194] and "neo-textualism"[195] in the same article, suggesting that "new" might not be so new after all.

New textualism demonstrates one of the difficulties in studying textualism in general, that some discuss textualism in light of statutory construction and some discuss textualism in light of constitutional construction or constitutional interpretation.[196] On the surface, distinguishing between statutes and the constitution seems to make little sense with regard to an interpretational model with "textualism" in the name, a name that suggests to some degree or another, the text matters. Statutes and the Constitution each qualify as texts, even, legal texts. Be that as it may, James E. Ryan wrote, in 2011, that as of the writing of this article, "the term 'new textualism'" has not been "in apparent use among constitutional theorists."[197] On the other hand, in 1995, Jed Rubenfield argued for a "new textualism" in "constitutional interpretation" "a textualism aspiring to neither the mystery of literature nor the transparency of literalism," a textualism "which takes as its starting point the central role of a written constitution in democratic self-government.[198] In 1998, David A. Strauss penned, or at least published his article "The New Textualism in Constitutional Law,"[199] the title of which strongly suggests at least one version of "new textualism" be applied to constitutional interpretation. Finally, Ralph H. Brock, dis-

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[191] Paul A. Freund, *Thomas Reed Powell*, 69 HARV. L. REV. 800, 801 (1956).
[192] Hoechst Aktiengesellschaft v. Quigg, 724 F. Supp. 398, 403 n.15 (1989).
[193] Burns H. Weston, *Book Review*, 117 U. PA. L. REV. 647, 650 (1969) (reviewing MYRES S. MCDOUGAL, HAROLD D. LASWELL & JAMES C. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967)).
[194] *Id.* at 648, 649.
[195] *Id.* at 650.
[196] Brannon P. Denning, *Common Law Constitutional Interpretation: A Critique*, 27 CONST. COMMENT. 621, 640 (2011) (reviewing DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010)) ("Randy Barrett, … distinguishe[s] … constitutional 'interpretation' and constitutional 'construction'").
[197] Ryan, *supra* note 188, at 1552 n.89.
[198] Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1142 (1995).
[199] David A. Strauss, *New Textualism in Constitutional Law*, 66 GEO. WASH L. REV. 1153 (1998).

cussing constitutional interpretational methodologies declares Robert Bork "[t]he father of the new textualism movement."[200]

Perhaps each of these "new textualisms" are the same, perhaps they are different. Either way "new textualism" is not really all that new. Indeed, J.T. Hutchens seems to recognize this with his "New New Textualism."[201] Elliott M. Davis, a student at Harvard, in 2007 when he published his Note, preferred "newer textualism,"[202] and 13 years before that Philip S. Runkel, then a student at William and Mary wrote about "the newer textualist approach."[203] More recently, Abbe R. Gluck referred to "The New Modified Textualism."[204] Perhaps Bork fathered "new textualism." Perhaps Eskridge coined the phrase. Perhaps each person's version of new is the same, perhaps different. Whenever or whoever created or first recognized "new textualism," no doubt exists that new textualism, at a minimum, dichotomizes textualism, separating "new" from, well, old or perhaps "plain ol'" textualism.

"New" does not stand alone, however, as the sole temporal adjective used to describe one or more versions of textualism. Rather than use "new" other writers use "modern." For example, in an article published before the birth of most current law review students, Mark. G. Yudof discussed "modern-day textualists,"[205] Two years later Daniel B. Rodriguez incorporated within the term "modern textualists" "those advocates of the so-called 'plain meaning' [] approach."[206] In 1990 Nicholas Zeppos suggested that "modern textualism" might be 200 years old, saying writing "the methodology of the [Supreme] Court's early nineteenth-century cases bears a striking resemblance to modern textualism."[207] On the other hand, Suzanna Sherry argues that "the founding generation" had "understandings" of the meaning of the Constitution "*inconsistent* with our modern narrow textualism."[208] So, if Sherry and Zeppos are each correct, then modern textualism goes back to the founding generation, but the founding

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[200] Brock, *supra* note 161, at 653 n.7.
[201] J. T. Hutchens, *A New New Textualism: Why Textualists Should Not Be Originalists*, 16 KAN J. L. & PUB POL'Y 108 (2006).
[202] Elliott M. Davis, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J. L. & PUB POL'Y 983 (2007).
[203] Philip S. Runkel, *Civil Rights Act of 1991 – A Continuation of the Wards Cove Standard of Business Necessity*, 35 WM. & MARY L. REV. 1177 (1994).
[204] Gluck, *supra* note 80, at 1750; *see also*, Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027 (2005).
[205] Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 897 (1979).
[206] Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CAL. L. REV. 919, 931 (1989) (reviewing WILLIAM N. ESKRIDGE, JR., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988)).
[207] Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1363 n.322 (1990).
[208] Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 171 n.7 (1992). Sherry does not tell the reader to whom the pronoun "our" refers.

generation had different understandings of the meaning of the Constitution than would be created with "modern narrow textualism." Perhaps, such is the nature of textualism. Lawrence Lessig may have solved the conundrum with reference to the "theory of 'modern understanding' textualism"[209] which might or might not be the same thing as Rodriguez' "modern textualism" or Sherry's "modern narrow textualism." William Michael Treanor suggests a different "modern" textualism, "modern usage textualis[m]."[210] Jonathan T. Molot posits that modern textualists have created a "new brand of modern textualism"[211]

With all the different versions of modern it is no surprise that commentators cannot agree on whether "new" means "modern." Adam A. Milani appears to use the words interchangeably[212] as does Bradford C. Mank,[213] although, student author, Catherine E. Greely, seems to disagree.[214] Whether or not "modern" means "new" or the two conflict, nothing (perhaps nothingness) completes a "modern" idea like a "postmodern" response, and a number of commentators have discussed one version or another of post-modern textualism even if they cannot agree on the meaning. Scott D. Gerber, while describing techniques of some legal historians identified "textualism" as a "postmodern technique."[215] William W. Fisher seeming to agree, equates "Postmodernists" and "Textualists."[216] Daniel R. Coquillette perhaps suggests a sort of equivalence in using the term "a postmodern 'textualist.'"[217] Alternatively, he uses the term to suggest that "[T]he larger umbrella or work of such postmodern textualism includes the critics as Jacques Derrida and Michael Foucault."[218] Carving out postmodern textualism as a subset of textualism divides textualism into parts related, in some form or fashion of time.

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[209] Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1184 n.61 (1993).
[210] William Michael Treanor, *Take-ings*, 45 SAN DIEGO L. REV. 633, 634, 635 (2008).
[211] Molot, *supra* note 78, at 1.
[212] Adam A. Milani, *Go Ahead – Make My 90 Days: Should Plaintiffs Be Required to Provide Notice to Defendants before Filing Suit under Title III of the Americans with Disabilities Act?*, 2001 WIS. L. REV. 107, 146 n.216 (2001).
[213] Bradford C. Mank, *Implementing Rapanos – Will Justice Kennedy's Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators, and Developers?*, 40 IND. L. REV. 291, 332 (2007).
[214] Catherine E. Creely, *Prognosis Negative: Why the Language of the Hatch-Waxman Act Spells Trouble for Revers Payment Agreements*, 56 CATH. U. L. REV. 155, 174 n.140 (2006).
[215] Scott D. Gerber, *Bringing Ideas Back In – A Brief Historiography of American Colonial Law*, 51 AM. J. LEGAL HIST. 359, 367 (2011).
[216] William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1069, 1084, 1085 (1997).
[217] Daniel R. Coquillette, *First Flower – The Earliest American Law Report and the Extraordinary Josiah Quincy Jr. (1774-1775)*, 30 SUFFOLK U. L. REV. 1, 1 (1996).
[218] George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 330 (1995).

Others suggest an inconsistency between postmodernism and textualism. Louis E. Wolcher describes Stanley Fish as a "[p]ost modern critic[] of strict textualism" who claims the "impossib[ility]" of "'[f]ormalist, or literalist or four corners interpretation.'"[219] George Kannar implicitly finds "the literalist-textualist impulse" impossible when describing the impulse as "[a]bsurd" "in a generally post-modern era."[220] So those who use the words post-modern and textualism disagree with whether the two conflict or whether one subsumes the other. This article seeks not to resolve this dispute but instead to note that at least some commentators suggest the existence of "post-modern textual[ism]."[221] If indeed postmodern textualism exists, then its existence recognizes no fewer than three timeframes under the textualism umbrella: post-modern, modern and pre-modern.

Perhaps realizing that others had expropriated the terms "modern" and "post-modern," or perhaps sensing that the term "post-post-modern" or "really post-modern" or "more modern post-modern-textualism" contain too much pith to be pithy, John F. Manning creates "second-generation textualism," distinguishing it from, of course, "first generation textualism."[222] At this point in time, "second generation textualism" may focus on statutory interpretation. However, commentators now apply "new textualism," which began life as a methodology tied to statutory construction, to constitutional interpretation. Generational textualism has a clear advantage over "new" and "modern" in that in the future commentators can use bigger numbers for new generations, e.g., "third generation," an approach that reads more easily than when relying on terms such as the newest, most-modernist, postmodern-textualism. Manning's use of first and second as modifiers of textualism raises the question whether second generation textualism includes other generational textualisms such as Abbe R. Gluck's reference to "a new generation of textualist judges;"[223] or Larry Cata Baker's suggestion that every generation has a "crop of textualists" with their own "political whims."[224]

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[219] Louis E. Wolcher, *A Philosophical Investigation into Methods of Constitutional Interpretation in the United States and the United Kingdom*, 13 VA. J. SOC. POL'Y & L. 239, 283 (2006).
[220] Kannar, *supra* note 141, at 1343.
[221] *See, e.g.*, Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL IN'T L.J. 101, 149 (2001-2002) ("postmodern textual interpretation"); Sharon Hom & Robin Paul Malloy, *China's Market Economy: A Semiosis of Cross Boundary Discourse Between Law and Economics and Feminist Jurisprudence*, 45 SYRACUSE L. REV. 815 (1994).
[222] John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287 (2010).
[223] Gluck, *supra* note 80, at 1804.
[224] Larry Cata Backer, *Disciplining Judicial Interpretation of Fundamental Rights: First Amendment Decadence in Southworth and Boy Scouts of America and European Alternatives*, 36 TULSA L.J. 117, 144 (2000).

Some contradistinguish new textualism with, perhaps obviously, "old textualism,"[225] which Maura Flood defines as "[l]iteralism with the addition of the 'golden rule,'"[226] and she defines the golden rule as "giving words … their ordinary meaning."[227] Perhaps using less obviously temporal adjectives, others refer to "classic textualis[m];"[228] "traditional textualism;[229] or, perhaps more pejoratively, "dated textualism."[230] Whatever word an author might use, authors sometimes slice textualism into before and after time slots, each time slot strongly suggesting more than one type of textualism.

F. DESCRIPTIVE ADJECTIVE TEXTUALISMS

Some of textualism's flavors relate to a sense of better or worse; others relate to some sense of time, i.e., older or newer. Other scholars prefer to create or note a specialized version of textualism, giving a first name to textualism that might suggest the substance of the methodology of that textualism. James E. Pfander, looking at the narrow question of supplemental jurisdiction and 28 United States Code, Section 1367, invented "sympathetic textualism,"[231] with which he would "fuse two competing approached" to arrive at a better interpretation to a specific statute: (1) "rigorous textualis[m]" plus (2) "taking into consideration the expressed purpose of Congress and...history" of the area of law.[232] While Pfander refers to a specific statute, another textualist could take a sympathetic view of Pfander's approach and apply it to constitutional interpretation. Certainly, if one textualist advocates for a "sincere and sympathetic 'effort' to

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[225] *E.g.*, Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1138 (2008); Samuel C. Rickless, *A Synthetic Approach to Legal Adjudication*, 42 SAN DIEGO L. REV. 519, 520 (2005).

[226] Maura A. Flood, *Kennewick Man or Ancient One – A Matter of Interpretation*, 63 MONT. L. REV. 39, 56 n.81 (2002).

[227] *Id.* at 56.

[228] *See e.g.*, A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 71, 71 n.1 (1994) ("classic textualist approach"); Michael C. Dorf, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 21 (1998) ("classic textualist fashion").

[229] *See e.g.*, John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997); Francisco Forrest Martin, *Our Constitution as Federal Treaty: A New Theory of United States Constitutional Construction Based on an Originalist Understanding for Addressing a New World*, 31 HASTINGS CONST. L. Q. 269, 276 (2004).

[230] Robert Justin Lipkin, *We Are All Judicial Activists Now*, 77 U. CIN. L. REV. 181, 199, n.75 (2008). *See also*, Jamal Greene, *Heller High Water: The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 328 (2009) (referring to "[t]he Framers" as "dated textualists.").

[231] James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism,* 148 U. PA. L. REV. 109 (1999).

[232] *Id.* at 112-13.

uncover the meaning of a statute,"[233] another could advocate a similar approach to the meaning of a constitutional provision.

Sympathetic textualism may find some kinship to "holistic textualism," which according to Akhil Amar, "invites readers to ponder connections between noncontiguous [constitutional] clauses that have no textual overlap."[234] Amar describes, as well, "[a]nother brand of holistic textualism," a brand that squeezes meaning from the Constitution's organization chart."[235] Other forms of "holistic textualism" include, or may include, comparing words that "fall within a larger genus, class of thing, or subject-matter."[236] According to William Michael Treanor, "[h]olistic textualism insists that the location of clauses in the Constitution reveals meaning"[237] "assumes...ideological coherence" in disparate parts of the Constitution, including the assumption that the Bill of Rights has the same ideological goals as parts of the original Constitution.[238] According to Larry J. Pittman, "[Justice Scalia] supports 'holistic textualism,'" at least as regards statutory construction.[239] William N. Eskridge, Jr., agrees, "recognizing that ...Justice Scalia...has developed a 'holistic textualism' theory that relies on contextual constraints."[240]

Sympathetic and holistic textualism have very little in common other than that each seek to go beyond "clause-bound textualism" which "'purports to construe words and phrases very narrowly and precisely.'"[241] Professor Akhil Amar rejects a clause-bound textualist approach that "reads the words of the Constitution in order" and discusses a form of holistic textualism he monikers "intratextualism."[242] An anonymous writer, in response to Amar, satirically created "intra-intra-textualism."[243]

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[233] *Id.* at 113-14.
[234] Amar, *Intratextualism*, *supra* note 136, at 798.
[235] *Id.* at 798 n.197.
[236] Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies,* 17 WM. & MARY BILL RTS. J. 1037, 1056 n. 89 (2009).
[237] William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights,* 106 MICH. L. REV. 487, 518 (2007).
[238]*Id.* at 518.
[239] Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change,* 53 ALA. L. REV. 789, 803 (2002).
[240] John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter,* 143 U. PA. L. REV. 2209, 2220-36 (1995).
[241] Stewart, *supra* note 142, at 100, quoting from Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 204 (1980).
[242] Amar, *Intratextualism, supra* note 136, at 798.
[243] Anonymous, *Our Boggling Constitution: Or, Taking Text Really, Really Seriously*, 26 CONST. COMMENT. 651 (2010). This Article suggests that the anonymous author engaged in satire regarding textualism recognizing that textualism, i.e., looking at the meaning of words, seems to eliminate the possibility of satire, and this Article concerns textualism.

These various forms of textualism (other than the perhaps satirical intra-intra-textualism) seem to use some form of context to find meaning of words. Other textualisms whose first name may also suggest the importance of context include:

> 1) "locational textualism" which, as defined by Akhil Amar, considers the potential significance of the location of a given clause in influencing the proper interpretation;"[244]
>
> 2) "architectural textualism," which seems similar to (perhaps indistinguishable from) "locational textualism" finds "meaning of a [clause] from an analysis of its relationship with other clauses of the Constitution;"[245] and
>
> 3) "structural textualism" which finds "congruen[ce] with the argument of Charles Black's Structure and Relationship in Constitutional Law"[246] in which "Black contrasts simple interpretation of a particular passage with 'the method of inference from the structures and relationships created by the constitution in all its constituent parts or in some principle part'" and in which Black argues that the meaning of the Constitution must come from "'a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text.'"[247] "Contextual textualism ... considers holistic and normative sources,"[248] and may include "(1) legislative contextualism, (2) semantic contextualism, [and] (3) linguistic contextualism."[249]

On the other hand, not all agree that contextualism and contextual textualism have the same meaning. Jonathan R. Siegel makes a concerted effort to distinguish a contextual textualist from a "contextualist,"[250] which, over-simplified, relates to the reasoning used by the contextualists as opposed to that used by the contextual textualists.[251] "As explained by Professor Ewold, contextualists insist that law must be studied in the context of is surrounding society while textualists embrace the view that a le-

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[244] Akhil Reed Amar, *Architexture,* 77 IND. L.J. 671, 696 (2002).
[245] Mehrdad Payandeh, *Constitutional Aesthetics: Appending Amendments to the United States Constitution*, 25 B.Y.U. J. PUB. L. 87, 121 (2011).
[246] CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).
[247] Taylor, *supra* note 218, at 350.
[248] Eskridge, *No Frills Textualism, supra* note 110, at 2051.
[249] Durden, *Animal Farm, supra* note 1, at 357 (citations omitted). *See also,* Gene Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1065 (2006) (discussing John Manning's "own version of contextualism").
[250] Siegel, *Textualism and Contextualism, supra* note 87, at 1041.
[251] *Id.*

gal system may operate according to its own rules."[252] Perhaps one leads to the other. Justice Scalia is a self-identified "'good textualist'" who "aspires to be a 'reasonable contextualist,'" or at least Brendan Beery asserts that Scalia has such an aspiration.[253]

Perhaps contextualism and contextual textualism differ, perhaps not. Either way, various forms of contextual textualism exist. Either approach contrasts with "acontextual textualism," which might be a search for ordinary meaning of words[254] or which might be "a choice of context that privileges the Justices' own understandings,"[255] or simply another name for plain meaning[256] or literal[257] textualism. Textualism, then, may or might include context (of various sorts, or it may or might not. In any event, some claim the existence, and efficacy of some version or another of contextual textualism. Others use the antithesis of contextual textualism, "hypertextualism,"[258] described by Jessie Allen as a "context-free interpretive style..., because it works something like the highlighted textual links online"[259] taking the reader to definitions and usages of the term outside of the document actually being interpreted.

Textualism, then, can have many first names which seek to describe to some degree or another a version of textualism. Many of these may have similar meanings. Alternatively, these textualisms have a homograph-like quality, having the same spelling, but different meanings. These differing versions lead to one undeniable conclusion: that textualism has more than one form.

G. Source of Meaning Textualism

Some versions of textualism have a first name that indicates a purported source of, or guideline for determining, meaning of the words or phrases of the constitutional text. By the 1990s commentators began dis-

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[252] Lesley K. McAllister, *On Environmental Enforcement and Compliance: A Reply to Professor Crawford's Review of Making Law Matter: Environmental Protection and Legal Institutions in Brazil,* 40 GEO. WASH. INT'L L. REV. 649, 673 (2009).
[253] Brendan T. Beery, *When Originalism Attacks: How Justice Scalia's Resort to Original Expected Application in Crawford v. Washington Came Back to Bite Him in Michigan v. Bryant,* 59 DRAKE L. REV. 1047, 1056 (2011).
[254] Thomas Y. Davies, *Recovering the Original Fourth Amendment,* 98 MICH. L. REV. 686 n. 388 (1999).
[255] Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 970 (2005).
[256] Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN. ST. L. REV. 397, 464 (2004) (referring to "the traditional, acontextual plain meaning rule").
[257] Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1177 n. 255 (referring to "a (fully) literal or acontextual interpretation").
[258] Jessie Allen, *Documentary Disenfranchisement,* 86 TUL. L. REV. 389, 453 (2011).
[259] *Id.*

cussing "plain meaning textualism,"[260] a form of "source of meaning" textualism previously discussed in this article, the source of the meaning being the letters placed in a particular order creating a word, i.e., the source of the meaning is inherent in the word and its existence. By 1994, Steven G. Calabresi and Saikrishna B. Prakash described other sources of meaning, distinguishing between "original" meaning and "present" meaning textualism.[261] Prior to that, Stephen D. Smith discussed similar ideas[262] without actually using the terms "original meaning textualism" or "present meaning textualism."[263] Scholars continue to debate the value and explain the use of original meaning textualism.[264] In 2003, Vasan Kesavan and Michael Stokes Paulsen advocated for a somewhat original version of "original meaning textualism," what they called "original public meaning originalism."[265] Oversimplified, they define "original public meaning textualism" as "the original, non-idiosyncratic meaning of the words and phrases in the Constitution: how the words and phrases, and structure (and sometimes even punctuation marks!) would have been understood by a hypothetical, objective reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted."[266] A few years before Kesavan and Paulsen used the term "original public meaning textualism," Michael C. Dorf argued that "[t]he [Supreme] Court's textualists aim to discover the original public meaning of...the Constitution."[267] Before that, Gary Lawson discussed the "original public meaning" of text,[268] as did Steven G. Calebresi and Saikrishna B. Prakash[269] and Thomas W. Merrill,[270] although these scholars did not actually use the term "original public meaning textualism." In the years subsequent to the Kesavan and

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[260] William D. Popkin, *Law-making Responsibility and Statutory Interpretation*, 68 IND. L. J. 865, 875 (1993).
[261] Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L. J. 541, 546 n. 13 (1994).
[262] *Id.*
[263] Smith, *supra* note 157, at 104-05 (Smith refers to "present-oriented interpretation" rather than "present meaning textualism."
[264] Ryan, *supra* note 188, at 1551; Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 13 (2011); Thomas B. Colby, *The Sacrifice of New Originalism*, 99 GEO. L. J. 713, 748 (2011); Peter J. Smith, *Biblical Literalism and Constitutional Originalism*, 86 NOTRE DAME L. REV. 693, 712 n. 81 (2011); Durden, *I am Textualism*, *supra* note 30 at 431.
[265] Kesavan & Paulsen, *supra* note 13, at 1127.
[266] *Id.* at 1132.
[267] Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 6 (1998).
[268] Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992).
[269] Calabresi & Prakash, *supra* note 261, at 553.
[270] Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J. L. PUB. POL'Y 509, 510 (1996).

Paulsen article, numerous scholars have discussed "original public meaning" as one of the "textualist theories of interpretation."[271]

Recently, Paulsen identified a more specific version[272] of original public meaning textualism, or at least which has a new name, that is: "objective, original public-meaning textualism,"[273] which phrase he modifies again creating "objective, original-public-meaning written textualism."[274] His version may, or may not, incorporate within its meaning, but certainly incorporates within its title, the previously discussed "original public meaning textualism" as well as, inter alia:

1) "objective textualism"[275] which "posits a hypothetical, highly-informed, and disinterested reader of the provision, other pertinent law, and other textual sources who seeks meaning from semantic context, considering the ordinary ('plain meaning') and [where relevant] specialized meaning;"[276]

2) "public meaning textualism," declared by Randall P. Bezanson as "Justice Scalia's brainchild and today's dominant view of textualism" and further described by Bezanson as "rel[ying] on the common objective understanding of the words used by the populace and culture at the time the words were written;"[277]

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[271] Mitchell, *supra* note 264, at 9.

[272] Perhaps "original public meaning textualism" and "objective, original public-meaning textualism have the same meaning, but it does seem strange that a textualist would choose to create the exact same meaning by using an additional word. If indeed, the second phrase means exactly what the first phrase means, then perhaps the word "objective," i.e., the additional word has no meaning. On the other hand if it does have meaning, then it seems as though adding it to a phrase would change the meaning of the phrase.

[273] Paulsen, *Does the Constitution, supra* note 14, at 894.

[274] *Id.* at 872. Inasmuch as "[t]he first American dictionaries were published after ratification," Saul Cornell, *The People's Constitution vs. the Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 298 (2011), the requirement that textualism be both objective and written creates a conundrum. The textualist, apparently, must find written proof of meaning, and that proof must be objective. Without the existence of a dictionary, the existence of written proof of meaning that is also objective must be difficult to find. Also, it is not so clear what percentage of voters pre-Constitution were literate. So the question arises as to how to determine what the founders originally read, i.e., the Constitution, if many or most could not read.

[275] Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 644 (1995).

[276] Mackey, *supra* note 163, at 406-07.

[277] Randall P. Bezanson, *Art and the Constitution*, 93 IOWA L. REV. 1593, 1606 (2008). Bezanson asks a number of reasonable questions regarding public meaning textualism, e.g., "Which public does the Supreme Court choose? Men only? Property owners who were voters? Educated men, of whom there were few? How about women? Slaves?" *See also*, Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 914 (1998).

3) "original textualism;"[278] and

4) "original meaning textualism."[279]

Other scholars find meaning in words other than "original" and "public," recognizing or creating other versions of "meaning(ful)" textualisms. Those versions of textualism include:

1) "ordinary meaning textualism;"[280]

2) "present meaning textualism;"[281] and

3) (as much discussed) "plain meaning textualism."[282]

Notwithstanding the personal desires of those who advocate for one or more of the "meaning textualisms" listed above, relying on the "objective", "original," or "original, objective and public" meaning of words does not always, in and of itself, lead to a meaningfully singular approach to meaning. Those who write about textualism have identified a number of categories of meaning, which categories would or could supplement terms such as "original." Those categories include, inter alia:

1) "term-of-art meaning;"[283]

2) cultural meaning;[284]

3) contextual meaning;[285]

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[278] Terrance R. Kelly, *Canaanites, Catholics and the Constitution: Developing Church Doctrine, Secular Law and Women Priests,* 7 RUTGERS J.L. & RELIGION 3, 46 n. 163 (2005).

[279] Ryan, *supra* note 188, at 1551.

[280] Carlos E. González, *Turning Unambiguous Statutory Materials into Ambiguous Statutes: Ordering Principles, Avoidance, and Transparent Justification in Cases of Interpretive Choice*, 61 DUKE L. J. 583, 589 N. 23 (2011) and Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO L. J. 1119, 1124 (2011).

[281] Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1215 (1992).

[282] Durden, *Textualist Canons*, *supra* note 39, at 130; Durden, *Partial Textualism supra* note 23, at 3, 4; Emerson H. Tiller and Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 225 (1999); Akhil Reed Amar, *Sixth Amendment First Principles* 84 GEO. L. J. 641, 660 n. 76 (1996).

[283] Carlos A. Ball, *Why Liberty Judicial Review is as Legitimate as Equality Review: The Case of Gay Rights Jurisprudence*, 14 U. PA. J. CONST. L. 1, 6 n. 19 (2011) quoting from Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L. J. 408, 411 (2010) (internal quotations omitted).

[284] David L. Paavola, *I Know Exactly what You Mean: Recognizing the Danger of Coded Appeals to Religious Prejudice in Capital Cases*, 62 S.C. L. REV. 639, 653 n. 107 (2011). ("Words are not self-defining; their meaning depends both on culture and context") (citations and internal quotations omitted).

[285] Manning, *Textualism and the Equity*, *supra* note 77, at 111. *See also,* James E. Westbrook, *A Comparison of the Interpretation of Statutes and Collective Bargaining Agree-*

4) "semantic meaning;"[286]

5) "unmistakably clear meaning:"[287]

6) "surface meaning;"[288]

7) "common sense meaning:"[289]

8) "natural meaning;"[290]

9) "conventional meaning;"[291]

10) "common meaning;"[292]

11) "capacious meaning;"[293]

12) "determinate meaning;"[294]

13) "apparent meaning;"[295]

14) "technical meaning;"[296]

15) "repressed meaning[];"[297]

16) "recondite meaning;"[298]

17) "lay meaning;"[299]

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ments: Grasping the Pivot of Tao, 60 Mo. L. Rev. 283, 301 (1995) ("Textualism prefers the meaning derived from a contextual reading of the text....").

[286] Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. PUB. POL'Y 65, 65, 66 (2011).

[287] Tallchief Skibine, *Formalism and Judicial Supremacy in Indian Law*, 32 AM. INDIAN L. REV. 391, 432 (2007-2008) (internal quotations omitted).

[288] Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 344 (2007).

[289] Douglas J. Goodman, *Approaches to Law and Popular Culture*, 31 LAW & SOC. INQUIRY 757, 759 n. 4 (2006).

[290] Durden, *Textualist Canons supra* note 39, at 123; David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1774 (2000); Manning, *Textualism and the Equity*, *supra* note 77, at 118.

[291] Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 461 (2005).

[292] Taavi Annus, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments*, 14 DUKE J. COMP. & INT'L L. 301, 308 n. 30 (2004).

[293] Jack N. Rakove, *The Constitution in Crisis Times*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 11, 18 (2003).

[294] Robert A. Shapiro, *Judicial Deference and Interpretive Coordinacy in State and Constitutional Law*, 85 CORNELL L. REV. 656, 682 (2000).

[295] Deborah Jones Merritt, *The Third Translation of the Commerce Clause: Congressional Power to Regulate Social Problems*, 66 GEO. WASH. L. REV. 1206, 1209 (1998).

[296] Craig Oren, *Detail and Implementation: The Example of Employee Trip Reduction*, 17 VA. ENVTL. L.J. 123, 134 (1998).

[297] Gary C. Leedes, *The Latest and Best Word on Legal Hermeneutics: A Review Essay of Interpreting Law and Literature: A Hermeneutic Reader*, 65 NOTRE DAME L. REV.375, 387 N. 105 (1990).

[298] Nagel, *supra* note 147, at 190 n.105.

18) "legal meaning;"[300]

19) "average person in the street in 1789 meaning;"[301] and

20) "person-in-the-street meaning."[302]

A textualist's search for meaning involves a wide, overlapping, sometimes contradictory array of approaches.

According to Gary Lawson, the "originalis[t] textualist ... searches for the ordinary public meanings that the Constitution's words, read in linguistic, structural, and historical context, had at the time of those words' origin."[303] Rephrased, by William H Widen, "The textualist believes that ... [the] correct approach to legal texts....focus[es] on [] search[ing] for ... the intent of the words ... as ... the relevant community of language speakers [understood those words] at the time of promulgation of the text."[304] Jessie Allen describes "a textualist approach ... [which] consider[s] the enacted text's word choices, syntax and structure."[305] Justice Scalia apparently "use[s] ... constitutional debating history and contemporary political writings in attempting to divine original constitutional meaning."[306] "[L]ocational textualism, or architexturalism or architectural [interpretation]" "derive[s] constitutional meaning from an analysis of [the] relationship [of a certain clause or phrase] with other clauses of the Constitution."[307] Derigan Silver notes that some have the view that textualism should rely on "the use of legal or regular dictionaries to interpret the meaning of words."[308] For example, "Justice Scalia frequently refers to dictionary meanings in order to determine a word's common usage."[309] John Figura suggests that at least some "[t]extualists ... look to sources such as dictionaries and the Federalist Papers [to determine] the public meaning of the words in the Constitution."[310] As explained by John F.

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[299] Durden, *Animal Farm Jurisprudence*, *supra* note 1 at 378.
[300] Jim Chen, *Law as a Species of Language Acquisition,* 73 WASH. U. L.Q. 1263, 1292 (1995).
[301] *See*, Wolcher, *supra* note 219, at 248.
[302] James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1505 (2010).
[303] Gary Lawson, *Proving the Law*, *supra* note 268, at 875.
[304] William H. Widen, *The Arbitrage of Truth: Combating Dissembling Disclosure Derivatives, and the Ethic of Technical Compliance*, 66 U. MIAMI L. REV. 393, 412 (2012).
[305] Allen, *supra* note 258, at 395 n.16.
[306] Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX L. REV. 1, 4 n. 13 (2011) (citation omitted).
[307] Payandeh, *supra* note 245, at 121.
[308] Derigan Silver, *Power, National Security and Transparency: Judicial Decision Making and Social Architecture in the Federal Courts*, 15 COMM. L. & POL'Y 129, 146 (2010).
[309] Emily J. Sack, *The Domestic Relations Exception, Domestic Violence, and Equal Access to Federal Courts*, 84 WASH. U. L. REV. 1441, 1505, n. 336 (2006).
[310] John Figura, *Against the Creation Myth of Textualism: Theories of Constitutional Interpretation in the Nineteenth Century*, 80 MISS. L.J. 587, 593 (2010).

Manning, "Given the historical nature of the Federalist, a textualist judge must treat [it] as a source of highly informed persuasion – to be evaluated critically on its merits, but never to be taken at face value as an authoritative exposition of constitutional meaning."[311]

These differing sources of meaning and differing types of meaning do not necessarily create a school or type of textualism. They may indicate subsets of textualisms, while at the same time creating sources of conflict within a single textualist theory over legitimate sources of meaning. The debates in the constitutional convention provide an example of the conflict. Bradford Clark,[312] John F. Manning,[313] and James S Liebman and William F. Ryan[314] each rely on the record of the convention as a source of constitutional meaning. Vasan Kesavan and Michael Stoke Paulsen wrote an outstanding article arguing for the legitimacy of those sources.[315] Their article recognizes that not all agree as to the legitimacy of those records inasmuch as the article discusses a variety or criticisms of using the records of the convention.[316]

While each of the above-discussed types and sources of meaning may not create a complete interpretational methodology, they each demonstrate the potential variations in textualism. Conversely, if "plain meaning" can be a type of textualism, then "legal meaning" qualifies as a type of textualism as well. However looked at, the differing types and sources of meaning provide a multitude of choices for a textualist.

H. PROPER NAME TEXTUALISMS

Some textualisms have proper names associated with them, often the names of Supreme Court Justices. Justice Scalia may have the honor of having his name most often associated with his own brand of textualism. "Justice Scalia's [T]extualism goes back at least as far back as 1989 when Ann Althouse identified "Justice Scalia's rigid textualism,"[317] followed by George Kannar's 1990 reference to "Justice Scalia's textualism."[318] Justice Scalia may have a variety of different forms inasmuch as author's use different words in identifying "Scalia's textualism," e.g.,

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[311] Manning, *Textualism and the Role*, *supra* note 162, at 1365.
[312] Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1348 n. 133 (2001).
[313] Manning, *Textualism and the Role*, *supra* note 162, at 1339.
[314] James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 707 (1998).
[315] Kesavan & Paulsen, *supra* note 13.
[316] *Id.* at 1134-38.
[317] Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1162 n. 193 (1989).
[318] Kannar, *supra* note 141, at 1345.

1) "Scalia's strict textualism;"[319]
2) "Scalia's new textualism;"[320]
3) "Scalia's rigid textualism;"[321]
4) "Scalia's doctrinaire textualism;"[322]
5) "Justice Scalia's cocktail party textualism;"[323]
6) "Scalia's formalistic textualism;"[324]
7) "Scalia's neo-textualism;"[325]
8) "Scalia's self-proclaimed textualism;"[326]
9) "Scalia's rigorous textualism;"[327]
10) "Scalia's semantic textualism;"[328]
11) "Scalia's 'plain meaning' textualism;"[329]
12) "Scalia's strong textualism;"[330]
13) "Scalia's contextual textualism;"[331]
14) "Scalia's obsessive textualism;"[332]
15) "Scalia's pure textualism;"[333]

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[319] Michael P. Van Alstine, *Dynamic Treaty Interpretation,* 146 U. PA. L. REV. 687, 726 n. 157; Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. 991, 1005, 1008 (1994).
[320] Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO L. J. 1119, 1124 (2011); and David Aram Kaiser, *Entering onto the Path of Inference: Textualism and Contextualism in Bruton Trilogy*, 44 U.S.F. L. REV. 95, 102 (2009).
[321] Rudolph J. Gerber, *Survival Mechanisms: How America Keeps the Death Penalty Alive,* 15 STAN. L & POL'Y REV. 363, 376 (2004).
[322] Jamal Greene, *Selling Originalism,* 97 GEO. L. J. 657, 687 (2009).
[323] Thomas A. Bishop, *The Death and Reincarnation of Plain Meaning in Connecticut: A Case Study*, 41 CONN. L. REV. 825, 842 (2009) (internal quotations omitted) (citation omitted).
[324] Holning Lau, *Formalism: From Racial Integration to Same-sex Marriage*, 59 HASTINGS L.J. 843, 846 n. 24 (2008).
[325] Ian Gallacher, *Conducting the Constitution: Justice Scalia Textualism and the Eroica Symphony*, 9 VAND. J. ENT. & TECH. L. 301, 329 (2006).
[326] Jed Rubenfeld, *The New Unwritten Constitution*, 51 DUKE L.J. 289, 292 (2001).
[327] Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 892 (2000).
[328] David M Zlotnick, *Battered Women & Justice Scalia*, 41 ARIZ. L. REV. 847, 851 (1999).
[329] Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 224 (1999).
[330] Samuel Marcosson, *Colorizing the Constitution of Originalism: Clarence Thomas at the Rubicon*, 16 LAW & INEQ. 429, 479 n. 211 (1998).
[331] Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 267 n. 95 (1997).
[332] James G. Wilson, *Surveying the Forms of Doctrine on the Bright-Line Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 817 (1995).

16) "Scalia's conservative textualism;"[334]

17) "Scalia's literal textualism;"[335] and

18) "Scalia's holistic textualism."[336]

Justice Scalia stands not alone as possessor of a brand of textualism. Scholars and commentators have honored (or accused) a variety of other justices by naming a textualism after the justice. These justices include:

1) Justice Samuel Alito;[337]

2) Justice Hugo Black;[338]

3) Justice Clarence Thomas;[339]

4) Justice William O. Douglas;[340]

5) Justice Thurgood Marshall;[341]

6) Justice Byron White;[342]

7) Chief Justice John Marshall;[343]

8) Justice Anthony Kennedy;[344]

9) Justice Sandra Day O'Connor;[345] and

10) Justice Rehnquist.[346]

Some textualisms carry as first names the last names of scholars and professors, e.g.,

1) Professor Amar's textualism;[347]

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[333] David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 U.C.L.A. L. REV. 953, 985 (1994).
[334] Gerhardt, *A Tale of Two Textualists*, *supra* note 178, at 25 n.2.
[335] Bryan Wildenthal, *The Right of Confrontation, Justice Scalia, and the Power of Textualism,* 48 WASH & LEE L. REV. 1323, 1345 (1991).
[336] Robert M. Lawless, *Legisprudence through a Bankruptcy Lens: A Study in the Supreme Court's Bankruptcy Cases*, 47 SYRACUSE L. REV. 1, 109).
[337] Note, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J.L. PUB. POL'Y 983, 984 (2007).
[338] Gerhardt, *A Tale of Two Textualists*, *supra* note 178, at 56.
[339] H. Brent McKnight, *The Emerging Contours of Justice Thomas's (sic) Textualism*, 12 REGENT U. L. REV. 365 (1999-2000).
[340] Mark Tushnet, *Can You Watch Unenumerated Rights Drift?,* 9 U. PA. J. CONST. L. 209, 212 n. 2 (2006).
[341] Nelson, *What is Textualism?*, *supra* note 140, at 373 n.78.
[342] Susan H. Bitensky, *The Constitutionality of School Corporal Punishment of Children as a Betrayal of Brown v. Board of Education*, 36 LOY. U. CHI. L.J. 201, 219 (2004).
[343] Marjorie O. Rendell, *2003—A Year of Discovery: Cybergenics and Plain Meaning in Bankruptcy Cases*, 49 VILL. L. REV. 887, 905 n. 128 (2004).
[344] J. Richard Broughton, *The Jurisprudence of Tradition and Justice Scalia's Unwritten Constitution*, 103 W. VA. L. REV. 19, 49 n. 232 (2000).
[345] Stephen E. Gottlieb, *The Moral Agendas of Justices O'Connor, Scalia, and Kennedy,* 49 RUTGERS L. REV. 219, 232 (1996).
[346] Wilson, *supra* note 332, at 787.

2) Professor Manning's textualism;[348]

3) Professor Vermeule's textualism;[349]

4) Professor Tribe's textualism;"[350]and

5) Professor Popkin's textualism.[351]

Undoubtedly, others besides the above-mentioned justices and professors merit having their last name placed in front of the word "textualism." Adding more names, however, does little to change the conclusion that different people create, embrace, or, perhaps, are associated with different versions of textualism, which conclusion suggests, even if it does not prove, that different versions of textualism exist.

IV. ENDLESS TEXTUALISMS AS ENDING TEXTUALISM'S PROMISE

"Justice Scalia defends textualism as the only form of interpretation that should govern judicial interpretation of ...the Constitution."[352] Professor Kesavan and Paulsen agree with Professor Lawson that "original meaning textualism is the only method of interpreting the Constitution."[353] Perhaps Professors Lawson, Kesavan and Paulsen correctly stake their claim to the primacy of their one, true constitutional methodology and simultaneously the one, true textualism. If so, dozens, nay, hundreds of others have wasted hours upon hours and footnote upon footnote describing (if Lawson, Kesavan and Paulsen are correct) a variety of heretical and false versions of textualism. Conversely, as long as textual heretics choose to reject the textualism of others, they will have scores of others from which to choose. Textualism has no meaning other than what any particular author intends it to mean. Textualism will cabin discretion only when one person forces upon all others a particular form of textualism. Then, again, even using one particular form of textualism is unlikely to cabin discretion.[354] Textualism, in all its forms, provides logical and reasonable methods for determining meaning. Textualism, given its variety of forms, provides no significant control over personal choice of the interpreter.

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[347] Durden, *Textualist Canons*, *supra* note 39, at 138 **(**internal quotations omitted) (citation omitted); Treanor, *Taking Text Too*, *supra* note 237, at 501; Suzanna Sherry, *Textualism and Judgment*, 66 GEO. WASH. L. REV. 1148, 1149 (1998).

[348] Glen Staszewski, *Avoiding Absurdity,* 81 IND. L.J. 1001, 1061 (2006) ("Professor Manning's version of textualism").

[349] Eskridge, Jr., *No Frills Textualism*, *supra* note 110, at 2043, 2074 ("Professor Vermeule's 'no frills' textualism").

[350] David M Golove, *Against Free-form Formalism*, 73 N.Y.U. L. REV. 1791, 1915 n. 376 (1998).

[351] Westbrook, *supra* note 285, at 300 n.102 ("Professor Popkin's Surface Textualism").

[352] Donald J. Kochan, *The Other Side of the Coin: Implications for Policy Formation in the Law of Interpretation*, 6 CORNELL J.L. & PUB. POL'Y 463 (1997).

[353] Kesavan & Paulsen, *supra* note 13, at 1142.

[354] *See, e.g.*, Durden, *Animal Farm Jurisprudence, supra* note 1. *See also*, Durden, *Plain Language Textualism*, *supra* note 1; Durden, *Partial Textualism*, *supra* note 23; Durden, *I Am Textualism*, *supra* note 30; Durden, *Textualist Canons*, *supra* note 39.

U.S. Supreme Court Justices' Religious and Party Affiliation, Case-Level Factors, Decisional Era and Voting In Establishment Clause Disputes Involving Public Education: 1947-2012

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ABSTRACT

We applied logistic regression analyses to the votes cast in 53 decisions involving Establishment Clause disputes in public education rendered by the United States Supreme Court between 1947 and 2012. A binary dependent measure, individual justices' votes, was selected. The model was set up with two justice-level independent variables (party-of-appointing president and religion) and three case-level independent variables (issue salience, lower court dissent, and inter-court conflict) and a decisional era independent variable (Reagan and later versus pre-Reagan era).

When the Republican and Democratic data bases were combined, the results revealed that with all other variables controlled for the entire period: the odds of justices appointed by a Republican president voting in a conservative pro-religion direction were greater than justices appointed by a Democratic president; the odds of Protestant and Catholic justices voting in a conservative pro-religion direction were greater than for Jewish justices; and the odds of Protestant and Catholic justices voting in a conservative pro-religion direction did not differ from one another. The odds of the justices voting in a conservative pro-religion direction during the Reagan and later years were greater than the justices voting in that direction during the pre-Reagan era.

Separate examinations of the relationship of the case level predictors within the Republican, Democratic, Protestant, and Catholic justice-groups revealed important distinctions in how votes were cast. Justices nominated by Republican presidents consistently voted in a pro-religion direction, regardless of the judicial era which was studied. The results for justices nominated by Democratic presidents were more subtle. They revealed the odds of Protestant and Catholic justices voting in a conservative pro-religion direction were significantly greater than that of Jewish justices, but the odds of Protestant and Catholic justices voting in a conservative pro-religion direction did not differ from each other within this group. During the Reagan and later years, the odds of Democratic justices voting in a pro-

religion direction were greater than during the pre-Reagan era. Analysis of the Protestant justices revealed that the odds of voting in a pro-religion direction were greater for those justices nominated by Republican than by Democratic presidents. The odds of Protestant justices voting in a pro-religion direction were higher in low salience cases than in high salience ones. The odds of Catholic justices voting in a pro-religion direction were greater during the Reagan and later years compared to the pre-Reagan era.

These and other results were interpreted in terms of the attitudinal and/or legal models in explaining voting at the Court. Because of our findings, we recommend the use of category specific investigations in order to avoid the risk of erroneous conclusions when large undifferentiated data bases are used, with the caveat that this approach may limit the generalizability of the findings. Among the advantages to our approach is the fact that researchers and practitioners are generally interested in answers to questions about specific conflict categories and it may lead to more accurate predictions.

CONTENTS

I. INTRODUCTION

"As far back as can be remembered religion has been at the center of American education, as a source of both inspiration and agitation."[1] During the post-World War II period, religious conflicts involving public education have spawned dozens of cases reaching the United States Supreme Court.

Despite the importance of these decisions, empirical studies of Supreme Court justices' voting in Establishment Clause cases involving public

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[1] JOSEPH P. VITERITTI, THE LAST FREEDOM: RELIGION FROM THE PUBLIC SCHOOLS TO THE PUBLIC SQUARE 74 (2007).

education have been rare. This is an attempt to fill that gap in the research.

In furtherance of this goal we examined justices' voting in public education Establishment Clause disputes from a data base comprised of the fifty-three decisions rendered by the United States Supreme Court from 1947 through 2012. A binary dependent measure was selected: whether a justice voted in a conservative (pro-religion) or liberal (not pro-religion) direction. The unit of analysis for the dependent measure was the vote cast by each justice in each case. The principal justice-level variables that we studied in relation to voting were ideology (conservative-liberal), for which the party affiliation of the nominating president served as a proxy, and religious affiliation (Protestant, Catholic, Jewish). The case-level factors whose influence we examined were issue salience (high-low), dissent in the lower court (dissent-no dissent), and inter-court conflict on the issue being appealed [(conflict-no conflict). Finally, we examined the relationship between decisional era (Reagan and later years-pre-Reagan era) and the direction of the justices' voting. We subjected the data to both descriptive summaries and logistic regression analyses.

To set the stage for our data examination, Part II presents an overview of the principal theories of judicial decision making. Part III provides a brief history of the religious affiliation of members of the Supreme Court, focusing on the post-World War II era. Part IV gives an overview of research concerning the relationship of appellate justices' party and religious affiliation to their voting. Part V provides an overview of research concerning the influence of issue salience, dissent and inter-court conflict on appellate judges' voting. Part VI addresses the research design and means of data analyses selected. Part VII describes the results of the data analyses. Part VIII interprets the results in terms of their adherence to theories of appellate decision making. Part IX summarizes the foregoing Parts. Part X points out limitations to the present study, as well as other predictive models of Supreme Court justices' voting and makes suggestions for future research, including greater use of category specific investigations which correspond to the needs of social scientists and legal practitioners and can lead to more accurate predictions.

II. THEORIES OF JUDICIAL DECISION MAKING

The dominant empirical theory of judicial decision making is Segal and Spaeth's attitudinal model.[2] This asserts that when judges make decisions, they interpret the facts of a case and applicable law through the lens of their own policy preferences, and this is reflected in the direction in which they

[2] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) (asserting that justices' policy preferences are essentially a complete explanation of the Court's decisions).

cast their votes.[3] Reflecting on the attitudinal theory, Professor Baum has stated:

> … the justices' [policy] preferences exert their effects in combination with other important forces, such as the political environment – and, for that matter the law. But policy preferences provide the best explanation for differences in the positions the nine justices take in the same cases, because no other factor varies so much from one justice to another. [4]

Justices may express their attitudes in two ways. They might decide cases solely on their views of good policy, or act strategically. Strategic actions might include deciding whether to grant a writ of certiorari based on how a justice believes other members of the court would vote on the merits of the case,[5]or in writing merits decisions, tailoring the content to win the support of other justices, even though the opinion does not fully reflect the justice's own views.[6] In statutory cases the Court majority might write its opinion to avoid a Congressional override, which would replace the Court's holding with a policy the Court wishes to avoid.[7] Research has not definitively answered the question of the extent to which justices behave strategically and the scope of forms such strategies may take.[8] However, it appears that strategic considerations rarely move justices very far from their policy preferences.[9]

The foregoing observations raise serious questions about the influence of law, qua law, on the justices' decision making. Since theoretically the justices decide cases based on existing law, their decisions should be controlled by principles of constitutional and statutory interpretation.[10] Chief Justice John Roberts famously said during his confirmation hearings:

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[3] *Id.*

[4] LAWRENCE BAUM, *Decision Making*, *in* THE SUPREME COURT 106, 122 (2010).

[5] *See, e.g.*, Gregory A. Caldeira, John R. Wright, & Christopher Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J. L. ECON. & ORG. 549-572 (1999); Charles M. Cameron, Jeffrey A. Segal & Donald R. Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101-116 (2000).

[6] BAUM, *supra* note 4, at 122.

[7] *Id.*

[8] *See, e.g.,* Robert M. Howard & Jeffrey A. Segal, *A Preference for Deference? The Supreme Court and Judicial Review*, POL. RES. QUART.131-143 (2004) (studying how the Court handled requests for review of state and federal laws and finding little evidence of strategic considerations in the justices' decisions); *see generally*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998), and SAUL BRENNER & JOSEPH M. WHITMEYER, STRATEGY ON THE UNITED STATES SUPREME COURT (2009).

[9] BAUM**,** *supra* note 4, at 122.

[10] The questioning of nominees during federal judges' confirmation hearings is often unproductive when it comes to ascertaining their positions on issues where their church has adhered to a particular position. This is illustrated by questioning of Catholic nominees where the Catholic Church has taken an official position, such as on abortion and the death penalty. *See, e.g.*, Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1075-76 (1990); San-

> Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody went to a ball game to see the umpire.[11]

Justice Roberts's comment implies that the Court's decisions simply reflect objective applications of legal principles to the provisions it is called upon to interpret. The model of decision making espoused by Chief Justice Roberts is sometimes contrasted with the attitudinal model discussed above.[12] The legal model contends that judges decide cases based on their facts through the examination of "nonpartisan legal factors including precedent, the plain meaning of statutes and the Constitution and the original intent of the drafters."[13] It is fair to say this is unduly optimistic, if not a distortion of the way justices actually behave.[14]

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ford Levinson, *Is It Possible to Have a Serious Discussion about Religious Commitment and Judicial Responsibilities?,* 4 UNIV. ST. THOMAS L.J. 280, 291-95 (2006). The nominees uniformly avoid disclosing personal preferences in favor of responding in terms of adherence to precedents and applying accepted tools of construction.

[11] *Confirmation Hearing on the Nomination of John G. Roberts Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong., 1st Sess., 55 (2005).

[12] One investigator who studied the late Rehnquist court found evidence for the influence of law beyond ideology of the Supreme Court justices. *See* Kevin M. Scott, *Judicial Behavior and the Rehnquist Court's Federalism Revolution*, 36 AM. POL. RES**.** 85,101-03 (2008) (observing that legal model advocates have foundered on their inability to establish their theory empirically, while scholars advocating for the attitudinal model have unreasonably contended the theories are mutually exclusive). Scott contends that there is a difference between constitutional and political federalism in the context of the judicial role in federalism disputes*. Id.*

[13] Matthew Hall, *Experimental Justice: Random Judicial Assignment and the Partisan Process of Supreme Court Review*, 37 AM. POL. RES. 195, 198 (2009) (internal citations omitted). The legal model has been attacked (*see, e.g.,* Richard A. Brisbin, Jr., *Slaying the Dragon: Segal, Spaeth and the Function of Law in Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1004, 1013-15(1996); Rogers M. Smith, *Symposium: The Supreme Court and the Attitudinal Model,* 4 LAW AND COURTS 8-9 (1994)), but has enjoyed considerable support from some scholars claiming judicial decision making comports with the model, for example, in the significance of *stare decisis* on decision making. *See, e.g.*, Saul Brenner & Marc Stier, *Retesting Segal and Spaeth's Stare Decisis Model*, 40 AM. J. POL. SCI. 1036, 1045 (1996); Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1032-35(1996); Donald R. Songer & Stefanie A. Lindquist, *Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision-Making,* AM. J. POL. SCI. 1049, 1061-62 (1996).

[14] *See, e.g.*, Lee Epstein & William M. Landes, *Was There Ever Judicial Self-Restraint*, 100 CALIF. L. REV**.** 557, 558-59, 569-77 (2012). Epstein and Landes tested the hypothesis that the Court grew more activist during the period 1937-2009, and that the ideological leanings of the justices and not self-restraint, better explain how justices voted in cases challenging the constitutionality of federal laws. Although justices showed self-restraint, justices appointed since the 1960s were and remain ideological in their approach to determining the constitutionality of federal laws. *See also* Tracey E. George & Lee Epstein,

Finally, there is growing recognition as to the influence of public opinion on how Supreme Court justices have interpreted the United States Constitution.[15] Although important, this subject falls outside the scope of the present investigation.[16]

III. THE RELIGIOUS AFFILIATION OF SUPREME COURT JUSTICES

Of the 112 justices who have served on the United States Supreme Court, 91 have been from Protestant denominations, 12 have been Catholics, 8 have been Jewish and only one, David Davis, had no known religious affiliation.[17]

At the time of Stephen Breyer's elevation to the Court in 1994 there were two Roman Catholics serving there: Antonin Scalia and Anthony Kennedy, who had been serving since 1986 and 1988, respectively. Clarence Thomas joined the Court in 1991. Although he was raised as a Catholic and briefly attended the Conception Seminary College, Justice Thomas was an Episcopalian when he joined the Court in 1991. In the late 1990s Justice Thomas returned to Catholicism.[18]

In 2005, John Roberts became the fourth Catholic on the Court[19] and the Court's third Catholic Chief Justice.[20] In January, 2006 Samuel Alito became the fifth Catholic sitting on the Court and the eleventh in its histo-

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On the Nature of Supreme Court Decision Making, AM. POL. SCI. REV. 323, 332-34 (1992). In death penalty cases, although both the attitudinal ("extralegal model") and legal models performed quite well in predicting outcomes, the legal model over-predicted liberal outcomes while the extralegal model under-predicted conservative ones. George and Epstein propose that each explanation is codependent on the other and not mutually exclusive and offer an "integrated model" of Supreme Court decision making which would include a range of political, legal and environmental forces.

[15] *See, e.g.*, Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences,* 66 J. POL.1018, 1033 (2004) (concluding that in addition to being motivated by their own preferences, the justices are highly responsive to the public mood as well).

[16] S*ee* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

[17] *See Religious Affiliation of the U.S. Supreme Court*, www.adherents.com/adh_sc.html.

[18] At this point there were four Protestant justices, Chief Justice William Rehnquist and Associate Justices John Paul Stevens, Sandra Day O'Connor, and David Souter. The other Associate Justices, Stephen Breyer and Ruth Bader Ginsburg, were Jewish.

[19] Roberts's appointment achieved the first Catholic plurality in the Court's history. This meant for the first time the Court was not composed of a Protestant majority. *See* Nina Totenberg, *Supreme Court May Soon Lack Protestant Justices*, NPR (April 8, 2010), http://www.npr.org/templates/story/story.php?storyId=125641988**.**

[20] The first Catholic Chief Justice was Roger B. Taney (*see id.*) who was appointed by Andrew Jackson. He served in that capacity from 1835 to 1864 (*see* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 241 (1993)).

ry to serve in that capacity. Thus, in 2006 for the first time the majority of the Court was Catholic.[21]

In August 2009, Sonia Sotomayor became the sixth Catholic on the Court, having been nominated to the post by President Barack Obama. Thus, at the start of 2010, Justice John Paul Stevens was the sole remaining Protestant on the Court. Following Justice Stevens' retirement, President Obama appointed Elena Kagan, who is Jewish, to the Court. Justice Kagan's confirmation in 2010 meant that for the first time in history there were no Protestants on the Court, it being composed of six Catholic (Roberts, Kennedy, Scalia, Thomas, Alito, and Sotomayor) and three Jewish justices (Breyer, Ginsburg and Kagan).[22]

IV. JUDGE-LEVEL INFLUENCES

A. Religious Affiliation and Judicial Voting

"It has long been known that religion has a role in determining political attitudes and guiding political behavior."[23] Most studies treat judges' religion as a social background variable, along with a wide range of other demographic factors which influence judges' decision making.[24] For the

[21] Levinson**,** *Is it Possible to Have a Serious Discussion, supra* note 10, at 280-81 (2006) (observing event and its historical significance); *see also* Barbara A. Perry, *Catholics and the Supreme Court: From the 'Catholic Seat' to the New Majority*, *in* CATHOLICS AND POLITICS: THE DYNAMIC TENSION BETWEEN FAITH AND POWER (2008).

[22] *See* Totenberg, *supra* note 19 (observing that six of the twelve Catholic justices who have served on the Court since the founding of the republic are currently sitting there); *see also* Cathy Lynn Grossman, *Does the U.S. Supreme Court Need Another Protestant?* USA TODAY (April 8, 2010), http://content.usatoday.com/communities/Religion/post2010/04/supreme-court-justice-stevens-catholic-jewish/l.

[23] *See, e.g.*, Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. 507 (1999); JAMES L. GUTH & JOHN C. GREEN, THE BIBLE AND THE BALLOT BOX: RELIGION AND POLITICS IN THE 1988 ELECTION (1991).

[24] *See, e.g.,* Anthony Champagne & Stuart S. Nagel, *The Psychology of Judging, in* THE PSYCHOLOGY OF THE COURTROOM (N.L. Kerr & R.M. Bray eds., 1982); Stephen M. Feldman, *Empiricism, Religion, and Judicial Decision-Making*, 15 WM. & MARY BILL RTS. J. 43 (2006); Raul A. Gonzalez, *Climbing the Ladder of Success: My Spiritual Journey*, 27 TEX. TECH L. REV**.** 1139, 1139-40 (1996) (acknowledging he has "seen the impact of my faith on decisions I have made as a judge"); KENT GREENAWALT**,** PRIVATE CONSCIENCE AND PUBLIC REASONS (1995); and S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947-1956 Terms*, 17 AM. J. POL. SCI. 622, 624-25 (1973) **(**finding that three variables, age at appointment, federal administrative experience and religious affiliation (Protestant and non-Protestant), had explanatory power in predicting the rate at which the fourteen justices serving on the Court during the 1947 through 1956 terms of the Court supported state or federal governments in criminal cases).

most part such studies have examined the results under the attitudinal model.[25]

In one of the earlier studies, Nagel examined decisions rendered in 1955 by federal and state supreme courts as a function of judges' religion along with other background characteristics.[26] Catholic judges were significantly more likely than Protestant judges to show a "liberal" voting in non-unanimous cases in four of fourteen case categories: criminal matters, business regulation, divorce settlement, and employee injury.[27] "Liberal" was defined as voting for the criminal defendant, the administrative agency (exercising regulatory authority), the wife, and the employee, respectively.[28]

In a similar study, Goldman compared the voting patterns of Catholic and Protestant United States Courts of Appeals judges in a data base containing non-unanimous cases from 1965-1971.[29] Catholic judges were more liberal in the sense of siding with the economic underdog and with injured persons, as compared to Protestant judges.[30] Goldman found that there was no issue area where Protestant judges were more liberal than Catholics.[31]

In the narrower area of "gay rights," Pinello studied all published appellate decisions from state and federal courts from 1981-2000.[32] Among the issues examined were lesbian/gay family matters, including same-sex marriage, sexual orientation discrimination, gays in the military, consensual sodomy, and solicitation laws.[33] Overall, Pinello found that Jewish judges were more liberal than Protestant judges, but that Catholic judges were more conservative than the other groups in their decision making in this issue area.[34]

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[25] *See* Brian M. Bornstein & Monica K. Miller, *Does a Judge's Religion Influence Decision Making*, 45 COURT REVIEW 112 (2012).

[26] STUART S. NAGEL, *The Relationship between the Political and Ethnic Affiliation of Judges, and their Decision-making,* in JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH (G. Schubert ed., 1964).

[27] *Id.*

[28] *Id.* Because there were insufficient numbers of Jewish judges, the comparison was limited to Catholics and Protestants. The latter group was composed of mostly Methodists, Presbyterians, Episcopalians, and Baptists.

[29] Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited, 1961-1964*, 69 AM. POL. SCI. REV. 491, 498 (1975).

[30] *Id.* at 498. When Goldman brought in party as a control he found that only on economic liberalism and only for the Democrats was there still a statistically significant difference in the voting with Democratic Catholics emerging as more liberal than Democratic Protestants on the economic liberalism dimension. Republican Catholics and Republican Protestants did not evidence differences on this dimension.

[31] *Id.* at 499. Jewish judges were not included in this study because of their small number for purposes of statistical analysis.

[32] DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW (2003). Pinello included 468 cases in his data base.

[33] *Id.*

[34] *Id.*

In their study of Christian Evangelical justices voting on state supreme courts, Songer and Tabrizi found that Evangelical justices were significantly more conservative than mainline Protestants, Catholic, and Jewish justices in death penalty, gender discrimination, and obscenity cases, in the period from 1970 to 1993.[35] They concluded that the relationship between the religion and votes of state supreme court justices is most likely a reflection of the connection between judges' religious affiliation and their attitudes.[36] They stated:

> …This is a significant finding in that we see that including religion in the group of characteristics commonly used by judicial scholars to explain judicial votes uncovers effects that have been previously missed. Controlling for party identification, prosecutor status, Supreme Court policy, citizen ideology and institutional characteristics of the state, and the relevant case facts does not negate the impact of religion. Religious denomination has an independent and notable effect on judicial decision making even when these control variables have notable effects of their own. This suggests that religious affiliation represents a set of influences on the development of the values of judges that are separate from the partisan sources that have been frequently studied.[37]

When Songer and Tabrizi examined only non-unanimous decisions in their data base, the relationship between religious affiliation and judges' votes grew even stronger. Since non-unanimous cases tend to be the kind in which judges are freer to express their ideological preferences, the differences observed in non-unanimous cases reinforced the attitudinal interpretation of the findings.[38] In light of these results, Songer and Tabrizi suggested that future studies using the attitudinal model to investigate judicial decision making should not use judges' political party as the sole surrogate for their values.[39] Instead, they recommended that a combination of political party and religious affiliation may provide a better indicator of the values judges bring to the court.[40]

Ulmer examined the voting behavior of the fourteen justices who sat on the United States Supreme Court between 1947 and 1956 and found

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[35] Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. 507, 518-22 (1999).
[36] *Id*. at 523.
[37] *Id.*
[38] *Id.* at 523 n. 12.
[39] *Id.* at 523. These investigators also found that although mainline Protestant judges were liberal on the death penalty and obscenity, they were less so on gender discrimination, although they were more liberal than the Evangelicals on this issue. *Id.* at 521. Catholic judges' voting was more variable. They were more liberal on gender discrimination, moderate on the death penalty, and approaching the voting of the Evangelicals on obscenity.
[40] *Id.* Songer and Tabrizi acknowledge that their indicators of denominational affiliation were rough since they did not include measures of religious salience, doctrinal beliefs, church involvement and attendance, and political involvement. They conclude that because these more nuanced considerations were not built into their design, their analysis underestimates the effects of religion in the cases they studied.

that non-Protestant justices less often support the government in criminal cases than Protestants, concluding that religious affiliation improved the level of explained variance by 21 percent.[41] In another study, Tate and Handberg analyzed the Supreme Court justices' voting behavior during the 1916-1988 time period. They found no difference between Protestant and non-Protestant justices in civil rights and economic cases.[42] The differences in Ulmer's and Tate and Handberg's outcomes might be explained in that the latter study examined civil rights and economic cases, whereas the former study examined criminal cases. These results suggest that investigations into religious influences on justices' voting should focus on specific issue areas, and perhaps decisional era, rather than merely broad aggregate voting patterns for particular religious groups.

Sorauf studied church-state decisions issued between 1951-1971, emanating from high appellate courts within state and federal systems.[43] He concluded that "[n]othing explains the behavior of the judges in these cases as frequently as do their own personal religious histories and affiliations. Jewish judges voted heavily separationist, Catholics voted heavily accommodationist, and Protestants divided."[44] Sorauf found that this pattern was strongest in non-unanimous decisions, where Jewish justices voted for separation 82.4% of the time, compared to 56.1% for conservative Protestants,[45] 48.7% for liberal Protestants,[46] and 15.6% for Catholics.[47]

Yarnold conducted a study in which she examined all 1,356 religious liberty decisions emanating from federal circuit courts from 1970-1990.[48] The data base included both Free Exercise and Establishment Clause cases, but they were not treated as separate independent variables.[49] Yarnold set up Methodist, Presbyterian, Baptist, Catholic, Jewish, Disciples of Christ, Church of Christ, or non-religious affiliation, as the independent varia-

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[41] *See* S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947-1956 Terms*, 17 AM. J. POL. SCI. 622, 625-26 (1973). Since only three of the fourteen justices were non-Protestants, this may be a limitation on the inferences which may be drawn from the data. Moreover, there were only two Catholics (Murphy and Brennan) and one Jewish justice (Frankfurter), who served during this period.

[42] C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88*, 35 AMER. J. POL. SCI. 460, 473-75 (1991).

[43] FRANK J. SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE (1976).

[44] *Id.* at 220.

[45] For example, Baptists and Methodists.

[46] For example, Episcopalians and Presbyterians.

[47] SORAUF, *supra* note 43. The differences appeared as well in unanimous appellate cases.

[48] Barbara M. Yarnold, *Did Circuit Courts of Appeals Judges Overcome Their Own Religion in Cases Involving Religious Liberties? 1970-1990*, 42 REV. RELIGIOUS RES. 79 (2000).

[49] *Id.* at 80.

bles.[50] Only two of the religious affiliation variables, Catholic and Baptist, produced significant differences. Both the Catholic and Baptist jurists were more likely to rule in a pro-religion direction.[51] She attributed these differences to the fact that Baptists and Catholics have endured minority status in terms of their low levels of popular acceptance and, therefore, tend to be more supportive of religious liberty claims than mainline Protestant denominations.[52]

In contrast to the above described results, Sisk and Heise found in their recent examination of federal court of appeals and district court voting for the period 1995 through 2005, that judges' religious affiliation was not a salient factor "in predicting the outcome of claims alleging that governmental conduct crossed the supposed line 'separating Church and State' under the Establishment Clause."[53] The results for United States Supreme Court justices' voting, however, might be different than those reported by Sisk and Heise, since Supreme Court decisions are unreviewable. For example, most of the time Supreme Court justices continue to reject a precedent that they opposed when it was originally established.[54] Lower court judges do not have that luxury, since by definition they must look upward for guidance.[55]

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[50] *Id.* at 82. She also examined the influence of judges' shared religious affiliation with plaintiffs on cases outcomes. Yarnold found the fact that judges were of the same denomination as the ones concerned in the case did not significantly increase the chances of plaintiff's winning though it did make a pro-religion decision more likely. *Id.* at 83.

[51] *Id.* at 82-83. Cases coded as "pro-religion" were those which enabled the plaintiff to practice his or her faith. Thus, winners in Free Exercise cases were coded as pro-religion, whereas winners in cases making Establishment Clause claims were coded as "not pro-religion."

[52] *Id.* at 84.

[53] *See* Gregory C. Sisk & Michael Heise, *"Ideology All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1205 (2012). These researchers found a significant association between the percentage of Catholics in the population of the metropolitan area where the judges have their chambers and their voting direction, but the relation between this variable and the votes cast was in a direction opposite to what was expected. They postulated that the outcome was due to omitted variables which co-vary with the independent variable and have an effect on the votes cast. *Id.* at 1228-29.

[54] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED, 311 (2002) (concluding that justices easily avoid precedents with which they disagree).

[55] *See, e.g.* Jonathan Kastellec, *Hierarchical and Collegial Politics on the U.S. Courts of Appeals*, 73 J. POL. 345 (2011). Kastellec contended that members of three-judge panels consider whether their decisions will survive en banc and Supreme Court review. He showed that this hierarchy affects the ability of a single Democratic or Republican judge on a three-judge panel to influence two colleagues from the opposing party. Adding a "counter-judge" to a panel leads to asymmetric results, which vary based on the hierarchical arrangement. He concluded that the interaction of hierarchical and collegial politics increases the Supreme Court's control of the judicial hierarchy and helps to promote the rule of law.

In its totality, the research suggests that religious affiliation may be a significant factor in how Supreme Court justices vote.

B. PARTY AFFILIATION AND JUDICIAL VOTING

Hall investigated the relationship of party affiliation on decision making in the United States Courts of Appeals between 1995 and 2004. He found that assigning three Democrats to the court of appeals panel, compared to three Republicans, more than quintupled the chances that the Supreme Court would overturn a decision from that panel in fourteen politically salient issue areas, and concluded that in the absence of random assignment of judges to cases, the magnitude of the partisan effects would have been even larger.[56]

Approaching ideology from another angle, Segal *et al.* examined the influence of ideology on Supreme Court voting by using the content of newspaper editorials as a surrogate measure of the justices' ideology,[57] selecting this approach based on its efficacy in prior investigations by Segal and Cover,[58] and its then current wide-spread usage.[59] In the 1995 study Segal *et al.* examined votes in economic cases, as well as civil liberty conflicts and expanded the reach of the investigation to the seven Roosevelt and four Truman appointees through the Eisenhower and Bush nominees. Their measure had strong predictive power for aggregated votes cast in economic and civil liberties cases for the Eisenhower and Bush appointees, but was less robust for justices appointed by Roosevelt and Truman.[60]

In a cross-national study Weiden posited what he called the judicial politicization theory, which argues that judges on highly politicized courts will be more likely to decide cases using ideological and attitudinal factors than judges on less politicized courts.[61] Politicization is assessed by informal norms regarding judicial appointment by the executive, rather than by the formal selection procedure employed in the jurisdiction. The results

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[56] Matthew Hall, *Experimental Justice: Random Judicial Assignment and the Partisan Process of Supreme Court Review*, 37 AM. POL. RES. 195, 196, 215-17 (2009).

[57] *See* Jeffrey A. Segal, Lee Epstein, Charles M. Cameron & Harold J. Spaeth, *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 813-15 (1995) (describing methodology).

[58] *See* Jeffrey A. Segal & Albert Cover, *Ideological Values and Votes of U.S. Supreme Court Justices*, 83 THE AM. POL. SCI. REV. 557-565 (1989). Segal and Cover created ideological measures independent of actual voting for justices by gathering editorials from four newspapers *before* the Senate confirmed the nominee and using their measure to "predict" the votes cast. They found a correlation of .80 between judicial values and votes in civil liberties cases for justices appointed between 1953 (Earl Warren) and 1988 (Anthony Kennedy). They concluded this approach confirmed the aptness of the attitudinal model.

[59] Segal *et al.*, *supra* note 57, at 812.

[60] *Id.* at 821-822 (discussing the results).

[61] David L. Weiden, *Judicial Politicization, Ideology, and Activism at High Courts of the United States, Canada, and Australia*, 64 POL. RES. QUART**.** 335, 336-37 (2011).

supported the thesis that judges on highly politicized courts are more likely to decide cases ideologically.[62]

In still another approach to studying the influence of ideology on justices' voting, Benesh and Spaeth focused on the decision to dissent, rather than concur, when justices write separately. Although the law mattered, it did not constrain expression of ideological preferences.[63]

In a meta-analysis of research investigating the relationship of party to judicial ideology in all courts, Pinello concluded that party is a dependable yardstick for ideology. He found Democrats were more liberal on the bench than Republicans, even when researchers' use of non-unanimous appellate decisions was corrected for.[64] Moreover, he found that party was a stronger attitudinal force in federal courts than in state tribunals.[65]

Sisk's and Heise's research investigating Establishment Clause conflicts in federal courts of appeals and district courts from 1996 through 2005, adverted to earlier,[66] confirmed the powerful influence of ideology in judicial decision making.[67] Holding other variables constant, Democratic-appointed judges were predicted to uphold Establishment Clause challenges at a 57.3% rate, while the predicted rate of success in decisions by Republican-appointed judges was only 25.4%.[68] When Sisk and Heise separately examined voting patterns for district court judges, however, the differences between Democratic- and Republican-appointed judges fell just barely out of statistical significance.[69] By contrast, Sisk and Heise's separate examination for court of appeals voting revealed that party-related differences remained highly significant.[70] This finding is consistent with the view that appellate judges enjoy "greater freedom of movement in deciding cases" than do trial level judges.[71] On this theory, United States Supreme Court justices would be most likely to express party influences in their voting, since they enjoy the greatest freedom of movement in deciding cases.

When Sisk and Heise studied non-unanimous appellate cases, they found that party differences increased. When they held all other independent variables constant, the predicted probability that a Republican-appointed judge would vote to uphold an Establishment Clause claim in a

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[62] *Id.*
[63] Sara C. Benesh & Harold J. Spaeth, *The Constraint of Law: A Study of Supreme Court Decisions,* AM. POL. RES. 755, 762-66 (2007).
[64] *See* Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 238-40 (1999) (basing conclusions on cases emanating from legal and political science literature from 1959-1998).
[65] *Id.*
[66] *See* Sisk & Heise, *supra* note 53.
[67] *Id.*
[68] *Id.* at 1216-17.
[69] *Id.* at 1217-18.
[70] *Id.* at 1218.
[71] *Id.* at 1217. This is not to say that other motivations do not influence the voting of court of appeals judges. Indeed, this has been a source of much investigation. *See, e.g., id.* at 1219-20 (discussing research on party and panel composition effects in circuit courts).

non-unanimous case was only 13.2%, while the probability that a Democratic-appointed appellate judge would uphold the claim was 70.5%.[72] Thus, in divided decisions for this data set, the chance of success for an Establishment Clause claimant was more than five times greater before Democratic-appointed judges than before Republican-appointed judges.[73]

Finally, when Sisk and Heise re-examined their earlier study of court of appeals and district court voting in Establishment Clause decisions rendered between 1986 and 1995,[74] they found that holding other variables constant, Republican-appointed judges during that period were predicted to rule in favor of the Establishment Clause claimant 34.4% of the time, while Democratic-appointed judges were predicted to do so 53.3% of the time.[75] This led them to conclude that differences between Republican- and Democratic-appointed judges' voting in Establishment Clause disputes appear to be getting greater.[76] Indeed, they observed: "The federal courts may be sliding into the same "God gap" that has opened and widened between left and right and between Democrat and Republican in the political realm."[77]

V. CASE-LEVEL INFLUENCES: SALIENCE, LOWER COURT DISSENT, AND INTER-COURT CONFLICT

Research in political and social psychology places a strong emphasis on the conditions under which attitudes guide behavior to varying degrees.[78] Since situational characteristics across contexts may stimulate different motivations and considerations, attitudes should be expected to exhibit varying effects across contexts. In this vein, situational variables may activate pre-existing attitudes to a greater extent, leading to greater attitude

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[72] *Id.*
[73] *Id.*
[74] *See* Michael Sisk & Gregory Heise, *Judges and Ideology: Public and Academic Debates about Statistical Measures*, 99 NW. U. L. REV**.** 743, 767 (2005) (finding the party of the appointing president to be statistically significant by a margin of 18% in terms of raw frequencies for combined federal district court and circuit religion decisions).
[75] Sisk & Heise, *supra* note 53, at 1218.
[76] *Id.*
[77] *Id.* at 1207.
[78] *See, e.g.*, Jon A. Krosnick, *The Role of Attitude Importance in Social Evaluation: A Study of Policy Preferences, Presidential Candidate Evaluations, and Voting Behavior,* 55 J. PERS. & SOC. PSYCHOL.196, 200-201, 206-208 (1988) **(**finding the importance voters attach to particular policy attitudes by presidential candidates in part determines their candidate preferences, with extreme attitudes having more impact than moderate ones**).** *See also* Eileen Braman & Thomas E. Nelson, *Mechanism Motivated Reasoning? Analogical Perception in Discrimination Disputes*, 51 AM. J. POL. SCI. 940, 954-55 (2007) (participants with diverging opinions evaluate the legal precedents in a manner consistent with those opinions); Joanne M. Miller & David A.M. Peterson, *Theoretical and Empirical Implications of Attitude Strength*, 66 J. POLIT. 847, 862-63 (2004) (demonstrating the important role that situational influences and different measures of attitude strength play in predicting the behaviors being studied).

strength, accessibility and importance.[79] The stronger the attitude, the more it will influence behavior.[80] These observations give rise to the question as to whether certain situational variables interact with judge-level variables to influence how the justices vote. In the context of the present study, that question is whether voting direction, as it relates to religious and party affiliation, becomes more or less extreme based on particular situational variables pressing upon the Court. Three factors investigated here are: issue salience; dissent in the court from which the case is appealed and inter-court conflict.

Issue salience implies that the case is of high importance to the justice. Unah and Hancock[81] and Collins[82] contend that high salience cases strongly activate judicial preferences and trigger increased levels of ideological voting.

Dissents within United States Courts of Appeals, which supply most of the Supreme Court's docket, are relatively rare.[83] However, dissents may signal serious ideological differences in the lower court.[84] Moreover, dissent

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[79] Jon A. Krosnick, *Government Policy and Citizen Passion: A Study of Issue Publics in Contemporary America,* 12 POL. BEHAV**.** 59, 81-86 (1990).

[80] *See, e.g.,* Miller & Peterson, *supra* note 78, at 847-67; RICHARD E. PETTY & J.A. KROSNICK, ATTITUDE STRENGTH: ANTECEDENTS AND CONSEQUENCES (1995); Brandon L. Bartels, *Choices in Context: How Case-Level Factors Influence the Magnitude of Ideological Voting on the U.S. Supreme Court,* 39 AM. POL. RES. 142, 146-47 (2011); Jon A. Krosnick, *The Role of Attitude Importance in Social Evaluation: A Study of Policy Preferences, Presidential Candidate Evaluations, and Voting Behavior,* 55 J. PERS. & SOC. PSYCHOL.196, 200-01, 206-08 (1988).

[81] Isaac Unah & Ange-Marie Hancock, *U.S. Supreme Court Decision Making, Case Salience and the Attitudinal Model*, 28 L. & POL'Y 295, 314 (2006) (reviewing civil rights case outcomes during forty-seven Supreme Court terms and concluding the attitudinal model is more capable of explaining voting in high salience than in low salience cases).

[82] Paul M. Collins, *The Consistency of Judicial Choice*, 70 J. POL. 861, 870-71 (2008)) (concluding that in high salience cases justices with extreme ideologies exhibit more stable voting patterns than justices who are less extreme).

[83] A recent study found that dissent rate in United States Courts of Appeals for years 1990 to 2007 was only 2.6% for the cases appearing in the Lexis and West data bases for that period. This rose to 7.8% based on a random sample of 1025 court of appeals cases from 1989-1991. These modest rates contrast markedly with a dissent rate of 62% at the United States Supreme Court. *See* Lee Epstein, William M. Landes & Richard Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 106 n.9 (2011).

[84] Virginia A. Hettinger, Stefanie A. Lindquist, & Wendy L. Martinek, *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Court of Appeals,* 48 AM. J. POL. SCI. 123, 134-35 (2004) (finding no evidence to support the theory that strategic considerations guide judges' decisions to dissent in an attempt to influence the circuit as a whole, and concluding that ideological disagreement better accounts for the circuit judges' behavior); Paul H. Edelman, David E. Klein & Stefanie A. Lindquist, *Measuring Deviations from Expected Voting Patterns on Collegial Courts*, 5 J. EMPIRICAL LEGAL STUD. 818, 833 (2008) (asserting that disordered voting occurs because ideology is trumped by other considerations, but recognizing that disordered voting may occur even when the justices vote ideologically—either because the conflict implicates a different

may lay out a road map for reversal in the high court, and help the Supreme Court justices graft their own preferences on the dissenter's.[85] Edelman *et al.* observed that lower court dissents lead to more ordered ideological voting, intensifying justices' voting in the direction to be expected by party affiliation, for example.[86] Bartels found enhanced ideological voting in cases where there is a dissent, relative to unanimously decided cases. He interpreted this result as supporting the assertion that dissents send signals to the justices sitting on a court of last resort identifying ideological fault lines in a case, which in turn activate preferences and ease mapping of those preferences onto votes.[87] Bartels derived this conclusion by showing that the lack of a lower court dissent produced ideological voting slightly under baseline levels, while the presence of a dissent enhanced ideological voting above the baseline levels.[88]

Finally, it is well known that one of the principal bases for the Court to grant certiorari to a case is whether an inter-court conflict exists.[89] In what is perhaps a counterintuitive hypothesis, one view of how the Supreme Court reacts to inter-court conflict is to subordinate ideology to its role in ensuring that uniformity in federal law exists.[90] Bartels observed that where inter-court conflict existed in interpretation, it elicited lower magnitudes of ideological voting as compared to cases without such conflict,[91] differences which approached, but did not attain significance.[92]

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ideological dimension or because "the [j]ustices disagree about where the midpoint between policy alternatives is.").

[85] *See, e.g.*, Caldeira et al., *supra* note 5, at 549-72 (arguing that judges are aware that their dissenting opinions may serve to signal the Supreme Court concerning certworthy cases, since the empirical correlation between dissent below and the decision to grant certiorari is well established).

[86] Edelman, et al., *supra* note 84**,** at 837, 842 (finding negative relationship between lower court dissent and disordered voting, thereby confirming the hypothesis that where the lower court direction was inconsistent with the ideological preferences of the dominant coalition of the justices, disordered voting on the Court was less likely to occur.).

[87] Bartels, *supra* note 80, at 163.

[88] *Id.* at 163-64.

[89] *See, e.g.*, Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV**.** 81, 145-57 (2001) (overwhelming factor in granting certiorari is conflict in the circuits); Thomas Goldstein, *One Plugged, Thousand to Go*, LEGAL TIMES**,** Nov. 18, 2002, at 68 (about 80% of the cases the Court accepts involve conflicts between federal courts of appeals).

[90] Edelman et al., *supra* note 84, at 836, 841 **(**discussing research which investigated the theory that when the Court takes a case to resolve a conflict, a "jurisprudential" approach to case selection may come more to the fore than ideology and predicting, but not obtaining this result in their own study).

[91] Bartels, *supra* note 80, at 163.

[92] *Id.*

VI. RESEARCH DESIGN

A. JUDGE-LEVEL VARIABLES

In light of the foregoing investigations, we expect that religious affiliation is among the set of socialization agents which contribute to the development of attitudes in Supreme Court justices and these attitudes in turn will affect the decisions of those judges. Similarly, party affiliation of the nominating president as a surrogate for justices' ideology is expected to have a significant impact on the justices' voting.

The data sets for the analyses below were derived from the fifty-three kindergarten through grade twelve and college and university Establishment Clause decisions issued by the United States Supreme Court during years 1947-2012.[93] The data bases include all decisions rendered by the Court after argument. The information for each decision was derived from the standard Spaeth United States Supreme Court data base[94] and then cross-checked for accuracy against each case individually for accuracy. The number of justices' votes included in the data base was 469.[95] Data on the religious and political affiliations of the justices were derived from standard biographic sources such as The American Bench,[96] Who's Who in American Law,[97] and the Congressional Guide to the Supreme Court[98] as well as Justices, Presidents and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II.[99]

The unit of analysis for the dependent measure was the vote of each justice for each decision, that is, whether the justice voted in a conservative pro-religion or liberal not-pro-religion direction. The independent (predictor) variables were judges' religious affiliation across the religious groups which have been represented on the Court: Catholic, Protestant and Jew-

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[93] A schedule of those cases appears in Appendix 1, which includes the case name, citation, year of the decision and whether the dispute involved governmental financial support, devotional activities or other issues. *Meek v. Pittenger* and *Wolman v. Walter* were three and four part cases, respectively. Because separate legal issues were resolved in each Part and the unit of analysis was justices' votes, the votes were tallied individually for each Part in each case. For this reason the text reports fifty-three "decisions," although there were fewer "cases."

[94] *See* The Supreme Court Data Base, http://scdb.wustl.edu (last visited Sept. 1, 2012).

[95] Of the fifty-three Establishment Clause decisions studies here, thirty-six arose from disputes involving governmental financial aid to students attending private educational facilities (for example, public school teachers rendering direct services to students attending denominational schools at the private school); thirteen involved devotional activities (bible reading and school prayer, for example) within public educational settings, and three from "other" disputes (those not readily classified as falling within the first two categories).

[96] THE AMERICAN BENCH: JUDGES OF THE NATION (2012).

[97] WHO'S WHO IN AMERICAN LAW (17th ed. 2011-2012).

[98] DAVID G. SAVAGE, GUIDE TO THE U.S. SUPREME COURT (5th ed. 2010).

[99] HENRY JULIAN ABRAHAM, JUSTICES, PRESIDENTS AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II (2008**).**

ish. Protestant denominations are grouped together as one level of the religious affiliation variable, since all the Protestant justices who have served on the Court have come from mainline denominations[100] and previous researchers have observed no meaningful differences in the voting patterns among the mainline Protestant denominations.[101] The second independent variable was ideology. Party of the nominating president served as a proxy for the conservative or liberal ideology of each justice.[102]

Prior to performing the data analysis the dependent variable conservative pro-religion vote was coded as a "1" and a liberal not pro-religion vote was coded as a "0." A pro-religion vote was considered one which rejected a claim that governmental actors violated the Establishment

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[100] The Protestant justices whose votes are under examination came from only four denominations. These were Episcopal (Potter Stewart, Byron R. White, Thurgood Marshall, Sandra Day O'Connor, David H. Souter); Methodist (Charles E. Whittaker, Harry A. Blackman); Presbyterian (Lewis F. Powell, Jr., Warren E. Burger, William O. Douglas); and Lutheran (William H. Rehnquist); Unspecified Protestant (Earl Warren, John Paul Stevens). *See*, *Religious Affiliation of the U.S. Supreme Court*, http://www.Adherents.com/adh_sc.html.

[101] *See, e.g.,* Songer & Tabrizi, *supra* note 23, at 518-22.

[102] Other measures of justices' ideology used in predictive models include Martin-Quinn scores, a voting pattern based measure which allows justices' scores to change over time, based on their position relative to the "median justice" in each term served (*see* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POLITICAL ANALYSIS 134-53 (2002); Andrew D. Martin & Kevin M. Quinn, *Ideal Points for the U.S. Supreme Court* (November 19, 2004), http:mqscores.wustl.edu/ (accessed November 16, 2012); and Andrew D. Martin & Kevin M. Quinn, & Lee Epstein, *The Median Justice on the United States Supreme Court,* 83 N.C.L. Rev. 1275 (2005)) and the "judicial common space" measure (*see generally*, Lee Epstein, Andrew Martin, Jeffrey A. Segal & Chad Westerland, *Judicial Common Space*, 23 JOURNAL OF LAW, ECONOMICS, & ORGANIZATION 303 (2007)), which attempts to place political actors, including those from the judiciary and the political branches, into "common [policy] space" for purposes of data analysis. Common space is scaled from -1 for most liberal to + 1 for most conservative. *See generally*, Michael Giles, Virginia Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 631 (2001) (discussing derivation of common space scores for federal judges). We selected the party of appointing president since it is simpler, continues to be the convention in the legal academy, and produces substantially similar information to common space measures. *See, e.g.* Joshua B. Fischman & David S. Law, *What is Judicial Ideology, and How Should We Measure It?,* 29 Wash. U. J.L. & Pol'y 133, 204 (studies which have included multiple proxies for ideology as part of a more fully specified model of judge-specific variables have found common space scores are largely interchangeable with the party of the appointing president proxy).*See also*, Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates about Statistical Measures*, 99 NW. U. L. REV**.** 743, 788-89 (2005) (describing concordance between these measures). *But see*, Michael Giles, Virginia Hettinger & Todd Peppers, *Measuring the Preferences of Federal Judges*: *Alternatives to Party of the Appointing President* 10 (2002) (working paper) (asserting that common space measures outperform party of the appointing president variable), cited in Sisk & Heise, *supra* note 53, at 1223 n. 90.

Clause and a not pro-religion vote was one which accepted the assertion that the government's conduct violated the Establishment Clause. A vote or decision which approved of state or federal expenditures for students who attended religiously affiliated schools or devotional activities within a public school was coded as pro-religion. A vote or decision which eschewed state or federal expenditures for students who attended religiously affiliated schools or devotional activities within the public schools was coded as not pro-religion.

Two dummy variables were created as indicators of judges' religious affiliation. Catholic was coded "1" if the judge was a Catholic, and "0," if "otherwise." Similarly, Jewish was coded "1" and "0" if "otherwise." This methodology allows the alternative category to serve as the reference group for mainline Protestant justices. The political ideology predictor was coded "1" and "0" for justices nominated by Republican and Democratic presidents, respectively.

Since ordinary least squares regression is inappropriate when the dependent variable is dichotomous,[103] as is the case in the present analyses, the parameters of the models were estimated by binary logistic regression techniques. This statistic was selected because the data satisfy each of the assumptions for this technique;[104] it is the most effective statistic for analysis of binary dependent variables;[105] and its use will enable comparisons with other studies using this analytic tool.

Logistic regression ("logit") produces estimates of a model's independent variables in terms of the contribution each makes to the odds that the dependent variable falls into one of the designated categories (here, conservative pro-religion or liberal not pro-religion).[106] In essence, this technique allows the researcher to determine whether each independent variable improves the model relative to the model without that independent variable.

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[103] ROBERT BURNS & RICHARD BURNS, BUSINESS RESEARCH METHODS AND STATISTICS USING SPSS 569 (on-line supplement ch. 24) (2008) available at www.uk.sagepub.com/burns/website%material/Chapter%2024%20-%Logistic%20regression.pdf.

[104] *Id.* at 569-70. Logistic regression does not assume a linear relationship between the dependent and independent variables; the dependent variable must be binary; the independent variable(s) need not be interval, or normally distributed, or linearly related, or of equal variance in each grouping; the categories must be mutually exclusive (a case can only be in one group) and exhaustive (every case must be a member of one of the groups). Moreover, larger samples are needed for linear regression because the maximum likelihood estimates are large sample estimates.

[105] *Id.*

[106] *Id.* at 570-71. Technically, logistic regression forms a best fitting equation or function using the maximum likelihood method (MLM), which maximizes the probability of classifying the observed data into the appropriate category, given the regression Epstein coefficients.

B. Case-Level Variables

Since prior research showed that issue salience intensified ideological voting at the Supreme Court,[107] the influence of this factor was investigated here. Since we cannot survey elite actors, like members of the Supreme Court, to ascertain which cases they consider important, we are left with indirect measures of this phenomenon.

Epstein and Segal define a high salience case as one which: led to a story on the front page of the New York Times ("NYT"), on the day after the Court handed down its decision, was the lead or "headline" case in the story, and was orally argued and decided with an opinion.[108] A second approach to measuring salience is whether the decision appears on the Congressional Quarterly's list of "major" Supreme Court cases.[109] Criticisms of the CQ methodology include: its validity is suspect, since the measure of case importance is retrospective rather than contemporaneous in nature; it focuses on civil liberties and constitutional cases, rather than the broad range of cases which come before the Court; it covers more recent cases than earlier ones; it emanates from sources so centered on the Court that it cannot be adopted to study other political institutions; and changes in the case list vary from one CQ edition to the next, making its assessment somewhat unstable.[110] On the other hand, decisions appearing on the front page of the NYT are more contemporaneous. Impliedly, since the NYT circulates nationally, it may be a more effective measure of the importance the justices attribute to the case at the time they cast their votes.[111] Moreover, the NYT measure is a reliable one and readily transported to other

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[107] I. Unah & A. Hancock, *U.S. Supreme Court Decision Making, Case Salience, and the Attitudinal Model*, 28 L & POL'Y 295, 314-15 (2006) (*using civil rights votes during forty-seven Supreme Court terms, from 1953 through 2000, finding that that justices rely significantly more on ideological preferences when deciding high salience cases than low salience ones).*

[108] *See* Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 Am. J. Pol. Sci. 66, 72-73 (2000) **(**finding previous measures of salience inadequate and recommending a new measure, appearance on the front page of The New York Times).

[109] Researchers are not unanimous in their support for the Epstein and Segal measure as an indicator of salience. *See, e.g.,* Beverly B. Cook, *Measuring the Significance of U.S. Supreme Court Decisions*, 55 J. POL. 1127, 1135-36 (1993) (finding that the list compiled by Congressional Quarterly was a concise and reliable alternative for research on contemporary decisions and advocates for same); Paul Douglas Foote, *The So-Called Moderate Justices on the Rehnquist Court: The Role of Stare Decisis in Salient and Closely-Divided Cases*, 6 J. SOC. SCI. 186, 190-91 (2010) (using the NYT and CQ to measure case salience in studying voting of "moderate" Supreme Court justices) **.** The most recent edition of the CQ guide is DAVID G. SAVAGE, GUIDE TO THE U.S. SUPREME COURT (5th ed. 2010).

[110] Epstein & Segal, *supra* note 108, at 72-73.

[111] The left-of-center bias of the NYT is adequately explained away by the authors. *See id.* at 76 n. 66 and Table 4 **(**demonstrating empirically that the paper is not especially inclined to highlight stories about liberal court decisions).

fields, such as the study of Congress and the Presidency.[112] Notably, when the NYT and CQ measures are cross-validated, about 85% of the 291 cases appearing on the CQ list also appeared on the front page of the NYT.[113] Although the NYT and CQ measures are imperfect in measuring salience, the NYT measure appears sounder than CQ's: it is essentially contemporaneous and therefore it may represent the justices' assessment of the case's importance when they cast their vote. Accordingly, the NYT measure was selected as the measure of issue salience.

This predictor was organized as follows: 1= "high salience," if the case appeared on the front page of the NYT on the day following issuance of the decision and satisfied the other Epstein and Segal criteria, and 0= "not high salience," if the decision failed to satisfy the Epstein and Segal criteria.[114]

Similarly, since a dissent in the lower court appears to trigger more intense ideological voting than when the lower court decision is unanimous,[115] the influence of this variable on the justices' voting in K-16 Establishment Clause disputes was investigated. Where a dissent occurred in the lower court the case was coded "1" and where no dissent occurred it was coded "0."[116]

Finally, since some research has shown that inter-court conflict reduces the intensity of justices' ideological voting,[117] this independent variable was included as well: where the circuits divided or a circuit was in conflict with the state court of last resort, or state courts of last resort were in conflict with each other on an issue reviewed by the Supreme Court, the case was coded with a "1;" where no reference to inter-court conflict was made in the decision, the case was coded as "0."[118]

C. *DECISIONAL ERA*

The era during which a decision issued was identified as either Reagan and later periods or the pre-Reagan time frame. These corresponded to 1981 and later, which was coded as "1" and 1980 and earlier which was coded as "0." This division was selected because the arc of the Republican Supreme Court appointments appeared to turn in a markedly conservative

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[112] *Id.* at 79-81.
[113] *Id.* at 76-77.
[114] Epstein and Segal argue, we think correctly, that merely because the measure of salience is temporally subsequent to the justices' choices the measure nevertheless taps contemporaneous salience. See, *id.* at 72-73 & n.103 (arguing for validity of measure on ground that, among other things, salience means approximately the same thing to newspaper editors and justices, since they both work in the same political context and lag time between this salience measure compared to others is far less).
[115] *See supra* notes 83-89 and accompanying text.
[116] This information was first derived from the Spaeth Data Base (*see supra* note 94) and then cross-checked against the Westlaw data base.
[117] *See supra* note 78 and accompanying text.
[118] This data was derived from the Spaeth data base for the cases examined.

direction during the Reagan years[119] and thereafter.[120] Moreover, the *number* of Republican appointed conservative justices seated during the1981-2012 period should also have resulted in measurably more conservative voting for the Court as a whole.[121]

Of the seventeen justices who served exclusively during the pre-Reagan era, thirteen were nominated by Democratic presidents and four by Republican presidents. Among the eight justices who served during *both* the pre-Reagan and later periods, six were nominated by Republican presidents and two by Democrats. Finally, among the eleven justices who served exclusively during the Reagan and later years, there were seven justices selected by Republican and four by Democratic presidents.[122] The joinder

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[119] Indeed, "[no] other president [since Roosevelt] has had as great an impact on the federal judiciary [than Ronald Reagan]." DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 70-71 (5th ed. 2011). Even before his presidency officially began, speculation was rife about Ronald Reagan's appointments to the Court, due to the age of several justices. Reagan had promised "to appoint only those opposed to abortion and the 'judicial activism' of the Warren and Burger Courts." *Id.* at 70. President Reagan appointed almost half of all lower-court judges and elevated William Rehnquist to chief justice, as well as three other justices to the Supreme Court. Reagan, working hand-in-glove with Attorney General Edwin Meese III in the appointment process, attempted to "institutionalize" the Reagan revolution, regardless of the results of future presidential elections. *Id*.

[120] President Reagan was remarkably successful in achieving his ambitions. This is attributable to his administration's meticulous screening of judicial nominees and hard-line positions with moderate Republicans challenging the norms of Senatorial patronage. THE REAGAN PRESIDENCY: PRAGMATIC CONSERVATISM AND ITS LEGACIES (W. Elliot Brownlee & Hugh Davis Graham eds., 2003), *as reprinted in* David M. O'Brien, *Why Many Think that Ronald Reagan's Court Appointments May Have Been His Chief Legacy*, HISTORY NEWS NETWORK, available at http://www.nn.us/articles/10968.html. The post-Reagan appointments representing a continuation of this approach are: Clarence Thomas, John Roberts, and Samuel Alito. David Souter's appointment was an exception to this consistent trend; it was apparently intended to avoid a confirmation battle.

[121] This approach cannot tease out the specific influence of the Reagan appointments *per se,* relative to the selection made by other Republican presidents. This could be achieved by coding those justices, say "1," and the other justices "0" within the Republican appointed justice data base, or within the Protestant and Catholic data bases, for example.

[122] The justices who have served on the Court since 1947 are: Hugo L. Black (D) (1937-1971), Stanley F. Reed (D) (1938-1957), Felix Frankfurter (D) (1939-1962), William O. Douglas (D) (1939-1975), Frank Murphy (D) (1940-1949), Robert H. Jackson (D) (1941-1954), Wiley B. Rutledge (D) (1943-1949), Harold H. Burton (D) (1945-1958), Fred M. Vinson (D) (1946-1953), Tom C. Clark (D) (1949-1967), Sherman Minton (D) (1949-1956), Earl Warren (R) (1953-1969), John Harlan (R) (1955-1971), William Brennan, Jr. (R) (1956-1990), Charles Whittaker (R) (1957-1962), Potter Stewart (R) (1958-1981), Byron White (D) (1962-1993), Arthur Goldberg (D) (1962-1965), Abe Fortas (D) (1965-1969), Thurgood Marshall (D) (1967-1991), Warren Burger (R) (1969-1986), Harry Blackmun (R) (1970-1994), Lewis Powell (R) (1971-1987), William Rehnquist (R) (1971-2005), John Paul Stevens (R) (1975-2010), Sandra Day O'Connor (R) (1981-2006), Antonin Scalia (R) (1986-), Anthony Kennedy (R) (1988-), David Souter (R) (1990-2009), Clarence Thomas (R) (1991-), Ruth Bader Ginsburg (D) (1993-), Stephen Breyer (D) (1994-), John Roberts (R) (2005-), Samuel Alito (R) (2006-), Sonia Sotomayor (D)

of the pre-Reagan Republican justices with the later Republican appointed justices strengthened our expectation that Establishment Clause decisions would be more pro-religion during the later as compared to the earlier period.

D. HYPOTHESES

Based on the foregoing investigations and our own assessment of the descriptive data, we anticipated the following outcomes for the data base containing justices appointed by both Republican and Democratic presidents:

Hypothesis 1: The odds of justices appointed by Republican presidents voting in a conservative pro-religion direction in K-16 Establishment Clause disputes for the entire period (1947-2012) would be greater than that of justices appointed by Democratic presidents.

Hypothesis 2: The odds of either Protestant or Catholic justices in K-16 Establishment Clause disputes voting in a conservative pro-religion direction for the entire period would be greater than that of Jewish justices.

Hypothesis 3: The odds of Protestant justices voting in a conservative pro-religion direction in K-16 Establishment Clause disputes would not be greater than that of Catholic justices for the entire period.

Hypothesis 4: The odds of the justices voting in a conservative pro-religion direction during the Reagan and later years would be greater than the justices voting in that direction during the pre-Reagan era.

Our predictions for the voting among the justices appointed by Republican presidents were:

Hypothesis 5: The odds of justices nominated by Republican presidents voting in a conservative pro-religion direction during the Reagan and later periods would be greater than justices nominated by Republican presidents voting in that direction during the pre-Reagan era.

Our predictions for the voting among the justices appointed by Democratic presidents were:

Hypothesis 6: The odds of either Protestant or Catholic justices appointed by Democratic presidents, in K-16 Establishment Clause disputes voting in a conservative pro-religion direction would be greater than Jewish justices appointed by Democratic presidents for the entire period.

Hypothesis 7: The odds of Protestant justices nominated by Democratic presidents voting in a conservative pro-religion direction in K-16 Establishment Clause disputes would not be greater than for Catholics nominated by Democratic presidents for entire period.

(2009-), and Elena Kagan (D) (2010-). The "D" and "Rs" appearing in parentheses after each justice's name indicates the political affiliation of the President who nominated that justice. Although there is a high concordance between the President's party and the party of the nominee, there have been some exceptions. William Brennan was a liberal Democrat nominated by President Eisenhower and Lewis Powell was a conservative Democrat chosen by President Nixon.

Hypothesis 8: The odds of justices appointed by Democratic presidents voting in a conservative pro-religion direction during the Reagan and later years would not be greater than the odds of justices appointed by Democratic presidents voting in that direction during the pre-Reagan era.

Our predictions for the voting among the justices in the Protestant-only data base were:

Hypothesis 9: The odds of Protestant justices appointed by Republican presidents voting in a conservative pro-religion direction in K-16 Establishment Clause disputes for the entire period would be greater than the odds of Protestant justices appointed by Democratic presidents voting in a conservative pro-religion direction.

Hypothesis 10: The odds of Protestant justices voting in a conservative pro-religion direction in K-16 Establishment Clause disputes for the entire period in high salience cases would be greater than it would be in low-salience cases.

Our predictions for the voting among the justices in the Catholic-only data base were:

Hypothesis 11: The odds of Catholic justices voting in a conservative pro-religion direction in K-16 Establishment Clause disputes for the entire period in high salience cases would be greater than in low-salience cases.

Hypothesis 12: The odds of Catholic justices voting in a conservative pro-religion direction during the Reagan and later years would be greater than the Catholic justices voting in that direction during the pre-Reagan years.

To preview the results, Hypotheses 1, 2, 3, 4, 6, 7, 9 and 12 were confirmed. Hypotheses 5, 8, 10, 11 were not confirmed.

VII. RESULTS

A. Descriptive Statistics for Religion and Party Affiliation

The relationship of the judge-level variables to Supreme Court voting was examined descriptively prior to performing logit analyses on the data sets.

Table 1 shows the frequency distribution of votes cast categorized as conservative (pro-religion) or liberal (not pro-religion) in K-16 Establishment Clause cases within each of the religious groups which has served on the Court. The percentage next to each entry is of the total votes cast within each religious group. Table 1 reveals that between 1947 and 2012 Catholic justices cast 63%, while Protestant justices cast 56%, of their votes in a conservative (pro-religion) direction. In stark contrast to the pattern for Protestant and Catholic justices, Jewish justices voted in a decidedly liberal direction. This group voted 14% of the time in a pro-religion direction, suggesting a strong separationist disposition among Jewish justices.

Table 1. Frequency and Percentage of Conservative Pro-Religion and Liberal Not Pro-Religion Votes Cast in K-16 Establishment Clause Decisions at the United States Supreme Court between 1947 and 2012 as a Function of Justices' Religious Affiliation

Religious Affiliation	Conservative Votes	Liberal Votes
Total		
Protestant	196 (56%)	156 (44%)
352 (75%)		
Catholic	56 (63%)	33 (38%)
89 (19%)		
Jewish	4 (14%)	24 (86%)
28 (6%)		
Total	256 (55%)	213 (45%)
469 (100%)		

Table 2 shows the frequency distribution of justices' votes as conservative or liberal, as a function of their political affiliation for K-16 Establishment Clause decisions rendered between 1947 and 2012. The percentage next to each entry is of the total votes cast within each ideological group. It can be seen that justices nominated by Republican presidents cast conservative (pro-religion) votes 62% of the time while their colleagues nominated by Democratic presidents did so only 40% of the time. This suggests the presence of a strong ideological influence on voting in these cases, worthy of further investigation.

Table 2. Frequency and Percentage of Conservative Pro-Religion and Liberal Not Pro-Religion Votes Cast in K-16 Establishment Clause Decisions at the United States Supreme Court between 1947 and 2012 as a Function of Justices' Party Affiliation

Party	Conservative Votes	Liberal Votes
Total		
Republican	197 (62%)	123 (38%)
320 (68%)		
Democratic	59 (40%)	90 (60%)
149 (32%)		
Total	256 (55%)	213 (45%)
469 (100%)		

Table 3 displays the frequency distribution of voting by the Protestant justices in K-16 Establishment Clause cases reaching the Court during the period 1947-2012. The data reveal that justices nominated by Republican

Table 3. Frequency and Percentage of Conservative Pro-Religion and Liberal Not Pro-Religion Voting by Protestant Justices in K-16 Establishment Clause Decisions at the United States Supreme Court between 1947 and 2012 as a Function of Party Affiliation

Party	Total	Conservative Votes	Liberal Votes
Republican	235 (67%)	143 (61%)	92 (39%)
Democratic	117 (33%)	53 (45%)	64 (55%)
Total	352 (100%)	196 (56%)	156 (44%)

presidents voted more often in a conservative, pro-religion direction (61%) than they did in a liberal direction (39%), while justices nominated by Democratic presidents voted more often in a liberal (55%) than a conservative direction (45%).

Table 4 displays justices' voting in kindergarten-16 cases during the Rehnquist 7 natural court. A natural court is one where no personnel change occurs.[123] By convention, such courts are referred to by the name of the Chief Justice, followed by the number of the court, starting with 1. The Rehnquist 7 natural court existed from August 3, 1994 to September 28, 2005, making it the longest period in Supreme Court history without a personnel change. Using a natural court as a frame of reference allows comparison among the justices and ranking them from most to least conservative, in cases decided during their period of common service.

[123] The Supreme Court Database, scdb.wustl.edu/documentation.php?var=naturalCourt.

Table 4. Ranking of Justices in K-16 Establishment Clause Decisions from Most to Least Conservative During the Rehnquist 7 Natural Court (August 3, 1994-September 28, 2005) as Measured by Percent of Conservative Pro-Religion Votes.

Justice	Party/Religious Affiliation Percent	Conservative Votes/Total
Thomas	Republican-Catholic 100%	9/9
Scalia	Republican-Catholic 100%	9/9
Rehnquist	Republican-Protestant 88%	8/9
Kennedy	Republican-Catholic 78%	7/9
O'Connor	Republican-Protestant 67%	6/9
Breyer	Democrat-Jewish 33%	3/9
Souter	Republican-Protestant 11%	1/9
Ginsburg	Democrat-Jewish 11%	1/9
Stevens	Republican-Protestant 11%	1/9

These results indicate that during the Rehnquist 7 natural court, Justices Thomas and Scalia voted 100% of the time in a conservative pro-religion direction, followed closely by Justice Rehnquist, who voted in a conservative direction 88% of the time and was separated from Thomas and Scalia by only one vote among the nine votes cast by each justice. At the other end of the continuum, Justices Souter, Ginsburg and Stevens voted in a conservative pro-religion direction only 11% of the time. Justice O'Connor voted in a conservative direction 67% of the time while Justice Breyer did so 33% of the time.

Several patterns emerge from the Rehnquist 7 natural court. First, Republicans occupied the five highest rankings among the nine justices in percentage of conservative votes (voting conservatively from 67%-100% of the time). Moreover, all of these conservative voters came from Protestant or Catholic backgrounds. By contrast, the justices who voted less frequently in a conservative pro-religion direction (11%-33% of the time) came from Protestant and Jewish backgrounds, with no Catholics in this group. Two Democrats and two Protestants justices were included in this liberal leaning group. This pattern suggests, as did other descriptive data, that greater scrutiny of the justices' voting was warranted.

The second longest natural court during the period under study was the Burger 6 natural court, which existed from December 24, 1975 until September 24, 1981. This was followed closely in duration by the Burger 7 natural court, which existed from September 25, 1981 until September 26, 1986. Since only one change in personnel occurred between the Burger 6 and 7 courts, the data representing the votes cast during these eras were combined. This change occurred when Sandra Day O'Connor replaced Potter Stewart. Since Stewart and O'Connor voted similarly and were both Republican-Protestants, their votes were combined as if they were a single justice and designated as PS/SDO for purposes of descriptive analysis. Table 5 contains the voting of the justices comprising the combined Burger 6 and 7 courts.

Table 5 shows that seven of the nine justices serving during the Burger 6-7 natural courts were appointed by Republican presidents. Among these justices, Rehnquist, Burger, and White voted most conservatively (100%, 100% and 85% of the time), while Blackmun, Stevens, Marshall, and Brennan voted most liberally (31%, 31%, 18%, and 8% of the time). Justice White, a known exception to typical Democratic voting in church-state disputes, voted more like a Republican than would ordinarily be expected based on his political roots.[124]

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[124] Two of Justice White's dissents will illustrate this point. In *Wallace v. Jaffree,* 472 U.S. 38 (1985), the Court struck down Alabama's moment of silence law with six justices concluding the law had no secular purpose. Although the Alabama statutes already authorized silence in the schools for "meditation," the legislature amended the law to include "voluntary prayer." The sponsor had said that the law's purpose was to encourage prayer (54 U.S. at 56-57) and the state presented no evidence of a secular purpose, and therefore failed the first prong of the *Lemon v. Kurtzman* test. *Id.* at 57. Justice Burger dissented and Justice White mostly agreed with Burger's reasoning. They rejected the majority's finding that the legislation had a non-secular purpose. Since the bill sponsor's comments were made *after* the legislation had passed, there was no record evidence that other legislator' shared in this impermissible motive. *Id.* at 88. Another example is White's dissent in *Committee for Public Education and Religious Liberty*, 413 U.S. 756 (1973). There, the majority opinions held that a law providing for direct payments to sectarian schools for repair and maintenance of equipment and facilities was unconstitutional and that tuition reimbursement and income–tax credits for parents of nonpublic school children were unconstitutional. Justice White, joined in part by Chief Justice Burger, and then Associate Justice Rehnquist dissented. The dissenters observed that much of educational activity at the private schools was secular in nature and conformed to state curricular requirements *Id.* at 813-14. They argued that the state should not create obstacles to students achieving constitutionally acceptable alternatives to public education. *Id.* The dissenters asserted that precedent make clear that the First Amendment does not bar all state aid to religion, of whatever kind and whatever extent (*id.* at 820) and that the sparse language of the First Amendment did not provide unequivocal language warranting the undoing of the state educational initiatives, especially since there were both policy and economic underpinnings animating the statutes. *Id.* In both *Wallace* and *Committee for Public Education,* Justice White was on the opposite side of Democrats Douglas and Marshall and Democratic, but Republican nominated Brennan.

Table 5. Ranking of Justices in K-16 Establishment Clause Decisions from Most to Least Conservative during the Combined Burger 6 and 7 Natural Courts (December 24, 1975-September 24, 1981 and September 25, 1981-September 26, 1986), as Measured by Percent of Conservative Pro-Religion Votes

Justice	Party/Religious Affiliation Percent	Conservative Votes/Total
Rehnquist	Republican-Protestant 100%	13/13
Burger	Republican-Protestant 100%	13/13
White	Democrat-Protestant 85%	11/13
PS & SDO	Republican-Protestant 69%	9/13
Powell	Republican-Protestant 54%	7/13
Blackmun	Republican-Protestant 31%	4/13
Stevens	Republican-Protestant 31%	4/13
Marshall	Democrat-Protestant 18%	2/13
Brennan	Republican-Catholic 8%	1/13

Liberal votes were cast among a diverse group of justices based on party affiliation. Justice Brennan, a Democratic-Catholic nominated by Republican President Eisenhower, voted only 8% of the time in a pro-religion direction, while two Protestants nominated by Republican president Nixon, Blackmun and Stevens, voted in a pro-religion direction only 31% of the time. Blackmun and Stevens were known to have drifted to the left ideologically during their tenure on the court,[125] and this is certainly

[125] On Justice Blackmun, *see, e.g.,* 85-100 HARV. L. REV. (1972-1987) (providing annual statistics on the Court's terms and showing a definitive shift to the left between Blackmun and his colleagues) *and* Note: *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717, 717-22 (1983) (observing declining agreement between Chief Justice Burger and Justice Rehnquist and increasing agreement with Justices Brennan and Marshall,

reflected in these Establishment Clause cases. Thus, no clear pattern emerges from the voting on the Burger 6-7 courts based on party or religious affiliation.

B. LOGISTIC REGRESSION ANALYSIS FOR COMBINED DEMOCRATIC AND REPUBLICAN DATA BASES

Table 6 shows the results of the logit analysis performed on the combined data bases for Supreme Court justices nominated by Republican and Democratic presidents voting in K-16 Establishment Clause decisions rendered between 1947 and 2012.

A total of 469 votes were analyzed. A test of the full model against a constant-only model was statistically significant, indicating that the predictors, as a set, reliably distinguished between conservative (pro-religion) and liberal (not pro-religion) votes of the individual justices (X^2= 36.858, p= < 001 with *df*=7).

Prediction success was 75.8% for pro-religion votes and 41.6% for not pro-religion votes. Overall, 60.1% of the predictions were accurate. Variability in the dependent variable accounted for by the independent variables was approximately .010, as measured by Nagelkerke's R Square.

Table 6 gives the Wald statistic and associated degrees of freedom and probability values for each of the predictor variables. The Wald criterion demonstrated that ideology (p=.049), Jewish/Other (p=.002), and Decision Era (p=.031) made a significant contribution to prediction.

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and from positions which provided institutional support to those which insulated vulnerable individuals from injury). *See also*, LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY (2005) (chronicling Justice Blackman's jurisprudential evolution). On Justice Stevens, *see e.g.*, Ari Berman, *Why the Supreme Court Matters*, THE NATION, http://www.the nation.com/article/167350/why-supreme-court-matters# (Apr. 11, 2012) (stating that when Stevens joined the Court in 1975 he was situated in its ideological center and by the time he retired in 2010 he was its most liberal member, but concluding that the Court changed more than Stevens, and that as a result what was once centrist is now left wing).

Table 6. Logit Analysis on the Likelihood of a Conservative Pro-Religion Vote at the United States Supreme Court in K-16 Establishment Clause Decisions, Combined Data Bases for Justices Nominated by Republican and Democratic Presidents, 1947-2012

Independent Variables	*B (SE)*	*Wald*	*df*	*P*	*Exp(B)*
Ideology	0.463 (.235)	3.883	1	.049	1.589
Decision Era	0.486 (.226)	4.636	1	.031	1.625
LC Dissent	-.079 (.195)	0.165	1	.685	0.924
Inter-Court Conflict	0.125 (.317)	0.155	1	.693	1.133
Catholic-Other	0.124 (.262)	0.223	1	.637	1.132
Jewish-Other	-1.815 (.588)	9.540	1	.002	0.163
Issue Salience	-0.350 (.218)	2.570	1	.109	0.705
Constant	-0.049 (.232)	0.045	1	.832	

The output indicates that judicial ideology was strongly related to the voting choices of the justices. Justices appointed by Republican presidents were more likely to vote in a conservative, pro-religion direction than their colleagues nominated by Democratic presidents, under controls for the other independent variables. For the two categories associated with the ideology variable, calculation of the effect size[126] revealed that the odds of justices nominated by Republican presidents voting in a conservative pro-religion direction increased using a factor of 1.589 over the odds of voting in a conservative pro-religion direction for justices nominated by Democratic presidents, when all of the other independent variables were held constant. This finding reinforces the conclusions of other studies that have found the political values of appellate court judges, including those serving on the Supreme Court, are strong predictors of the direction of their decision making, and extends them to K-16 Establishment Clause disputes.

Turning to the justices' religious affiliation, it can be seen that Jewish justices were less likely than Protestant justices to cast conservative (pro-

[126] Effect size within the predictors is revealed by the odds ratio for each independent variable. This result appears in the *Exp(B)* column in each logit Table.

religion) votes when all other variables were held constant.[127] Calculation of the effect size for this comparison revealed that odds of a Jewish justice voting conservative pro-religion was reduced using a factor of .163 over the odds of voting in a pro-religion direction for a Protestant, when all of the other independent variables were held constant. Catholic justices did not differ significantly from Protestant justices in the odds of their casting pro-religion conservative votes when all of the variables were held constant. Finally, the odds of Jewish justices voting conservative pro-religion were significantly less than the odds for a Catholic justice voting in that direction.[128]

The results for the Jewish justices confirmed the apparently strong separationist disposition among the Jewish justices, compared to the Protestant and Catholic justices. This finding is consistent with previous findings about Jewish justices' voting in church-state disputes[129] and confirms their applicability to K-16 public educational settings.

Voting during the Reagan and later years (1981-2012) was significantly more pro-religion than during the pre-Reagan era (1947-1980), suggesting the care taken in vetting justices by Republican presidents in the Reagan and later years compared to the earlier period bore fruit in terms of bringing about pro-religion outcomes. These results are discussed in Part VIII, *infra*.

C. Logistic Regression Analyses for the Republican and Democratic and Protestant and Catholic Data Bases

To determine if any of the independent variables influenced pro-religion voting within each party-affiliated group of justices, separate logit analyses were performed on a Republican-only and Democrat-only voting

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[127] With respect to the set-up for the "dummy" categories, the *B* coefficient -1.815 for the Jewish/Other variable and 0.124 for the Catholic/Other variable which appear in Table 6 represent the effect of each "indicator category" within the particular group, compared to the reference ("other") category. The *B* coefficients for Jewish/Other is the change in the log odds for pro-religion voting for Jewish justices compared to Protestant justices. The B coefficient for the Catholic/other variable is the change in log odds for pro-religion voting for Catholic justices compared to Protestant justices. The negative value for the Jewish/Other variable means that Jewish justices, who were coded as "1," are associated with decreased log odds for pro-religion voting relative to the reference Protestant group, which was coded as "0" for purposes of this comparison.

[128] This relationship was revealed when we ran as well a second "dummy set" on the data base containing the votes of the justices nominated by Republican and Democratic presidents with Catholics as the reference group. The output established that the odds of Jewish justices voting in a conservative pro-religion direction was significantly less than the Catholic justices (*B*=-1.899, S.E.=.630, Wald=9.081, *df=1, p<.003, Exp(B)=0.150).* The indicator of effect size for this comparison reveals that the odds of a Jewish justice voting conservative pro-religion is reduced using a factor of .150 over the odds of voting pro-religion for a Catholic, when all of the other independent variables are held constant.

[129] *See* discussion *supra* accompanying notes 32-47.

of the justices in the fifty-three Establishment Clause decisions comprising the main data base.

i. Republican Data Base

The result for the 320 votes cast by justices nominated by Republican presidents is displayed in Table 7.

Table 7. Logit Analysis of the Likelihood of a Conservative Vote by Justices Nominated by Republican Presidents in United States Supreme Court K-16 Establishment Clause Decisions, 1947-2012

Independent Variables	*B (SE)*	*Wald*	*df*	*P*	*Exp(B)*
Decision Era	-0.003 (.291)	0.000	1	.991	0.997
LC Dissent	-0.354 (.237)	2.231	1	.135	0.702
Catholic-Other	0.188 (.277)	0.458	1	.499	1.206
Inter-court Conflict	0.221 (.374)	0.349	1	.555	1.247
Issue Salience	-.237 (.293)	0.655	1	.418	0.789
Constant	0.722 (.222)	10.613	1	.001	2.058

A test of the full model against a constant-only model for the justices nominated by Republican presidents failed to attain significance (X^2= 4.157, p=.527 with *df*=5). Therefore the model was not effective at discriminating between the two response categories. Table 7 gives the Wald statistic and associated degrees of freedom and probability values for each of the predictor variables.

Prediction success for the model for Republican justices was 100.0 % for conservative pro-religion votes and 0.0% for the votes not falling in this category. The overall success rate in predicting conservative pro-religion votes for this group was 61.6. %. Variability in dependent variable was accounted for by the independent variables was approximately .018, as measured by Nagelkerke's R Square.

The expectation that over time, the more carefully vetted Republican appointees from the Reagan and later administrations (1981-2012) would have had their influence felt in conservative pro-religion voting, as compared to Republicans voting during the earlier period (1947-1980), was

not realized.[130] This may be accounted for by the fact that, overall, justices nominated by Republican presidents had high rates of supporting pro-religion decisions in the earlier period and, therefore, it was hard to improve upon this baseline during the later period.[131] Table 7 also reveals that no meaningful difference in the odds of conservative pro-religion voting occurred between Catholic and Protestant justices selected by Republican presidents during the 1947-2012 period (p=.499).

There were no Republican Jewish justices. This fact seems largely to be a result of the reluctance of Republican presidents to nominate justices with liberal voting dispositions. That said, President Reagan nominated Conservative Republican Judge Douglas Ginsburg of the United States Court of Appeals for a vacancy on the Court in 1987. Under pressure from administration officials and supporters in his conservative base, Judge Ginsburg asked the President to withdraw the nomination, based on Ginsburg's admission that he had smoked marijuana several times in the 1960s and 1970s while he was a college student and Harvard Law School professor.[132]Absent this "glitch," it seems there would have been at least one Jewish Republican justice on the Court.[133]

ii. Democratic Data Base

A test of the full model against a constant-only model for the justices nominated by Democratic presidents was statistically significant, indicating that the predictors, as a set, reliably distinguished between conservative (pro-religion) and liberal (not pro-religion) votes of the Democratic justices (X^2= 16.860, p=.010 with *df*=6).

Prediction success for Democratic justices for pro-religion votes was 27.1 percent correct, but 90.0% for not pro-religion votes. Overall, 65.1% of the predictions were accurate. Variability in the dependent measure, as

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[130] Table 7 shows that no significant differences were found for Republican justices in the odds of a pro-religion vote during the pre-Regan and Reagan and later era (p=.991).

[131] There were 109 pro-religion votes cast by the justices nominated by Republican presidents during the Reagan and later period and 61 not pro-religion votes cast during that era for this group. During the pre-Reagan era the justices nominated by Republican presidents cast 88 pro-religion and 62 not pro-religion votes. This tally equals 64.1 percent pro-religion votes during the Reagan and later era and 58.6 percent pro-religion votes during the pre-Reagan period. These calculations were derived from data entry spread sheets which are available in the offices of the authors.

[132] *See* Steven V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana 'Clamor',* N.Y. TIMES, Nov. 6, 1987, http:// www.nytimes.com/1987/-ginsburg-withdraws-name-as-supreme-court-nominee-citing-marijuana-clamor.html.

[133] Although religious affiliation of judges historically "mirror[ed] the different religious composition of the two major political parties (SHELDON GOLDMAN, PICKING FEDERAL JUDGES 352 (1997)), religious origin largely has ceased to be a barrier or major factor in judicial selection. Although Democratic administrations in the past appointed more Catholics and Jews to judicial posts, that pattern largely disappeared with the Reagan Administration, which also appointed a high percentage of Catholics and Jews to the federal bench. *Id.* at 358.

accounted for by the independent variables, was approximately .145 as measured by Nagelkerke's R Square.

Table 8 gives the Wald statistic and associated degrees of freedom and probability values for each of the predictor variables used to analyze the Democratic data base.

Table 8. Logit Analysis of the Likelihood of a Conservative Vote by Justices Nominated by Democratic Presidents in United States Supreme Court K-16 Establishment Clause Decisions, 1947-2012

Independent Variables	*B (SE)*	*Wald*	*df*	*P*	*Exp(B)*
Catholic-Other	0.256 (1.058)	0.058	1	.809	1.291
Decision Era	1.037 (.469)	4.900	1	.027	2.821
Jewish/Other	-2.283 (0.675)	11.427	1	.001	0.102
Inter-Court Conflict	(-0.040) (.610)	0.004	1	.948	0.961
LC Dissent	.483 (.360)	1.802	1	.179	1.621
Issue Salience	-0.043 (.385)	.013	1	.910	0.958
Constant	-0.589 (.350)	2.837	1	.092	0.555

The Wald criterion demonstrated that, among Democrats, the "Jewish/Other" independent variable made a significant contribution to prediction (p=.001). As revealed by the negative coefficient value (*B*=-2.283), the odds of Jewish justices nominated by Democratic presidents voting in a pro-religion direction was less than that of the Protestant justices nominated by Democratic presidents. This difference was robust and highly significant. An examination of the effect size for this measure revealed that for the two categories associated with the Jewish-Protestant predictor, the odds of a Democratic-Jewish justice voting pro-religion is reduced using a factor of .102 over the odds of voting pro-religion for the Protestants, when all of the other independent variables are held constant. No differences occurred between Catholic and Protestants who were nominated by Democratic presidents in the likelihood of their pro-religion voting. However, substantial differences

appeared between the Jewish and Catholic justices nominated by Democratic presidents, with the Catholics being more likely to cast a pro-religion vote.[134]

Democratic justices were significantly more likely to vote in a pro-religion direction during the 1981 and later period, than during the 1947-1980 timeframe (p=.027). At first blush, the direction of the Democrats' voting may seem counterintuitive, since the preferences of the Democrats as a group appear to go in the opposite direction. This result might be explained by the "legal model" of judicial conduct. During the Reagan and later years, Establishment Clause jurisprudence in public education cases, at least those involving public monies, turned in a markedly conservative direction, a trend which continued through President Obama's election.[135]

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[134] We derived this result by running a second "dummy set" on the Democratic data base with Catholics as the reference group. The output established that the odds of Jewish justices nominated by Democratic presidents voting in a conservative pro-religion direction was significantly less than the Catholic justices nominated by Democratic president (*B*=-2.539, S.E.=1.212, Wald=4.386, *df=1, p<.036, Exp(B)=0.079).* The indicator of effect size for this comparison reveals that the odds of a Jewish justice nominated by a Democratic president voting conservative pro-religion is reduced using a factor of 0.079 over the odds of voting in a pro-religion direction for a Catholic nominated by a Democratic president, when all of the other independent variables are held constant.

[135] *See, e.g.,* Mueller v. Allen, 463 U.S. 388 (1983) (a state that allows taxpayers, in computing their state income tax, to deduct expenses incurred in providing tuition, textbooks, and transportation for children attending an elementary or secondary school does not violate the Establishment Clause); Bowen v. Kendrick, 487 U.S. 589 (1988) (the Adolescent Family Life Act, which authorizes federal grants to public and private organizations that provide services and research in the area of premarital adolescent sexual relations and pregnancy, but provides the services may not include family planning and abortion, does not violate the Establishment Clause); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (The Equal Access Act which prohibits public secondary schools receiving federal financial assistance from discriminating against students who wish to meet after school hours in a "limited open forum" on school premises on the basis of their religious beliefs, when the school allows other non-curriculum related groups to meet under those circumstances, does not violate the Establishment Clause); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (the Establishment Clause does not bar a school district from providing a sign-language interpreter to a hearing impaired student on the premises of a parochial school); Agostini v. Felton, 521 U.S. 203 (1997) (A publically funded program providing supplemental, remedial instruction to economically disadvantaged students on the premises of a parochial school, with proper safeguards for neutrality, does not violate the Establishment Clause); Mitchell v. Helms, 530 U.S. 793 (2000) (loan of educational materials and equipment to parochial schools under federal program, as part of a neutral secular federal program for all K-12 schools, does not violate the Establishment Clause); Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (a school voucher statute which provides parents a choice among private schools, both private and religious, and public schools, does not violate the Establishment Clause); and Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011) (state statute which permitted individual citizens who donated to qualifying not-for-profit scholarship granting organizations ("SGOs") to take dollar-for-dollar tax credit against their state tax liability, where SGOs in turn provided vouchers for parochial school education, did not violate the Establishment Clause).

During the Reagan and later years, the Democrats on the Court might have felt constrained by principles of *stare decisis* to adhere to these holdings, notwithstanding their personal inclinations to vote otherwise.

iii. Protestant Data Base

A logit analysis applied to the Protestant-only data base revealed the full model against a constant-only model for the justices was statistically significant, indicating that the predictors, as a set, reliably distinguished between conservative (pro-religion) and liberal (not pro-religion) votes of the Protestant justices (X^2= 13.482, p= .019 with *df*=5).

Prediction success for Protestant justices for conservative (pro-religion) votes was 83.7 percent correct and 23.7% for liberal (not pro-religion) votes. Overall, 57.1% of the predictions were accurate. Variability in the dependent measure accounted for by the independent variables was approximately 0.050, as measured by the Nagelkerke's R Square.

Table 9 gives the Wald statistic and associated degrees of freedom and probability values for each of the predictor variables applied in the Protestant data base.

Table 9. Logit Analysis of the Likelihood of a Conservative Vote by Protestant Justices in United States Supreme Court K-16 Establishment Clause Decisions, 1947-2012

Independent Variables	*B (SE)*	*Wald*	*df*	*P*	*Exp(B)*
Ideology	0.612 (0.243)	6.336	1	.012	1.844
Decision Era	0.014 (0.252)	0.003	1	.957	1.014
Inter-Court Conflict	-0.040 (.357)	0.013	1	.910	0.960
LC Dissent	-0.127 (.221)	0.330	1	.566	0.881
Issue Salience	-0.505 (.237)	4.538	1	.033	0.603
Constant	0.166 (.245)	0.459	1	.498	1.181

The Wald criterion demonstrated that, among Protestants, the party-ideology variable made a significant contribution to prediction (p=.012). Protestant justices nominated by Republican presidents were more likely to vote in a pro-religion direction than Protestant justices nominated by Democratic presidents. Among the Protestant justices, conservative and liberal preferences expressed themselves strongly in these K-16 Establishment Clause conflicts, with the justices appointed by Republican presidents more likely to vote to make the "wall of separation" more porous than those appointed by Democratic presidents. For the two categories associated with

the party ideology predictor, the odds of a Protestant justice nominated by a Republican president voting in a pro-religion direction is increased using a factor of 1.844 over the odds of voting pro-religion for a Protestant justice nominated by a Democrat, when all of the other independent variables are held constant.

The Wald criterion demonstrated that, among Protestants, the salience variable made a significant contribution to prediction (p=.033). For the Protestant justices, high salience had a negative relationship with conservative pro-religion voting, meaning that in high salience cases with controls in place for the other predictors, Protestant justices were less likely to vote in a conservative direction than in low salience cases. This result is discussed in Part VII, *infra*. The odds of a Protestant justice voting conservative pro-religion in a high salience case is reduced using a factor of 0.603 over the odds of voting pro-religion for a Protestant justice in a low salience case, when all of the variables are held constant.

The lower court dissent, inter-court conflict, and decision era variables failed to produce differences in the odds of a pro-religion vote among the Protestant justices.

iv. The Catholic Data Base

A test of the full model against a constant-only model for the Catholic justices was statistically significant, indicating that the predictors, as a set, reliably distinguished between conservative (pro-religion) and liberal (not pro-religion) votes for this group (X^2= 30.366, p= <.001 with *df*=5).

Prediction success for Catholic justices for conservative (pro-religion) votes was 87.5 percent correct and 66.7% correct for liberal (not pro-religion) votes. Overall, 79.8 % of the predictions were accurate. An estimate of variability in the dependent measure accounted for by the independent predictors derived from Nagelkerke's R Square was .395, the highest estimate obtained for this study.

Table 10 gives the Wald statistic and associated degrees of freedom and probability values for each of the predictor variables used in the Catholic-only data base.

Table 10. Logit Analysis of the Likelihood of a Conservative Vote by Catholic Justices in United States Supreme in Court K-16 Establishment Clause Decisions, 1947-2012

Independent Variables	*B (SE)*	*Wald*	*df*	*P*	*Exp(B)*
Ideology	-0.365 (1.241)	.087	1	.769	0.649
Decision Era	2.488 (.622)	15.974	1	.000	12.035
LC Dissent	0.286 (.564)	0.257	1	.612	1.331
Inter-Court Conflict	-0.136 (.846)	0.026	1	.872	0.873
Issue Salience	0.744 (.642)	1.342	1	.247	2.104
Constant	-1.343 (1.265)	1.128	1	.288	0.262

The Wald criterion demonstrated that, among Catholic justices, the Decision Era in which the justices served made a significant contribution to prediction ($p<.001$). Catholic justices during the Reagan and successive years were more likely to vote in a pro-religion direction than the Catholic justices during the pre-Reagan era. Since the model controlled for the other predictors, this result appears to reflect genuine differences between the Catholic justices who served during and after 1981, as compared to those who served during the pre-1981 period. This result is discussed more fully in Part VIII, *infra*. The odds of a Catholic justice voting in a conservative pro-religion direction during the Reagan and later period is increased using a factor of 12.035 over the odds of voting pro-religion during the pre-Reagan era, when all of the other predictor variables are held constant.

The political affiliation, lower court dissent, inter-court conflict, and issue salience failed to produce meaningful differences in the odds of a pro-religion vote among the Catholic justices.

VIII. DISCUSSION

A. THE COMBINED DATA BASE

The logit results for the combined Republican and Democratic data bases indicated that the model performed well in predicting the odds of justices nominated by Republican and Democratic presidents voting in a conservative pro-religion voting with the other independent variables controlled. The expectation that justices nominated by Republican presidents would vote in a more conservative pro-religion direction was confirmed. The direction of the justices' votes appears to have been mediated by their policy preferences in these cases. Thus, the attitudinal model maintained vitality in predicting

voting in K-16 Establishment Clause disputes for these groups for the period 1947-2012.

Voting differences among the three religious groups, with controls for the other independent variables, were more subtle, however. The odds of Catholic justices voting in a conservative direction were not significantly different from the odds of Protestant justices voting in the same direction from 1947-2012. This is consistent with previous results, since all of the Protestant justices were mainline affiliates and had no known characteristic which might have led to predicting greater odds of their voting in a conservative direction than the Catholic justices. Moreover, the Catholic group was comprised of justices spanning both the pre-Reagan and Reagan and later years. This would tend to homogenize the Catholic group by "averaging" the votes of the more liberal Catholics justices from the pre-Reagan era and the conservative Catholics from the later period and thereby minimize differences between the Catholic group as a whole and the Protestant group.

The Jewish justices' voting, in contrast to the Protestants and Catholics, was decidedly liberal and separationist.[136] The powerful differences in the direction of conservative voting between Jewish, on the one hand, and Protestant and Catholic justices on the other hand, suggest strong religiously based attitudinal influences were at work. The direction of the Jewish voting may reflect identification with other religious minorities, a protective stance for themselves, and perhaps even cultural traditions.[137] The Protestant and Catholic justices' voting during the period under scrutiny may reflect less intense concern with being a religious minority, weaker identification with religious minorities, greater comfort with government support of religious institutions, and perhaps their religious traditions.[138]

The odds of conservative pro-religion voting during the Reagan and later periods, as compared to the pre-Reagan era, with the other predictors controlled, attained significance (p=.031). These differences may reflect *stare decisis* effects, since the direction of the decisions moved definitively in a pro-

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[136] There were no Jewish justices nominated by Republican presidents in the data base.

[137] *See, e.g.,* Goldman *supra* note 29, at 498 (commenting, with respect to cases involving economic underdogs and injured parties that "the assumption is that those of minority faiths … are or have been outsiders in American society having never fully received widespread social, economic, and political acceptability. Because of historical and perhaps even their personal experiences as minority group members these judges may have been socialized to favor the underdog. On the other hand, it could be argued that religious affiliation is much too broad a variable encompassing a multitude of individual experiences and thus affected by a host of intervening variables."). *See also*, Yarnold, *supra* note 48, at 84 (attributing greater support of pro-religion voting of Catholics and Baptists as compared to mainline Protestants to enduring minority status and/or lower levels of popular acceptance).

[138] *Religious Affiliations,* THE PEW FORUM ON PUBLIC LIFE, http://religions.pewforum.org/affiliations (last visited Aug. 28, 2012**).**These preferences may reflect the fact that Jewish Americans comprise only 1.7 % of U.S. adults, whereas Catholics and mainline Protestants comprise 18.1 % and 23.9% of that group.

religion direction from the earlier to the later era.[139] However, it seems far more likely that these differences are a product of the number of Republicans reaching the Court and the careful vetting of justices before they got there, especially during and after the Reagan era.[140]

Nevertheless, proponents of the attitudinal model should not be too sanguine in the soundness of their approach. Indeed, assumptions about the uniform effects of party and religious affiliation may be incorrect. For example, expression of such attitudes may depend upon both the legal category involved (here First Amendment Establishment Clause) and the setting of the dispute (here K-16 educational environments).

B. JUSTICES NOMINATED BY REPUBLICAN PRESIDENTS

The logit analysis for the Republican-only data base revealed the odds of this group voting in a conservative pro-religion direction was highly uniform as between the Reagan and later years versus the pre-Reagan era, as well as between Catholic and Protestant justices nominated by Republican presidents. This indicates greater ideological unity among Republican, as compared to Democratic justices in K-16 Establishment Clause conflicts over time, and a high concordance between Protestant and Catholic Republicans in pro-religion voting.

C. JUSTICES NOMINATED BY DEMOCRATIC PRESIDENTS

The logit results for the justices nominated by Democratic presidents indicated that in K-16 Establishment Clause conflicts Jewish justices, as compared to their Democratic-Catholic and Protestant colleagues, were substantially less likely to vote in a conservative pro-religion direction when the other independent variables were controlled. This outcome supports the attitudinal model for expression of religious preferences for Jewish and Catholic and Protestant justices in the direction of their voting. Moreover, the fact that greater diversity in conservative pro-religion voting occurred among justices appointed by Democratic presidents than among justices nominated by Republican presidents, suggests that Democrats exhibited greater tolerance in policy preferences in church-state issues in their selection of Supreme Court nominees than Republicans. While this may lead to expansion of the Democrats political base, it results in disordered

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[139] *See, e.g.*, Sisk & Heise, *supra* note 53, at 1226. There, the investigators found that Establishment Clause challenges in the United States Courts of Appeal were significantly less successful after than before Agostini v. Felton, 521 U.S. 203, 235-37 (1997) was decided, where the model employed party of the appointing president as the proxy for ideology. They attributed the effects of this precedent variable as evidence of the continued influence of law in judicial decision making.

[140] Since precedential strength was not examined here its independent influence may account for some of the unaccounted for variability in the dependent measure.

voting[141] and may send a less clear message about what values are most important to Democrats on this issue.

That said, precedent seems to have had a constraining influence on the voting of the Democrats in the Reagan and later period as compared to the pre-Reagan era (p=.027), since Democrats voted in a more pro-religion direction in the later, as compared to the earlier period. This outcome supports the legal model over the attitudinal model for Democratic voting.

D. THE PROTESTANT JUSTICES

Modeling for the Protestant-only data base paralleled the result for the combined Republican and Democratic data bases for justices nominated by Republican and Democratic presidents for the political ideology predictor. The odds for Protestants nominated by Republican presidents were significantly greater than for Protestants nominated by Democratic presidents of voting in a conservative pro-religion direction (p=.012). Thus, within the Protestant justice group, attitudinal theory adequately accounted for the direction of the voting for the 353 Protestant votes cast, based on party ideology. [142]

Since salience was negatively associated with conservative pro-religion voting (p=.033) for the Protestants, with the independent variables controlled, it may be that when high-profile disputes reached the Court, the Protestant justices eschewed extending government financial support for religiously educational activities,[143]on account of the attention it brought to such support, or to the Court, whereas when the dispute drew less scrutiny, they were more likely to vote in a pro-religion direction. If high salience enhances pre-existing ideological preferences, it may simply be that mainline Protestant justices, as a group, are controversy-averse, and this value expresses itself more fully in high profile cases than in ones which draw less attention. Whether this result is anomalous or applies to other issue categories must await further study.

E. THE CATHOLIC JUSTICES

The substantial odds differences obtained in the model for the Reagan and later period in favor of pro-religion voting, compared to the pre-Reagan period, was striking for the Catholic justices (p<.001). Under conditions where other predictors were controlled, the odds of a conservative pro-religion vote in the Reagan and later period was more than twelve times greater than it was during the earlier time frame for the Catholic jus-

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[141] A disordered vote is one which deviates from theoretical expectations derived from any model of voting. *See generally*, Edelman, Klein & Lindquist, *supra* note 84, at 828.

[142] Of the 321 Protestant votes cast in the financial aid cases, 181 were "conservative pro-religion" and 140 "not pro-religion." Among the 123 votes cast in the devotional cases, 59 were pro-religion and 64 not pro-religion. In the "other group" there were a total of 25 votes cast of which 16 were pro- and 9 not pro-religion.

[143] Of the 53 decisions under study 68% involved disputes concerning financial aid to students attending religious entities or to the entities themselves. *See supra* note 80.

tices.[144] As with the Jewish justices, the Catholic justices' behavior may, at least in part, be explained by their motivation to follow the Court's precedents.

A second and perhaps more forceful explanation for these differences may be the importance of religious values to the Catholics as a group sitting during the Reagan and post-Regan era, as compared to the Catholics who sat on the Court during the pre-Reagan era. Indeed, the justices seated during the Reagan and later periods were carefully selected for, among other things, their church-state philosophies, whereas during the earlier time frame the selection process was neither as careful nor focused on church-state conflicts. Anecdotal comparisons of the justices serving during the two eras may be helpful in illustrating this point.

From 1981 until 2009, Justices Antonin Scalia (1986-), Anthony Kennedy (1988-), Clarence Thomas (1991-), John Roberts (CJ, 2005-), and Samuel Alito (2006-) were nominated and seated. Each of these Catholic justices is considered to have deep religious convictions and certainly, if attitudinal theory works, this value would be expected to express itself in the direction of their voting, which indeed it did.

The Catholic justices serving during the pre-Reagan era under study were: Frank Murphy (1940-1949), Sherman Minton (1949-1956), and William Brennan, Jr. (1956-1990). Murphy was a New Deal liberal appointed by Roosevelt, with urban liberal values and was a staunch Democrat.[145] Roosevelt's apparent motivation in appointing Murphy was obtaining support for New Deal legislation and unrelated to church-state matters.[146] Minton was a Kentuckian and a personal friend of Harry Truman from Truman's days in the Senate.[147] Truman was more interested in appointing justices who would refuse to overturn his legislative agenda

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[144] Descriptive data illustrate this result well. During the Reagan and later years, Catholic justices voted in a conservative direction 49 times (82% of their votes during this time frame), while in a liberal direction only 11 times (18% of their votes during this era). During the pre-Reagan period, Catholics voted in a conservative direction 7 times (24% of their votes during this time-frame), while voting in a liberal direction 22 times (76% of the vote total for this period).

[145] Murphy had previously served as mayor of Detroit and governor of Michigan before Roosevelt made him attorney general. Butler's death opened up what was then called the "Catholic seat" on the Court. Murphy's parents, especially his mother, filled him with idealism, ambition and religious faith. Murphy's appointment to the Court in 1940 appears to have been a reward for his support of New Deal programs not his philosophy about the church-state issues. *See generally*, RICHARD D. LUNT, THE HIGH MINISTRY OF GOVERNMENT: THE POLITICAL CAREER OF FRANK MURPHY (1965); SIDNEY FINE, FRANK MURPHY (1975-84).

[146] Murphy was Roosevelt's attorney general when he was appointed to the Court in 1940, following the death of Pierce Butler. He turned out to be one of the most liberal justices in the Court's history. *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 241 (1993).

[147] CATHERINE A. BARNES, MEN OF THE SUPREME COURT: PROFILES OF THE JUSTICES 111-13 (1978).

than the fine points of First Amendment jurisprudence. Moreover, friendship may have played a part in Minton's nomination as much as anything else.[148]

In the case of Brennan, Eisenhower appointed a New Jersey Democrat and got what he bought, a Northeastern liberal more akin to Frank Murphy than he ever expected.[149] Sonia Sotomayor (2009-), the sixth Catholic justice and the only Catholic Democrat currently on the Court, appears thus far to give more weight to her liberal policy preferences than to her religious background in the direction of her votes.[150] She may, in this respect, be more like Frank Murphy or William Brennan.[151]

Toolin, in commenting on the religious background of judges, states that "[m]embership in social groups has different degrees of importance, or salience to people."[152] She identifies four categories of membership, each with increasing centrality to the member's life.[153] Since the design of this study did not allow for measuring the importance of religion to the justices

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[148] *Id*. During the Roosevelt administration Minton had loyally supported all of Roosevelt's legislative initiatives, including his efforts to pack the Supreme Court. It was obvious that Minton would be a reliable vote in supporting Truman's executive actions.

[149] Looking back on his Presidency in a 1987 interview, Eisenhower said, "I made two mistakes and both of them are sitting on the Supreme Court." (referring to Chief Justice Earl Warren and Associate Justice William Brennan). Eisenhower's attorney general, Herbert Brownell, brought Brennan to the President's attention after Brownell heard Brennan give a speech at a conference. To Brownell the speech suggested a marked conservatism in criminal justice matters and other areas. *See* KIM ISSAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 85 (1993). Moreover, Brennan's status as a Catholic and a state court judge apparently contributed to this selection. Finally, Eisenhower's attempt to appear bipartisan was a consideration as well. *Id.* One commentator reflecting on Brennan observed: "No president has ever deliberately appointed a justice who was directly opposed to his policies. Justice Brennan never lived up to President Eisenhower's expectations. From moderate conservative, he moved rapidly to the left to the point where he could move no further. As the Catholic voice on the Court, his voting record rarely showed any hint of Catholic morality entering into his decisions." Benjamin A. Rybicki, Opinion, *Brennan Wasn't What Eisenhower Expected*, N. Y. TIMES, Aug. 12, 1990.

[150] Grossman, *supra* note 22 ("Justices Sotomayor and Antonin Scalia are both Catholic but their interpretation of living the faith - - social justice emphasis on the left or traditionalist on the right - - seems quite different.").

[151] *See supra* note 134.

[152] *See* Cynthia Toolin, *From Descriptive Label to Defining Statement*, 7 CATHOLIC DOSSIER at 27 (July-Aug. 2001); Teresa S. Collett, *"The King's Good Servant, But God's First:; The Role of Religion in Judicial Decision Making*, 41 S. TEX. L. REV. 1277, 1285 (2000) (observing "affiliation with any particular religious community does not equal personal acceptance of any particular tenet or teaching of that community.").

[153] *Id.* These are: (1) a descriptive label, that is, one which expresses a person's characteristics with minimal or no effect on external behavior; (2) a social declaration, a category that shows a person's characteristics that the actor wants other to see; (3) a distinctive affirmation, a category which expresses self-distinction and has a strong effect on external behavior; or (4) a definitive statement, a classification which expresses what permeates a person's inner life and has a significant effect on external behavior.

in the sense meant by Toolin, further refinement of our understanding of intra-religious differences based on "meaningfulness" to the justices must also await the results of further research. This might be achieved in a later study by using church attendance, Sunday school teaching and other measures of commitment to predict the odds of conservative pro-religion voting within the Catholic and perhaps other groups.[154]

Finally, unlike the Protestant group, high salience compared to low salience cases did not result in meaningful differences in the odds of Catholic justices voting in a pro-religion direction. This suggests that salience effects may not be uniform across the religious affiliations of the justices in K-16 Establishment Clause disputes.[155]

IX. SUMMARY

When the 469 votes rendered between 1947 and 2012 at the United States Supreme Court in K-16 Establishment Clause disputes were studied, the data revealed the odds of Republican affiliated justices voting in a conservative pro-religion direction were significantly greater than for the Democratic justices with the other predictors controlled. Further, the model indicated that the odds of Jewish justices voting in a conservative pro-religion direction, compared to both the Protestant and Catholic justices, were significantly less. The odds of Catholic and Protestant justices voting

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[154] In this vein, *see, e.g.,* Ronald Brownstein, *Attendance, Not Affiliation, Key to Religious Voters*, L.A. TIMES, Jul. 16, 2001, at A10 (contending that "the key to political loyalty is not so much religious affiliation as religious practice," in which the most religiously observant regardless of faith are attracted to the Republican Party, while more secular voters have moved to the Democratic Party). Recent polling reveals that among the religious groups whose members have served on the Supreme Court 8% of those affiliated with mainline Protestant churches attend more than once per week, 26% attend once per week, 19% attend one or twice per month, and 23% attend a few times per year. Among the Catholics: 9% attend more than once per week, 33% attend once per week, 19% attend once or twice per month, and 20% attend a few times per year. Among the Jews, 6% attend synagogue more than once per week, 10% attend once per week, 16% attend once or twice a month, and 37% attend a few time per year. *See Beliefs & Practices, Frequency of Attendance at Religious Services*, THE PEW FORUM ON RELIGIOUS & PUBLIC LIFE, http://www.religions.pewforum.org/comparisons# (last visited Aug. 26, 2012). Of the groups which have served on the Court, mainline Protestants make up about 18.1%, Catholics 23.9%, and Jews about 1.7% of the United States population. Other significantly sized groups are Evangelical Protestants which make up about 26.3% and "unaffiliated" 16.1% of the population**.** *See Religious Affiliations*, THE PEW FORUM ON RELIGIOUS & PUBLIC LIFE**,** http://www.religions.pewforum.org/affiliations (last visited Aug. 26, 2012).

[155] *See, e.g.*, Miller and Peterson, *supra* note 61, at 859-63. These investigators observed that among political actors attitude strength is not a single construct and it may be measured along dimensions such as persistence, resistance, cognitive impact and behavioral impact. Accordingly, they should not be applied in a haphazard fashion. Moreover, these measures of attitude strength may be appropriate to use in some environments and not others, because they may respond to different stimuli differently. These suggestions imply that, when investigating judge-level variables, category-specific approaches may be called for if accuracy is to be maintained.

in a conservative pro-religion direction did not differ significantly from each other with controls in place for the other independent variables.

These results support the continued viability of Segal and Spaeth's attitudinal model respecting the party and religious affiliation variables. The higher odds for the Republican affiliated justices for pro-religion voting compared to Democrats, and the lower odds associated with Jewish justices' conservative voting as compared to Protestants and Catholics, appears to be stable phenomenon over time, under controls for religious and party affiliation, respectively. Since Protestant and Catholic justices did not differ significantly in the odds of rendering a conservative vote, this may reflect a genuine similarity in the attitudes between justices affiliated with these groups in K-16 Establishment Clause conflicts. Since all the Protestants on the Court were drawn from mainline denominations, any generalizing of these results to other courts should proceed cautiously. The results might have been different if the justice-level religious affiliation variable was studied in intermediate appellate courts in federal or state systems and the predictors included jurists with less mainline religious viewpoints[156] or, for judges who were elected, rather than appointed to their seats.[157] This question remains to be answered in future research.

The results for the Republican-only data base revealed a high level of consistency in the odds of a conservative pro-religion vote across the variables included in the model. The justices nominated by Republican presidents did not differ from one another based on religious affiliation, decisional period, dissent in the lower court, inter-court conflict, and issue salience. As a group, Republican justices sitting on the Court between 1947-2012 were committed to a conservative pro-religion stance in interpreting Establishment Clause commands, at least with respect to governmental aid support to students who attend religiously affiliated institutions.[158]

The odds of Catholic justices rendering a pro-religion vote during the Reagan and later years (1981 and after) were significantly greater than during the pre-Reagan years, with the other independent variables controlled. This may be attributable to jurisprudential trends tilting heavily in a conservative pro-religion direction,[159] (thereby supporting the legal model of judicial decision making), or to justice-level characteristics, such as the

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[156] *See, e.g.*, Songer & Tabrizi, *supra* note 23 (finding Christian evangelical judges to be significantly more conservative than mainline Protestants, Catholic, and Jewish justices in death penalty, gender discrimination, and obscenity cases, in the period from 1970 to 1993).

[157] *See generally*, Ric Simmons, *Choose Your Judges.Org: Treating Elected Judges as Politicians*, 45 AKRON L. REV. 1 (2012) (discussing voting patterns in judicial elections and recommending procedures to assist voters in making choices among candidates).

[158] Indeed, since the lion's share of the decisions contained in the data base involved government financial support for privately related educational activities, as opposed to public school religious indoctrination disputes (s*ee supra* notes 80, 121, 122), this conclusion may be reasonable as a working hypothesis.

[159] *See*, *supra* notes 115 (listing cases illustrating point).

careful selection of the type of Catholic justice nominated to the Court (thereby supporting the attitudinal theory) and successful vetting before these Catholic justices were nominated. Since the design of this study did not contain adequate controls to distinguish the influence of these variables on Catholic justices' voting, the answer to this problem awaits future study.[160] Certainly, one avenue of investigation which should be explored is religious intensity and its concomitant centrality to the justices' lives as lived, along the lines that Toolin suggests.[161]

Finally, among the Catholic justices the odds of a pro-religion vote did not vary meaningfully in high versus low salience controversies. This outcome was quite different than that for the Protestant justices for whom the odds of a pro-religion vote diminished significantly in the face of high salience controversies. It appears the effect of salience for the Protestant justices was to trigger caution, if not resistance, to expanding of the Court's pro-religion direction. Thus, the influence of salience may not be uniform across religious groups and depend on the jurisprudential category under consideration by the Court. Further investigation into the influence of salience on justices affiliated with different religious denominations will be required.

X. CONCLUSION

Category-specific studies like those employed in this investigation reveal a nuanced understanding into how attitudes affect Supreme Court voting. Although investigations using large data bases, such as those built by Spaeth, are helpful in predicting the justices' conduct in very broad categories of cases,[162] the efficacy of the attitudinal model depends on the questions the investigator wants answered. Academic specialists, and certainly most legal practitioners, focus on relatively narrow categories of cases which correspond to their fields of study and practice. Here, overly broad theoretical studies miss the mark because results from large data sets mask

[160] A standard approach to addressing this problem is to add important case facts to the study to determine whether they reveal unobserved influences on the dependent variable. Using such "controls" helps reduce the threat of omitted variable bias.

[161] *See* discussion *supra* and accompanying notes 152-154. As to the influences of religious adherence in the community where judges live, *see, e.g.* Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, *Searching for the Soul of Judicial Decision Making: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 585 (2004).

[162] The fourteen case categories are: Criminal Procedure, Civil Rights, First Amendment, Due Process, Privacy, Private Action, Attorneys, Unions, Economic Activity, Judicial Power, Federalism, Interstate Relations, Federal Taxation, and Miscellaneous. *See* THE SUPREME COURT DATA BASE, http://scdb.wustl.edu/ (last visited Sept. 1, 2012). Voting within each of these categories is classified as "conservative" or "liberal," according to conventional perceptions of how such voting should be classified. *See* Simmons, *supra* note 146, at 10-12 (describing the classification system and some of its limitations).

important differences within narrower legal conflict categories, as well as differences within justice-level variables, such as those examined here.[163]

When this investigation painted with a broad brush, it tended to support Segal and Spaeth's attitudinal model but it also revealed differences in the relationship of the case-level and decisional era variables to pro-religion voting when studied in connection with data bases comprised solely of justices nominated by Republican or Democratic presidents and of Protestant and Catholic justices.[164] Without studying *within* group influences of the kind examined here, valuable information will be lost, leading to misunderstandings about the justices' behavior.[165]

Narrowing the focus to specific category types and justice-level studies runs the risk of limiting the generalizability of the conclusions which may be derived from the data sets, including their applicability to other political actors such as those operating in a legislative or executive capacity, or indeed the general public. What is gained is creation of specific modeling paradigms responding to the needs of social scientists and legal practitioners by developing more accurate predictions.

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[163] That said, this study is not wholly immune from such criticism. Since the estimates of variability accounted for by the independent predictors derived from Nagelkerke's R Square varied from a low of .010 (*see* text accompanying Table 6, *supra*, regarding the combined data base) to a high of .395 (see discussion of results contained in Table 10, *supra*, regarding the Catholic data base), it is evident that there are variables omitted from this study which are correlated with judge-level decision making and would lead to better predictive models.

[164] The n for the Jewish justices was insufficiently large to subject data from this group to separate logit analysis.

[165] Moreover, it bears emphasis that in conducting any of these analyses a finding statistical significance does not establish the importance of that relationship. One must consider the magnitude of that association. Sisk & Heise, *supra* note 53 citing FRANK B. CROSS, DECISION MAKING IN THE U.S. COURT OF APPEALS at 38 (2007). This is evident from the disparate effect sizes revealed in the current data set. *See* discussion *supra*. In light of the relatively small effect sizes generally shown for extra-legal variables (*see, e.g.* Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841, 856-57 (2006)), a great deal of modesty is called for before making sweeping pronouncements.

APPENDIX 1

United States Supreme Court K-16 Establishment Clause Decisions: 1947-2012

Case	Date	Category
Everson v. BOE (330 U.S. 1)	2/10/1947	Aid/Tax
Illinois ex rel. McCollum v. BOE (333 U.S. 203)	3/8/1948	Devotional
Zorach v. Clauson (343 U.S. 306)	4/28/1952	Devotional
Engel v. Vitale (370 U.S. 421)	6/25/1962	Devotional
Abington School Dist. v. Schempp (374 U.S. 203)	6/17/1963	Devotional
Chamberlin v. Dade County BoPI (377 U.S. 402)	6/1/1964	Devotional
BOE v. Allen (392 U.S. 236)	6/10/1968	Aid/Tax
Walz v. Tax Comm. (397 U.S. 664)	5/4/1970	Aid/Tax
Lemon v. Kurtzman (403 U.S. 602) (Lemon I)	6/28/1971	Aid/Tax
Tilton v. Richardson (403 U.S. 672)	6/28/1971	Aid/Tax
Wisconsin v. Yoder (406 U.S. 205)	5/15/1972	Other
Lemon v. Kurtzman (411 U.S. 192) (Lemon II)	4/2/1973	Aid/Tax
Hunt v. McNair (413 U.S. 734)	6/23/1973	Aid/Tax
Comm. for Pub. Ed. and Rel. Lib. v. Nyquist (413 U.S. 756)	6/25/1973	Aid/Tax
Levitt v. Comm for Pub. Ed. and Rel Lib. (413 U.S. 472)	6/25/1973	Aid/Tax
Sloan v. Lemon (413 U.S. 825)	6/25/1973	Aid/Tax
Wheeler v. Barrera (417 U.S. 402)	6/10/1974	Aid/Tax
Meek v. Pittenger (421 U.S. 349) Pt. I	5/19/1975	Aid/Tax
Meek v. Pittenger (421 U.S. 349) Pt. II	5/19/1975	Aid/Tax
Meek v. Pittenger (421 U.S. 349) Pt. III	5/19/1975	Aid/Tax
Roemer v. BO Pub. Wk. of Maryland (426 U.S. 736)	6/21/1976	Aid/Tax
Wolman v. Walter (433 U.S. 229) Pt. I	6/24/1977	Aid/Tax
Wolman v. Walter (433 U.S. 229) Pt. II	6/24/1977	Aid/Tax
Wolman v. Walter (433 U.S. 229) Pt. III	6/24/1977	Aid/Tax
Wolman v. Walter (433 U.S. 229) Pt. IV	6/24/1977	Aid/Tax
New York v. Cathedral Academy (434 U.S. 125)	12/6/1977	Aid/Tax

NLRB v. Catholic Bishop of Chicago (440 U.S. 490)	3/21/1979	Other
Comm for Pub. Ed. and Rel. Lib. v. Regan (444 U.S. 646)	2/20/1980	Aid/Tax
Stone v. Graham (449 U.S. 39)	11/17/1980	Devotional
St. Martin Evan Luth Church v. S.D. (451 U.S. 772)	5/26/1981	Aid/Tax
Widmar v. Vincent (454 U.S. 263)	12/8/1981	Devotional
Mueller v. Allen (463 U.S. 388)	6/29/1983	Aid/Tax
Wallace v. Jaffree (472 U.S. 38)	6/4/1985	Devotional
Grand Rapids School Dist. v. Ball (473 U.S. 373)	7/1/1985	Aid/Tax
Aguilar v. Felton (473 U.S. 402)	7/1/1985	Aid/Tax
Witters v. Svcs. for the Blind (474 U.S. 481)	1/27/1986	Aid/Tax
Edwards v. Aguillard (482 U.S. 578)	6/19/1987	Aid/Tax
Bowen v. Kendrick (487 U.S. 589)	6/29/1988	Aid/Tax
BOE v. Mergens (496 U.S. 226)	6/4/1990	Devotional
Lee v. Weisman (505 U.S. 577)	6/24/1992	Devotional
Lamb's Chap v. Ctr Mrchs Un Free Sch Dist (508 U.S. 384)	6/7/1993	Devotional
Zobrest v. Catalina Foothills Sch. Dist. (509 U. S. 1)	6/18/1993	Aid/Tax
BOE of Kiryas Joel v. Grumet (512 U. S. 687)	6/27/1994	Aid/Tax
Rosenberger v. Rector & Visit (515 U.S. 819)	6/29/1995	Devotional
Agostini v. Felton (521 U.S. 203)	6/23/1997	Aid/Tax
BOR of Univ. of Wis. v. Southworth (529 U.S. 217)	3/22/2000	Aid/Tax
Santa Fe ISD v. Doe (530 U.S. 290)	6/19/2000	Devotional
Mitchell v. Helms (530 U.S. 793)	6/28/2000	Aid/Tax
Good News Club v. Milford C.S.D. (533 U.S. 98)	6/11/2001	Devotional
Zelman v. Simmons-Harris (536 U.S. 639)	6/27/2002	Aid/Tax
Locke v. Davey (540 U.S. 712)	2/25/2004	Aid/Tax
McCreary County v. ACLU (545 U.S. 844)	6/27/2005	Other
Arizona Christian School Org. v. Winn (563 U.S. _)	4/4/2011	Aid/Tax

From Equal Protection to Private Law: What Future for Environmental Justice in U.S. Courts?

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The American instinct to cast controversies into a legal forum has been an American characteristic at least since Alexis de Tocqueville observed in 1835, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[1]

ABSTRACT

This essay discusses the past and future of the environmental justice movement's efforts to obtain a more equitable distribution of environmental burdens through the courts in the United States. I trace the development of the movement's litigation strategy from the use of the equal protection clause to recent attempts to invoke public nuisance claims and analyze the reasons for the almost complete failure of these attempts to secure environmental justice. This leads to an analysis of the future role of litigation in the efforts to achieve environmental and climate justice and the procedural, political and conceptual barriers that stand in the way. Finally I present some conclusions as to why litigation represents a second-best approach to environmental and climate justice.

CONTENTS

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[1] Darensburg v. Metropolitan Transport Comm'n, 636 F.3d 511,523 (9th Cir. 2011) (Noonan, J., concurring).

I. ENVIRONMENTAL JUSTICE AND THE ENVIRONMENTAL JUSTICE MOVEMENT

Environmental justice (EJ) is defined by the U.S. Environmental Protection Agency (EPA) as:

> " ... the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.[2]

This definition is at the heart of the EPA's efforts to address, in its policies and procedures, the inequities in the distribution of environmental benefits and burdens highlighted by the Environmental Justice Movement (EJM) in the United States. The origins of this movement are generally traced to the early 1980s and the events that occurred in Warren County, N. Ca..[3] In 1982, local residents discovered that the state planned to dis-

[2] U.S. Envtl. Prot. Agency: Office of Envtl. Justice, Plan EJ 2014, 3 (Sept. 2011) available at http://www.epa.gov/environmentaljustice/plan-ej/index.html.
[3] For a more detailed history of the environmental justice movement see *e.g.* DAVID SCHLOSBERG, DEFINING ENVIRONMENTAL JUSTICE. THEORIES, MOVEMENTS AND NATURE 469 (2007); GORDON WALKER, ENVIRONMENTAL JUSTICE: CONCEPTS, EVIDENCE AND POLITICS 78-79, 84-88 (2011);ROBERT D. BULLARD, DUMPING IN DIXIE: RACE CLASS AND ENVIRONMENTAL QUALITY (1994); Robert D. Bullard & Glenn S. Johnson, *Environmental Justice, Grassroots Activism and its Impact on Public Policy Decision Making,* 56 J. OF SOCIAL ISSUES, 555-78 (2000); Amanda K. Frantzen, *The Time Is Now For Environmental*

pose of more than 6000 truckloads of PCB[4]-contaminated soil in a landfill facility close to their homes. The resulting civil unrest led to an inquiry by the General Accounting Office (GAO) into the siting of four hazardous waste facilities located in the south eastern United States.[5] The study revealed that three of the four hazardous waste sites were in locations where minority Black communities made up a higher percentage of the local population than the state average. These findings were confirmed in 1987 by a study commissioned by the Commission for Racial Justice of the United Church of Christ which covered the whole of the USA and found that race was " … the most significant of variables tested in association with the location of commercial hazardous waste facilities."[6] As a result of this report and thanks to the activism of the Reverend Dr. Benjamin F. Chavis Jnr., one of the report's authors, the term "environmental racism" was first coined and accusations levelled at the Environmental Protection Agency for its failure to protect the civil rights of minority communities in respect of environmental hazards.[7] Following yet more confirmation of this general pattern in a survey by the National Law Journal in 1992, which highlighted the lower penalties imposed on those polluting minority-population areas as compared to other areas[8], the federal government was prompted to take actions on a number of fronts. The National Environmental Justice Advi-

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Justice: Congress Must Take Action By Codifying Executive Order 12898 ,17 PENN ST. ENVTL. L. REV. 379, 381-82 (2009); Douglas Rubin, *How Supplemental Environmental Projects Can and Should Be Used to Advance Environmental Justice* 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 179,181 (2010).

[4] Polychlorinated Biphenyls. A class of chemicals widely used in the past (especially in the power industry) and known to be carcinogenic and to exert neurobehavioural effects and effects *in utero. See Public Health Implications of Exposure to Polychlorinated Biphenyls* U.S. Public Health Service, The Agency for Toxic Substances and Disease Registry, U.S. Department of Health and Human Services and The U.S. Environmental Protection Agency (2012) *available at* http://water.epa.gov/scitech/swguidance/fishshellfish/techguidance/pcb99.cfm (last visited Sept. 7, 2012).

[5] U.S. GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS. WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES. GAO/RCED 83-168 B-211461. June 1, 1983.

[6]Benjamin F. Chavis & Charles Lee TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES. COMM'N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, Executive Summary at xiii (1987) *available at* http://www.ucc.org/about-us/archives/pdfs/toxwrace87.pdf.

[7] *See* SCHLOSBERG, *supra* note 3 at 50. The term 'environmental racism' was ultimately to prove too pejorative to be constructive and was replaced by the term environmental injustice.

[8] M. Lavelle & A. Coyle, *Unequal Protection?,* NAT'L L. J. 1-2 (1992). See Uma Outka, *Environmental Injustice and the Problem of the Law,* 57 ME. L. REV. 209,212 (2005) for a good summary. Note, however, that the NLJ Report is not without its critics, *see* Gerald Torres. *Environmental Justice: The Legal Meaning of a Social Movement* 15 J.L. & COM. 597, 606-07 (1996).

sory Council (NEJAC) was founded as a federal advisory committee to the EPA on September 30, 1993[9] and on February 11, 1994, the Clinton Administration issued Executive Order 12898[10] which, together with its accompanying memorandum,[11] required that

> … each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations … .[12]

To some extent this moment in time represented the pinnacle of achievement for the environmental justice movement in the United States. Although the movement itself was to spread beyond the shores of the United States,[13] its limited success in its country of origin belied the early promise of the Executive Order. There has been consistent and persistent criticism of the EPA for its failure properly to implement the spirit and letter of Executive Order 12898.[14] In *Toxic Wastes and Race at Twenty* 1987-2007,[15] the twenty-year anniversary follow-up report to the United Church of Christ's first report, it was concluded that:

> … environmental justice faltered and became invisible at the EPA under the George W. Bush Administration. This fact is made crystal clear by a string of government reports that give EPA failing grades and the agency's attempts to dismantle the environmental justice apparatus, including the EJ Executive Order 12898 …[16]

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[9] *See* http://www.epa.gov/environmentaljustice/nejac/ (last visited Sep. 7,, 2012).
[10] 59 Fed. Reg. 32 (1994) *available at* http://www.archives.gov/federal-register/executive-orders/pdf/12898.pdf.
[11] Memorandum of Understanding on Environmental Justice and Executive Order 12898. *See* http://www.justice.gov/crt/about/cor/TitleVI/080411_EJ_MOU_EO_12898.pdf.
[12] *Supra* note 10 at §§1-101.
[13] *See* WALKER *supra* note 3 at 16-38. *Also* J. CARMIN &AND JULIAN AGYEMAN, eds. ENVIRONMENTAL INEQUALITIES BEYOND BORDERS: LOCAL PERSPECTIVES ON GLOBAL INEQUALITIES. (J. CARMIN & JULIAN AGYEMAN, eds., 2011).
[14] *See* Office of Inspector General., U.S.Envtl. Prot. Agency, *EPA Needs to Conduct Environmental Justice Reviews of Its Programs, Policies, and Activities. Report No. 2006-P-00034*, 7-8 (Sept. 18, 2006) available at http://www.epa.gov/oig/reports/2006/20060918-2006-P-00034.pdf. There have also been two failed attempts in Congress to introduce Environmental Justice Acts which would have codified Executive Order 12898; one in 2007 (Envtl. Justice Act of 2007, H.R. 1103, 110th Congress (2007-2008)) and another in 2008 (Envtl. Justice Act of 2008 S. 642, 110th Congress (2007-2008)).
[15] ROBERT D. BULLARD ET AL., TOXIC WASTES AND RACE AT TWENTY 1987-2007: A REPORT PREPARED FOR THE UNITED CHURCH OF CHRIST JUSTICE & WITNESS MINISTRIES (2007).
[16] *Id.* at 12. Similar conclusions are to be found in Sandra George O'Neil, *Superfund: Evaluating the Impact of Executive Order 12898*, 115 ENVTL. HEALTH PERSP. 1087 (2007). However, it is not only inequities in environmental burdens that have not been adequately addressed. The disbursement of environmental benefits (such as access to public parks and green space generally) remains unequally distributed along race lines

In fact, the EPA was widely pilloried for apparently seeking to downgrade its commitment to addressing the racial element of environmental justice when in July 2005 it proposed redefining its working definition of environmental justice to diminish the racial element[17] – ostensibly in response to the need to conform to strict scrutiny principles said to apply to race-based decision-making by federal institutions following the 1995 Supreme Court decision in *Adarand Constructors, Inc. v. Pena*[18] (hereinafter *Adarand*). Although the EPA definition of environmental justice still retains race as a consideration, the EPA's working model for environmental justice decision-making known as EJSEAT (Environmental Justice: Smart Enforcement Assessment Tool 3) downgraded race as one of the determinants in decision-making in 2005.[19] EJSEAT still remains "a draft tool in development, intended for internal EPA use only"[20] although the detailed documentation referred to by Foot appears to be no longer available.[21]

Hopes that the first Obama administration would initiate a new era of environmental justice – not unreasonable hopes given the election promises of the Obama campaign[22] – have not, on the whole, been realized. Although some progress has been made on automobile emissions and towards the implementation of a cap-and-trade program to deal with greenhouse gases (GHGs), much of the Obama program has been vigorously opposed in the House of Representatives, to such an extent that it has been asked whether the 112th Congress might be "the most anti-environment Congress

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also; *see* Colin Crawford, *Environmental Benefits and the Notion of Positive Environmental Justice*. 32 U. PA. J. INT'L L. 911 (2011).

[17] *See* BULLARD, *supra* note 15 at 35.

[18] Adarand Constructors Inc. v. Pena, 515 U.S. 200 (1995).

[19] Christine S. Foot, *Scrutinizing Strict Scrutiny: Environmental Justice after* Adarand Constructors, Inc. v. Pena, 11BERKELEY J. AFR.-AM. L. & POL'Y 123 (2009). Foot attributes the adjustment of the determinants to the *Adarand* case in which the Supreme Court indicated that any federal measures which contain explicit racial criteria as guides to decisionmaking would attract strict scrutiny from the courts. Foot concludes that the EPA's response in downgrading the EJSEAT criteria was an over-reaction to *Adarand* and that the use of EJSEAT criteria were most likely to be treated in the same way as redistricting decisions and treated with considerable deference. Even if EJSEAT criteria did attract strict scrutiny Foot considers that it would survive such scrutiny as a "compelling interest". *See* Foot *id.* at 142-156.

[20] *See* U.S. Envtl. Prot. Agency, *The Environmental Justice Strategic Enforcement Assessment Tool (EJSEAT),* http://www.epa.gov/environmentaljustice/resources/policy/ej-seat.html#content (last visited Sept. 14, 2012).

[21] Foot *supra* note 19 at 131-32.

[22] "Barack Obama and Joe Biden will make environmental justice policies a priority within the Environmental Protection Agency (EPA)… As president, he and Joe Biden will work to strengthen the EPA Office of Environmental Justice and expand the Environmental Justice Small Grants Program, which provides non-profit organizations across the nation with valuable resources to address local environmental problems … ."
See http://usliberals.about.com/od/environmentalconcerns/a/ObamaEnergy.htm.

ever?"[23], According to the website of the Democratic Party's section of the House Energy and Commerce Committee, the GOP majority in the House has opposed environmental protection measures on 317 occasions.[24] There is also a strident campaign against climate change measures (indeed, climate change science in general) being led in the Senate by Senator James M. Inhofe, ranking member on the Senate Committee on Environment and Public Works.[25] Progress on environmental justice is unlikely to fare well in such a climate, despite the EPA's apparently renewed commitment.[26]

II. THE RELATIONSHIP BETWEEN THE ENVIRONMENTAL JUSTICE AND ECOLOGICAL JUSTICE MOVEMENTS

Before discussing the use and effectiveness of law suits by the EJM, it is necessary to examine in a little more detail the precise scope and ambitions of the movement and its relationship with what has been termed 'ecological justice.'[27] It is all too easy to consider the environmental justice movement as part of the wider movement for ecological justice. Without question the interests of the two movements coincide on certain matters but there are also distinct differences in the goals and agendas of the two - and particularly in the United States. There have been a number of occasions where the two schools of activism have clashed seriously over their respective expectations.[28] Schlosberg points out that "[t]he vast majority of work on environmental justice does not concern itself with the natural world outside human impacts, and most work on ecological justice does not pay attention to issues raised by movements for environmental justice."[29]

Perhaps not surprisingly then, litigation involving environmental justice in the United States, the principal focus of this essay, has, until recently, been almost exclusively concerned with human health threats, or threats to property, on a local scale. Professor Gordon Walker conceptualizes this mismatch between concerns for the local human scale and the global eco-

[23] Remarks attributed to Rep. Henry Waxman, ranking member on the House Energy and Commerce Committee. *See* Kate Sheppard, *The Most Anti-Environment Congress Ever?* GUARDIAN (Sept.13, 2011).
[24] *See* http://democrats.energycommerce.house.gov/index.php?q=legislative-database-anti-environment&legislation=All&topic=All&statute=All&agency=Department+of+Energy.
[25] *See* Senator Inhofe's commissioned report on scientists opposed to climate change: *More Than 700 (Previously 650) International Scientists Dissent Over Man-Made Global Warming Claims* at http://epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=d6d95751-802a-23ad-4496-7ec7e1641f2f) (Last visited Sept. 7, 2012).
[26] Plan EJ 2014 *supra* note 2.
[27] SCHLOSBERG, *supra* note 3, at 6.
[28] *See e.g.* Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J.L. & COM. 597, 610 (1996).
[29] *Id.*

logical scale as a difference in the 'framing' of environmental justice, which changes with time, from issue to issue, and from one part of the world to another.[30] Differences in framing can have a profound effect on the ability of different activist groups to make common cause. The concentration on human interests in many of the environmental justice cases that have been litigated in the United States means that they could just as accurately have been described as public health justice cases as environmental justice cases.[31]

In addition to the differences in the scope of anthropocentric and ecocentric concerns, there are profound differences in the conceptions of justice deployed by the EJM and those of a more ecocentric outlook. A full discussion of this issue is beyond the scope of this essay but it is important to note in passing that the traditional preoccupation with distributive justice, a legacy of the highly influential theories of 'justice as fairness' promulgated by John Rawls[32], is considered by many theorists of ecological justice to be too narrow a conception to meet the demands that are emerging -- owing to climate change, loss of biodiversity and so forth - for a broader view of justice that goes beyond the purely human.[33] The concept of sustainable development, for example, incorporates the notion of intergenerational equity and our increasing realization of the interconnectedness of all living and non-living aspects of the environment may demand a more inclusive and robust model of justice.[34] However, most of the litigation and activism that is discussed below relates to attempts, past or present, to obtain justice conceived of as fair distribution, rather than any of the broader models.

III. THE USE OF LITIGATION BY THE ENVIRONMENTAL JUSTICE MOVEMENT

From the earliest days of the environmental justice movement, activists have attempted to secure judicial remedies as well as encourage execu-

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[30] WALKER, *supra* note 3, at 16-38. On 'framing' more generally, Walker notes that the broadening of the frame of the EJM in the United States did not become evident until the latter part of the 1990s.

[31] There is some commonality here with a number of Article 8 cases heard before the European Court of Human Rights which have been characterized as 'environmental rights' cases, such as Guerra v. Italy 26 Eur. H.R. Rep. 357 (1998) and Lopez Ostra v. Spain 20 Eur. H.R. Rep. 227 (1994), both of which were essentially public health cases and required a human 'victim' in order to be justiciable in the first place. (*See e.g.* Margaret DeMerieux, *Deriving Environmental Rights from the European Convention on Human Rights and Fundamental Freedoms*, 21 OXFORD J. LEGAL STUD. 523 (2001); Mark Stallworthy, *Whither Environmental Human Rights?* 7(1) ENV. L. REV. 12-33 (2005)).

[32] JOHN RAWLS, A THEORY OF JUSTICE (1971).

[33] *See* SCHLOSBERG *supra* note 3, at 11-41. Schlosberg draws *inter alia* on the capabilities theory of justice advocated by Martha Nussbaum (*see* MARTHA C. NUSSBAUM, CREATING CAPABILITIES (2011)) and Amartya Sen (AMARTYA SEN, THE IDEA OF JUSTICE (2009)).

[34] *See* RICHARD P. HISKES, THE HUMAN RIGHT TO A GREEN FUTURE 48-68 (2009).

tive and legislative initiatives at both state and federal levels. In keeping with the origins of the EJM in the United States as an extension of the civil rights movement,[35] it was to be expected that remedies for environmental injustice should be sought through the application of the Equal Protection components of the Fourteenth[36] and Fifth[37] Amendments to the U.S. Constitution.

However, from the outset, securing environmental justice through the Equal Protection Clause (EPC) was always likely to be a difficult undertaking. In the case of *Washington v. Davis* the Supreme Court had determined that action by state or federal government was not "invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."[38]

In effect, plaintiffs relying on the EPC had to adduce evidence of *intentional* racial discrimination in order to obtain redress. The Supreme Court soon confirmed its *Washington* stance in *Village of Arlington Heights v. Metropolitan Development Corporation*[39] where an allegedly racially-biased zoning decision was at issue. Here the court did provide some guidance on the kinds of evidence that collectively might amount to *indicia* of intentional racial discrimination sufficient to engage the Fourteenth Amendment[40] but "without purporting to be exhaustive."[41] *Arlington* confirms that disparate impact is relevant only insofar as it forms part of a body of (circumstantial) evidence of discriminatory purpose. However in *Personnel Administrator of Massachusetts v. Feeney*[42] the Supreme Court seemed to go still further in requiring a "subjectively real mental

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[35] *See* Carlton Waterhouse, *Abandon all Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice* 20 FORDHAM ENVTL. L. REV. 51, 57 (2009).

[36] U.S. CONST. amend. XIV §1.

[37] U.S. CONST. amend. V. Although the Fifth Amendment does not contain the words "equal protection," in Bolling v. Sharpe, 347 U.S. 497,499 (1954) it was held that "the concepts of equal protection and due process … are not mutually exclusive. This was later affirmed in Washington v. Davis, 426 U.S. 229, 239 (1976) where it was held that "… the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups" thereby extending to the federal government the Fourteenth Amendment's requirement that equal protection be afforded "to any person.".

[38] *Id.* at 242.

[39] Village of Arlington Heights v. Metro. Dev. Corp., 429 U.S. 252 (1977).

[40] *Id.*at 267-68. These indicia were: the historical background; the specific sequence of events; departures from the normal procedural sequence; substantive departures; the legislative or administrative history.

[41] *Id.*at 268.

[42] Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

state that must be proven"[43] namely that "… the decisionmaker …[must have] selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group"[44].

Proving racial animus in these terms in cases involving complex and multi-faceted decisions on the siting of hazardous waste facilities, landfills, incinerators and so forth, where decision-makers must take account of a large number of competing factors, would be an enormous hurdle. And so it was to prove in the first major environmental justice case brought on the basis of the EPC, *Bean v. Southwestern Waste Management Corporation.*[45] In *Bean,* the U.S. District Court for the Southern District of Texas denied injunctive relief to a group of residents seeking to prevent the siting of a landfill near a predominantly Black school, on the basis that the level of statistical evidence supplied did not reach the level required by *Arlington* to prove intentional discrimination.[46] The Fifth Circuit affirmed the decision some seven years later.[47]

Given the almost insuperable difficulties involved in EPC claims, the EJM turned its attention to the possibilities offered by Title VI of the Civil Rights Act 1964.[48] §601 requires that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[49] This is bolstered by §602 which provides that "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title."[50]

The case of *Regents of the University of California v. Bakke* suggested that, as for EPC claims, only evidence of intentional discrimination would suffice for a successful Title VI claim. [51] However, the case of *Cannon v. University of Chicago* suggested that a private right of action existed under Title VI whether for claims based on intentional discrimination *or* disparate impact.[52] The matter was again before the Supreme Court in 1983 in

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[43] *See* Julia Kobick, *Discriminatory Intent Reconsidered: Folk Concepts of Intentionality and Equal Protection Jurisprudence*45 HARV. C.R.-C.L. L. REV. 517, 518 (2010).
[44] *Feeney*, 442 U.S. 256, 279.
[45] Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673 (S.D. Texas 1979).
[46] *Id.* at 677. District Judge McDonald did permit himself some expressions of surprise at the siting of the landfill so close to a non-air conditioned school. *Id.* at 679-80. The Fourth Circuit reached a similar decision in Residents Involved in Saving the Environment (R.I.S.E.) v. Kay, Inc., 786 F. Supp. 1144, 1149-50 (E.D. Va. 1991).
[47] Bean v. Sw. Waste Mgmt. Corp., 782 F.2d 1038 (5th Cir. 1986).
[48] 42 U.S.C. 2000a.
[49] 42 U.S.C. 2000d.
[50] 42 U.S.C. 2000d-1.
[51] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 375 (1978).
[52] Cannon v. Univ. of Chi., 441 U.S. 677, 694, 696 (1979).

Guardians Association v. Civil Service Commission [53] when the Supreme Court equivocated and the resulting multiple opinions in the case did little to clarify the matter.[54] Although it seemed that intentional discrimination was required under §601, the question of the availability of a private right of action under §602 based on disparate impact only was left unresolved. However, in *Alexander v. Sandoval*, Justice Scalia's opinion for the five-four majority left no doubt that a freestanding private right of action did not exist under §602 for claims relating to disparate impact:

> It is clear now that the disparate-impact regulations [that might be promulgated by an agency under § 602] do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.[55]

The decision in *Sandoval* was fatal for another environmental justice case, based on Title VI, which had been enjoying some success in the New Jersey District Court. *South Camden Citizens in Action v. New Jersey Department of Environmental Protection* involved an environmental justice community -- already suffering from a number of environmental burdens in their locality -- seeking injunctive relief from the NJDEP decision to site a cement grinding facility in their neighborhood.[56] In the District Court, Judge Orlofsky had found for the plaintiffs on the grounds that the defendants had pretty much ignored their Title VI obligations in reaching their decision and that a private right of action under §602 to enforce disparate impact claims was recognized under the jurisprudence of the Third Circuit.[57]

Unfortunately for the residents of South Camden their victory was undermined five days later by the Supreme Court's decision in *Sandoval*. Judge Orlofsky convened a rehearing of the parties and issued a supplemental opinion in which he upheld the original decision but on the grounds that the claim could be founded instead on 42 U.S.C. §1983.[58] This provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

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[53] Guardians Ass'n v. Civ. Serv. Comm'n, 463 U.S. 582 (1983).
[54] *See* Brian Crossman, *Resurrecting Environmental Justice: Enforcement Of EPA's Disparate-Impact Regulations through Clean Air Act Citizen Suits,* 32 B.C. ENVTL. AFF. L. REV. 599, 608-09 (2005).
[55] Alexander v. Sandoval, 532 U.S. 275, 285 (2001).
[56] South Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F.Supp.2d 446 (D.N.J. 2001).
[57] *Id.*at 500-01, 503 (relying on Powell v. Ridge, 189 F.3d 387at 398–401; Cheyney State College Faculty v. Hufstedler, 703 F.2d 732, 737 (3d Cir.1983)).
[58] *South Camden Citizens in Action*, 145 F.Supp.2d 505.

> privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

This no doubt owed much to Justice Steven's dissent in *Sandoval* in which he had stated that "[l]itigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference §1983 to obtain relief."[59] Criteria for identifying "any rights, privileges, or immunities secured by the Constitution" had already been provided by the Supreme Court in *Blessing v. Freestone*.[60] Thus despite *Sandoval* the EJM had reason to believe that the door was still ajar for disparate impact cases thanks to 42 U.S.C. §1983. Unfortunately the Third Circuit soon reversed the District Court in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection* on the grounds that §1983 did not offer a private right of action to uphold a disparate impact suit absent such a right "being already found in the enforcing statute."[61] Since, following *Sandoval*, §602 (the enforcing statute) evidently did not contain such a right, this marked the end of the road for environmental justice litigants' reliance on Title VI.[62]

The result of the Title VI case law is that although Federal Agencies may promulgate regulations (under §602) designed to avoid disparate impact, there is no private right of action on the part of citizens or citizen groups to enforce them, either under §602 itself or 42 U.S. §1983.[63] Of course, although the case law already discussed will guide, and in some circumstances bind, state judiciaries, there is still scope for disparate impact litigation at state level.[64] Moreover, it is also still open to litigants to attempt to establish *intentional discrimination* using the *fact* of disparate impact that amounts to "a clear pattern, unexplainable on grounds other than race" [65] or as part of a larger body of evidence that collectively suggests that a decision has been made, "at least in part, 'because of,' not

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[59] *Sandoval*, 532 U.S. at 300. Section 1983 was cited by plaintiffs as an alternative to §601, *see South Camden Citizens in Action*, 145 F.Supp.2d 505, 511. Judge Orlofsky went on to accept this alternative. *Id.* at n518.

[60] Blessing v. Freestone, 520 U.S. 329,340 (1997).

[61] South Camden Citizens in Action v. N. J. Dep't of Envtl. Protection, 274 F.3d 771,790 (3d Cir. 2001) (cert. denied, 536 U.S. 939 (2002)).

[62] *See* Carlton Waterhouse, *supra* note 35 (analyzing the reasons for the lack of success of EPC, Title VI and 42 U.S.C. §1983 claims).

[63] However, it has been said that the Scalia opinion in *Sandoval* implies that Federal Agencies should not promulgate regulations against disparate impact under §602 at all. *See* Crossman, *supra* note 54 at 616.

[64] *See* e.g. Darensburg v M.T.C, 636 F.3d 511 (9th Cir. 2011). Although this case ended up in federal court, the case had started with plaintiffs "[c]laiming state and federal civil rights violations," *Id.* 514. *See also* Hartford Park Tenants Association v. Rhode Island Dep't. of Envtl. Mgmt. 2005 WL 2436227 (R.I. Super.) (a purely state-based §1983 claim).

[65] Arlington Heights v. Metro. Dev. Corp., 429 U.S. 252, 266 (1977).

merely 'in spite of,' its adverse effects upon an identifiable group."[66] The South Camden action sought to do precisely that, though ultimately unsuccessfully.[67]

This most recent foray into the District Court by South Camden Citizens in Action also highlights how the EJM has been forced into a change of tactics. The virtual closure of EPC and Title VI as highways to environmental justice prompted the use of tortious suits, especially private and public nuisance.[68] The use of the common law of public nuisance in the pursuit of environmental justice will be further discussed below. In addition, however, a number of other recent EJ cases have turned to specific environmental laws as a means of opposing environmentally unfavorable decisions and it is to these remedies that we now turn. It is not the intention here to undertake a full review of the numerous environmental law enforcement remedies.[69] Rather, the purpose is to analyze how this category of legal challenge forms part of the history of the development of EJ litigation and the receptiveness of the courts to these types of challenge. Thus the analysis will be restricted to the statutes most commonly used in recent times.

A number of statutes permit legal challenges by interested parties, including private individuals, to administrative decisions that may impact the environment. One of the commonest challenges as far as the EJM is concerned is under the National Environmental Policy Act (NEPA).[70] This Act has been described as the "basic national charter for protection of the environment."[71] NEPA does not mandate specific actions in respect of environmental protection but imposes on federal agencies[72] a rigorous standard of review (commonly referred to as an Environmental Impact Statement or EIS) requiring a "hard look"[73] at any "major Federal actions significantly affecting the quality of the human environment."[74]

> To fulfill its purpose, an EIS must provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize ad-

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[66] Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).
[67] South Camden Citizens in Action, 274 F.3d 771,790 (3d Cir. 2001).
[68] South Camden Citizens in Action v. N.J. Dep't. of Envtl. Prot., 2006 WL 1097498 (D.N.J. 2006).
[69] For an indication of the range of potential administrative challenges see A.B.A. & Hastings Coll. of the Law, ENVIRONMENTAL JUSTICE FOR ALL: A FIFTY STATE SURVEY OF LEGISLATION, POLICIES AND CASES (Steven Bonorris ed., 4th ed. 2010) available at http://www.uchastings.edu/public-law/docs/ejreport-fourthedition.pdf .
[70] 42 U.S.C. §4321-4347. *See* Outka, *supra* note 8 at 237-40 (summarizing NEPA challenges).
[71] Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 993 (9th Cir. 2004).
[72] The Act applies to the administrative procedures of "All agencies of the Federal Government," *see* 42 U.S.C. §4333.
[73] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348(1989).
[74] 42 U.S.C. § 4332(C).

> verse impacts or enhance the quality of the human environment … To fulfill this mandate, agencies must consider every significant aspect of the environmental impact of a proposed action … including the direct, indirect, and cumulative impacts of the action.[75]

Challenges to an agency's decision under NEPA are mediated by the Administrative Procedures Act (APA) [76] under which an agency action or decision may be set aside if the court finds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[77] Thus, if a NEPA EIS can be challenged successfully on any of these grounds, it renders unlawful the project to which the EIS relates. An example of this type of challenge may be found in *California Wilderness Coalition v. U.S. Dept. of Energy*.[78] However, although this avenue of challenge can result in projects being overturned (as in the previously mentioned case), this is rare, largely owing to the high degree of deference extended to agencies' decision-making processes under the APA. Moreover, even where a challenge is successful, the most likely outcome is a delay to the proposed project or facility rather than cessation or closure, so that the litigants may well find that the same issue arises again later in time.

Other, more specific, environmental laws also permit citizen suits to challenge administrative decisions that might have adverse environmental consequences, including the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) of 1980 §310,[79] the Clean Air Act of 1970 §304(a)(1),[80] the Clean Water Act of 1987 §505,[81] the Re-

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[75] Oregon Natural Desert Ass'n v. Bureau of Land Management, 531 F.3d 1114 at 1121 (9th Cir. 2008) (internal quotation marks, citations and legislative references omitted).

[76] 5 U.S.C. §551.

[77] 5 U.S.C. § 706(2) (A). However, the standard of review is highly deferential: Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837(1984). Nonetheless APA offers a means of challenging agency action even where the statute under which the agency is operating offers no private right of action to citizens (like NEPA itself) or where the right of action is limited such as the Comprehensive Environmental Response Compensation and Liability Act [CERCLA] 42 U.S.C. 9601.

[78] Cal. Wilderness Coal. v. U.S. Dep't. of Energy, 631 F.3d 1072 (9th Cir. 2011). Examples of other NEPA environmental justice cases raising similar challenges include: Cal. Resources Agency v. U.S. Dep't. of Agric., 2009 WL 6006102 (N.D.Cal.), Communities against Runway Expansion, Inc. v. F.A.A., 355 F.3d 678 (D.C. Cir. 2004), Save Our Cumberland Mountains v. Kempthorne, 453 F.3d 334 (6th Cir. 2006), St Paul Branch of the NAACP v. U.S. Dep't of Transp., 764 F.Supp.2d 1092 (D.Minn. 2011); Amigos Bravos v. U. S. Bureau of Land Mgmt, --- F.Supp.2d ---- 2011 WL 3924489 (D.N.M. 2011).

[79] 42 U.S.C. § 9601.The citizen suit provision is limited to post-cleanup challenges by §310; other forms of challenge to EPA action *during* clean-up under CERCLA are severely limited by §130(h) and §130(i). *See* Maya Waldron, *A Proposal to Balance Polluter and Community Intervention in CERCLA Litigation*, 38 ECOLOGY L.Q. 401 (2011).

[80] 42 U.S.C. §§ 7604(a) (1)-(3), (f) (3, 4). Here challenges to EPA permitting decisions are limited to the post-permit era. *See* CleanCOALition v. TXU Power, 536 F.3d 469 (5th Cir. 2008); Concerned Citizens around Murphy v. Murphy Oil USA Inc., 686 F.Supp.2d 663 (E.D. La. 2010); Washington Envtl. Council v. Sturdevant, --- F.Supp.2d ----, 2011 WL 6014664 (W.D.Wash 2011). *See also*: Jeanne Marie Zokovitch Paben, *Approaches to*

source Conservation and Recovery Act of 1976 §7002,[82] and the Safe Drinking Water Act of 1974 §1449.[83]

Although much can be achieved in such actions, there are also significant drawbacks associated with them in terms of mitigating environmental injustice. Most of the citizen suit provisions make it difficult, if not impossible, to mount *preventative* challenges; establishing standing is difficult if the harm complained of will only accrue in the future. Similarly where citizen suits seek to challenge decisions related to pre-permit decisions where the permit has already been granted, the courts are unwilling to be generous.[84] Remedies under the statutes are limited to forcing agencies and polluters to comply with the law but in some environmental justice cases disparate impact is the result of entirely lawful activity so the remedies are unavailable. Moreover, statutory remedies do not normally permit compensatory or punitive damages (including those available under CERLCA §107, though the Act does permit the recovery of cleanup costs in certain circumstances.[85]) Hence those seeking compensation for decisions or activities that have disparate impact on their locality are unlikely to succeed under statutory citizen suits.

In passing, mention should be made of the significant activities of environmental groups and federal agencies (such as the EPA and the US Corps of Engineers) in their use of enforcement litigation in relation to statutory permitting provisions. These have had a particular impact in controlling the environmental effects of the coal industry for example. [86]

Environmental Justice: A Case Study of One Community's Victory, 20 S. CAL. REV. L. & SOC. JUST. 235 (2011); Annise Katherine Maguire, *Permitting under the Clean Air Act: How Current Standards Impose Obstacles to Achieving Environmental Justice*, 14 MICH. J. RACE & L. 255 (2009); Jeremy Linden, *At the Bus Depot: Can Administrative Complaints Help Stalled Environmental Justice Plaintiffs?* 16 N.Y.U. ENVTL. L.J. 170 (2008).

[81] 33 U.S.C. §1365(a)(1). *See also* Douglas Rubin, *How Supplemental Environmental Projects Can and Should be Used to Advance Environmental Justice*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 179 (2010).

[82] 42 U.S.C. §6972(a)(1)(A).

[83] 42 U.S.C. §300j-8.

[84] *See e.g. CleanCOALition*, 536 F.3d 469. Here the U.S. Court of Appeals for the Fifth Circuit upheld the district court's interpretation of the citizen suit provisions of the Clean Air Act to the effect that "(1) section of the Act authorizing citizen suit against a person alleged to have violated or to be in violation of an emission standard or limitation under the Act does not authorize citizen suits to redress alleged pre-permit, preconstruction, or pre-operation violations, and (2) section of the Act authorizing citizen suits ''against any person who proposes to construct or constructs any new or modified major emitting facility without a permit'' does not authorize preconstruction citizen suits against facilities that either have obtained a permit or are in the process of doing so." *Id.*

[85] 42 U.S.C. §9607.

[86] Especially through the introduction, by the EPA, of enhanced surface mining permit reviews under the Clean Water Act (33 U.S.C. 1344(a)) which impose stringent controls over the discharge of mine wastes into receiving waters. These provisions have withstood legal challenges by the coal industry. *See* Gorman Co., LLC v. U.S. E.P.A., 2011 WL 749508 (E.D. Ky. 2011). In this case the successful enforcement of the permitting system

Related to statutory suits, although not a court-based remedy, is administrative complaint through the Office of Civil Rights (OCR), a body created by the EPA following President Clinton's issuance of Executive Order 12898 and its accompanying Memo. The OCR is tasked with assisting the EPA in observing its Title VI and VII obligations under the Civil Rights Act 1964.[87] Title VI obligations include intentional discrimination and disparate impact and EPA has passed disparate impact regulations in order to comply with Title VI.[88] Any citizen who considers that an agency action offends these regulations may file a complaint with the OCR which has a mandatory duty to "promptly investigate" and respond within 20 days.[89] Although complainant(s) do not get their 'day in court' under this procedure, they are able to articulate disparate impact complaints directly, in a way which is likely to be more successful than using Title VI in the courts. However, the performance and transparency of the EPA OCR has been subject to some criticism and suffers from some significant drawbacks.[90] A recent report by Deloitte Consultants LLP into the EPA OCR in 2011 concluded that

> the Title VI program has struggled to develop a consistent framework to analyze complaints, resulting in a lengthy and time-consuming effort to evaluate the complaints and once accepted, to adequately investigate the cases. Only 6%, or 15 out of 247, were compliant with EPA targeted 20-day timeframe for acknowledgement. In fact, half of the complaints have taken one year or more to move to accepted or dismissed status. One case was accepted after nine years and a second case was accepted only after ten years.[91]

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under the Clean Water Act was said to "have imposed insurmountable technical and economic burdens on the coal mining industry, effectively shutting down surface coal mining (and possibly significant underground coal mining) throughout much of Central Appalachia …" *Id.* at 1. However, the agencies have not always been successful; *see* Ohio Valley Envt'l Coalition v. Aracoma Coal Co. 556 F.3d 177 (4th Cir. 2009). Moreover, efforts by environmental groups to challenge permits issued by the US Army Corps of Engineers have frequently met with judicial deference to the agency decisionmaking. *See e.g.* Coeur Alaska, Inc. v. Southeast Alaska Conservation Council 557 U.S. 261, 129 S. Ct. 2458 U.S. (2009); Sierra Club v. Van Antwerp 526 F.3d 1353 (2009).

[87] 42 U.S.C. 2000a.

[88] 40 C.F.R. §7.35: A recipient shall not use criteria or methods of administering its program or activity which *have the effect of subjecting individuals to discrimination* because of their race, color, national origin, or sex, … (emphasis added).

[89] *See* C.F.R. §7.120; C.F.R. §7.120(d)(1)(i) (2010). Other agencies also have OCRs and on occasion these too have been asked to review Title VI compliance. *See e.g.* the role of the OCR of the Department of Health and Human Services in King v. Office for Civil Rights of the U. S. Dep't. of Health and Human Services, 573 F. Supp. 2d 425 (D. Mass. 2008).

[90] Crossman, *supra* note 54, at 604-07.

[91] ENVT'L PROT. AGENCY, ORDER # EP10H002058, FINAL REPORT: EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS 25 (2011) available at http://www.epa.gov/epahome/pdf/epa-ocr_20110321_finalreport.pdf.

Lastly, there are the common law suits in negligence, trespass, and private and public nuisance. These were not widely used in the early days of the EJM but as the constitutional avenues have been gradually closed off by the courts and the limitations of statutory remedies have become apparent, common law suits have become more popular in environmental justice cases. This has almost certainly been influenced by two other important developments. The first of these was the broadening of the 'frame' of environmental justice to include the local effects of global climate change,[92] especially in the wake of the devastation caused by hurricane Katrina.[93] The second development was the harnessing of public nuisance as a tort in the high profile legal campaigns against cigarette manufacturers, arms manufacturers and gasoline producers.[94] The threat of public nuisance damages was at least partly responsible for the settlements that the tobacco industry reached with various litigants in the 1990s.[95]

As the effects of climate change have become more apparent, public nuisance in particular has been seized upon as a possible general means of obtaining redress for the damage caused, or allegedly caused, by polluters said to contribute to climate change.[96] The recent case of *American Electric Power Co. v. Connecticut* (*AEP*) in the Supreme Court is an exemplar of this type of challenge and the first 'climate justice' case to reach the Supreme Court.[97]

In *AEP*, a number of states, the City of New York and a number of land trusts attempted to sue the American Electric Power Company and others for their contribution to global warming. The claim was based on the federal common law against interstate nuisance,[98] or alternatively, state

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[92] Sometimes referred to as 'climate justice'.

[93] *See e.g.* Barasich v. Columbia Gulf Transmission Co., 467 F.Supp.2d 676 (E.D. La. 2006); Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010).

[94] *See* Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 2 (2011).

[95] *Id.*

[96] *See e.g.* Citizens for Alternatives to Radioactive Dumping, v. U. S. Dep't of Energy, 485 F.3d 1091 (10th Cir. 2007); Cal. v. General Motors Corp., 2007 WL 2726871 (N.D.Cal. 2007); Comer v. Murphy USA, 585 F.3d 855 (5th Cir. 2009); Comer v. Murphy USA, 607 F.3d 1049 (5th Cir. 2010); Native Village of Kivalina v. ExxonMobil Corp., 663 F.Supp.2d 863 (N.D. Ca. 2009); Native Village of Kivalina v. ExxonMobil Corp. 696 F.3d 849 (9th Cir. 2012). For more on this case see text accompanying notes 106 to 111 *infra*.

[97] American Electric Power Co. (AEP) v. Connecticut, 131 S.Ct. 2527 (2011).

[98] The use of federal public nuisance claims is rather controversial given that in Erie RR. Co. v. Tompkins 304 U.S. 64 (1938) it was held that "there is no federal general common law." *Id.* at 78. However, federal public nuisance claims continued to be entertained despite the *Erie* contention; in fact, the continued existence of federal nuisance claims was confirmed by the Supreme Court on the same day as the *Erie* decision in Hinderlinder v. LaPlata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). The history of federal common law since the *Erie* decision is a complex study; *see* Donald L. Doernberg, *The Unseen Track of Erie Railroad: Why History and Jurisprudence Suggest a More Straightforward Form of Erie Analysis*, 109 W. VA. L. REV.611 (2007), but it is clear that environmental protection disputes, particularly where they cross state boundaries, are precise-

tort law. The plaintiffs sought injunctive relief in the form of a "decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually."[99] This case was not an environmental justice case in the usual mould, in that the principal plaintiffs were not a local environmental justice community. Nevertheless, the implications were potentially far-reaching for the environmental justice movement, and particularly for local communities disproportionately affected by the consequences of climate change.

There were two main questions at issue in *AEP*; first whether the plaintiffs had Article III standing to bring the suit in the first place and, second, whether the fact that the CAA imposes upon the EPA a duty to regulate greenhouse emissions, displaces federal and state nuisance claims.[100]

The decision in *AEP* was compromised by the recusal of Justice Sotomayor, who, prior to her elevation to the Supreme Court, had already been involved in the Second Circuit's deliberations on *AEP*. As a result the court was equally split on the standing question, with four justices in favor of recognizing the standing of at least some of the plaintiffs, following the analysis in the majority opinion in *Massachusetts v. EPA*[101], and four justices, espousing the *Massachusetts* dissent, opposed.[102] Given the deadlock, the Second Circuit's positive decision on plaintiffs' standing was upheld. On the displacement question, the court was unanimous in holding that the *federal* nuisance claims were displaced.[103] However, the court did not decide on the state-based nuisance claims and the question remains open "for consideration on remand."[104]

The *AEP* case has been commented on at length but for present purposes it is sufficient to note that the displacement of federal public nuisance

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ly the kind of exceptional circumstances that the federal common law of public nuisance has been reserved for, particularly where Congress has not acted or not acted with sufficient clarity. Thus the Supreme Court in Illinois v. City of Milwaukee (Milwaukee I), 406 U.S. 91(1972): "When we deal with air and water in their ambient or interstate aspects, there is a federal common law . . . ." *Id.* at 103. However, as pointed out by Damian M. Brychcy, *American Electric Power v. Connecticut: Disaster Averted by Displacing the Federal Common Law of Nuisance* , 46 GA. L. REV. 459, 478-91, federal public nuisance is somewhat ethereal in nature, not least because of its susceptibility to displacement, as demonstrated in *AEP* and *Kivalina.*

[99] *AEP*, 131 S. Ct. 2532.

[100] The second of these questions was brought forth because of the previous Supreme Court decision in Massachusetts. v. EPA, 549 U.S. 497 (2007). Here the Court had held that the CAA did require the EPA to regulate greenhouse gases (GHGs) from motor vehicles (contrary to EPA's view). As a result of this decision EPA had not only moved to regulate GHGs from mobile sources but had also undertaken to finalise reduction measures from stationary sources by May 2012. *See AEP,* 131 S.Ct. 2527, 2533.

[101] *Massachusetts*, 549 U.S. 520-26.

[102] *Id.*at 535.

[103] *AEP*, 131 S.Ct. 2537.

[104] *Id.* at 2540.

claims in respect of climate change represents yet another closed legal avenue for environmental justice (or climate justice) claimants.[105]

It is important, however, to understand the scope of the *AEP* decision. The displacement element of the judgment related to the injunctive remedy sought by the plaintiffs which was that the court set a cap on emissions to be reviewed (downwards) annually. It did not relate to the possibility of seeking compensation for the effects of climate change under tortious principles. As it happens, the U.S. Court of Appeals for the Ninth Circuit has recently ruled on this matter also. In *Native Village of Kivalina v. ExxonMobil Corporation (Kivalina)* native Alaskan villagers sought compensation from a number of oil and power companies ("Energy Producers") for the effects of climate change on their community.[106] The village of Kivalina is being inundated by the sea as a result of the disappearance of the sea pack ice that has protected the village from the destructive effects of the ocean for hundreds of years. The U.S. Army Corps of Engineers has concluded that the village cannot be saved and that the whole community must be relocated at a cost of up to $400m.[107] On the basis that the defendants are major contributors of GHGs said to be the root cause of climate change,[108] the plaintiffs sought compensation for the costs of relocation of their village. The district court dismissed the claim on the grounds that the claims were not justiciable under the political question doctrine and because the plaintiffs lacked Article III standing.[109] The plaintiffs appealed unsuccessfully to the Ninth Circuit on both these questions. Their claim was dismissed by the U.S. Court of Appeals for the Ninth Circuit, following the Supreme Court decision in *AEP v. Connecticut*[110] on the basis that the Clean Air Act had displaced the damages claim under the federal common law of public nuisance.[111] Thus the possibility, left open in *AEP*, that claims for damages (as opposed to injunctive relief) might still be available in federal public nuisance claims despite the Clean Air Act, has been eradicated.

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[105] For commentary on *AEP* see Jonathan H. Adler, *The Supreme Court Disposes of a Nuisance Suit: American Electric Power v. Connecticut,* 2011 CATO SUP. CT. REV. 295 (2011); Michael B. Gerrard, *What Litigation of a Climate Nuisance Suit Might Look Like,* 121 YALE L.J. ONLINE 135 (2011); Katherine A. Guarino. *The Power of One: Citizen Suits in the Fight against Global Warming*, 38 B.C. ENVTL. AFF. L. REV (2011); James R. May, *AEP v. Connecticut and the Future of the Political Question Doctrine.* 121 YALE L.J. ONLINE 127 (2011); Hari M. Osofsky, *AEP v. Connecticut's Implications for the Future of Climate Change Litigation,* 121 YALE L.J. ONLINE 101 (2011); Maxine Burkett, *Climate Justice and the Elusive Climate Tort,* 121 YALE L.J. ONLINE 115 (2011).
[106] Native Village of Kivalina v. ExxonMobil Corp., 663 F.Supp.2d 863 (N.D. Ca. 2009).
[107] *Id.*at 869.
[108] IPCC Fourth Assessment Report (AR4)(2007) available at http://www.ipcc.ch/publications_and_data/ar4/wg1/en/contents.html.
[109] *Kivalina*, 663 F.Supp.2d 863, 868, 871-7, 877-83.
[110] AEP v. Connecticut, 131 S.Ct. 2527 (2011).
[111] *Kivalina,* 696 F. 3d 849.

IV. THE FUTURE OF ENVIRONMENTAL AND/OR CLIMATE JUSTICE LITIGATION.

Having traced the gradual narrowing of litigation and administrative remedies available to environmental or climate justice litigants, we turn now to what the future might hold. There appear to be difficulties with the continued use of litigation at two levels, the procedural and the jurisdictional/conceptual. These two levels will be analyzed separately, though the first derives to a large extent from the second.

A. THE PROCEDURAL LEVEL.

i. Constitutional Standing

In all cases, as a preliminary to establishing standing proper, a plaintiff must demonstrate that they have an interest that has been, or will be interfered with. For private citizens and citizen groups in environmental or climate justice cases, the interest is usually a proprietorial one, relating to bodily integrity or property, and demonstrating that interest is not normally a problem. This can be more difficult for non-governmental organizations where they must show "that one or more of [their] members would … be 'directly' affected apart from their 'special interest' in th[e] subject."[112] Where state plaintiffs are concerned (as in *Massachusetts v. EPA* and *AEP v. Connecticut*), a special generosity is extended -- based on the *parens patriae* doctrine -- which results in a more generous construction of the requirement for an interest than might otherwise have been the case.[113] The doctrine's origins can be traced to interstate disputes such as *Georgia v. Tennessee Copper Co.*,[114] where the quasi-sovereign role of the state in ensuring that its citizens "breathe pure air," justified leniency in permitting state access to the courts as an alternative to the use of force.[115]

Whatever the basis of the plaintiff's interest, environmental or climate justice litigation requires that constitutional standing is established before the case can proceed to the merits. At the level of constitutional challenges under the Fourteenth Amendment's Equal Protection Clause or under the Title VI provisions of the Civil Rights Act, establishing standing requires

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[112] Lujan v. Defenders of Wildlife Inc. 504 U.S. 555, 563 (1992) (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)). *See also* Posner J.'s generous analysis of standing for NGOs in American Bottom Conservancy v. U.S. Army Corps of Engineers, 650 F.3d 652, 655-59 (7th Cir. 2011).

[113] For detailed analysis of the *parens patriae* doctrine see Connecticut v. AEP, 582 F.3d 309, 334-47 (2d Cir. 2009) (Peter W. Hall J.) (opinion for the court).

[114] Georgia v. Tennessee Copper Co., 206 U.S. 230, 27 S.Ct. 618 (1907).

[115] *AEP*, 582 F.3d 309, 334. *Cf.* the dissenting opinion of Roberts, C.J.in Massachusetts v. EPA, 549 U.S. 497,537 (2007) (giving short shrift to the notion of special solitude and doubting the relevance of Georgia v. Tennessee Copper Co. to questions of standing).

that the plaintiff(s) show that: they have a personal stake in the outcome of the controversy sufficient to invoke federal jurisdiction and to justify the exercise of the court's remedial powers on their behalf; that they are injured by the defendant's action, though the injury may be indirect; and, that the injury is fairly traceable to the defendant's acts or omissions.[116] As discussed above, this was not the fatal difficulty in the line of EPC and Title VI cases, which foundered on the requirement to show intentional discrimination.

Challenges to environmental law statutes require that *both* statutory and constitutional standing criteria are met.[117] As an example of statutory standing, Crossman discusses the citizen suit provisions under §§304 and 307(b)(1) of the Clean Air Act which allow "any citizen" to proceed against anyone violating an emission standard or limitation imposed by a relevant agency, or against the agency Administrator for failure to act, or against the final decision of the agency Administrator.[118] However, whilst these and other similar statutory provisions may get the litigant to court, staying there requires demonstration of constitutional standing.

In environmental cases constitutional standing is widely said to be governed by the requirements articulated in *Lujan v. Defenders of Wildlife*[119]. These were summarized by Justice Stevens in *Massachusetts v. EPA* to require a litigant to "demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury."[120]

Where administrative failure is the point at issue, establishing standing may not be quite so challenging. In *Massachusetts,* 'the injury' was the failure of the EPA to regulate GHGs, rather than the damage caused by GHG emissions *per se*, and hence that injury was fairly traceable to the EPA, and if the court was minded to force the EPA to act (as it was) then the remedy would indeed redress the injury. Thus all the tests for standing could be discharged.

However, where the complaint relates to the effects of a particular pollutant or group of pollutants (such as in the common law actions in nuisance at the heart of *AEP* and *Kivalina*), the standing burdens imposed by *Lujan* are significant and not easily discharged. Concrete and particularized injury can be difficult to establish even where point sources of pollution are concerned, especially where a number of similar point sources exist in the same locale – a fairly common situation. Where diffuse sources are at issue (like GHGs), the difficulties would at first sight seem insupera-

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[116] *See* Arlington Heights v. Metro Dev. Corp., 429 U.S. 252, 261 (1977) (Stevens J.) (quotation marks and citations omitted).
[117] *See* Crossman, *supra* note 54 at 627-31. Constitutional standing is also referred to as Article III standing.
[118] 42 U.S.C. §7604; 42 U.S.C. §7607.
[119] Lujan v. Defenders of Wildlife Inc. 504 U.S. 555, 562 (1992).
[120] Massachusetts v. EPA, 549 U.S. 497, 517 (2007).

ble. Fair traceability (i.e. causation) likewise presents a considerable difficulty where diffuse or multiple sources of pollution are concerned and that being the case it is difficult to see how any remedy could be sure to offer adequate redress.

In *AEP* the injury complained of was the *effects* of climate change and for standing to be established plaintiffs needed to show that their injuries were caused by AEP and the others, even though they were a few among many, many, contributors to GHGs across the U.S., and indeed, the world. This appeared to be a considerable procedural barrier. However, before the Second Circuit -- whose findings on standing were not disturbed by the Supreme Court -- the plaintiffs were able to convince the court that a "concrete and particularized injury" of sufficient immediacy existed in the reduction in the extent of snowpack and the flooding caused by its earlier melting.[121] So far as causation was concerned, the Second Circuit relied on the principles of nuisance: "'[T]he fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution.'"[122] The Second Circuit also pointed out that the burdens associated with causation at the pleading stage were "not equivalent to a requirement of tort causation" and that "we are concerned with something less than the concept of proximate cause."[123] Thus the court was able to find sufficient causation for the standing test. Similarly, the question of whether the reduction of GHGs from these particular plaintiffs would "redress" the injury complained of was generously construed, by analogy with *Massachusetts* where "The Court recognized that regulation of motor vehicle emissions would not "by itself *reverse* global warming," but that it was sufficient for the redressability inquiry to show that the requested remedy would "*slow or reduce* it."[124]

However, in both *Massachusetts* and *AEP*, the notion that forcing the regulation of motor vehicle emissions or emissions from power production will necessarily and demonstrably slow or reduce climate change, might be acceptable as a means of applying a legal principle but would be extremely difficult to demonstrate in reality given the inherent uncertainties in climate science and the global impact of locally produced GHGs. This extension of a principle developed for the redress of much more localized causes and effects is not entirely plausible. It is just as plausible, for instance, to argue that overall emissions might *increase* if AEP and the other defendants were forced to reduce their output if other, less efficient, providers of electricity took AEP's place in the market. In order to make redressability certain, the court would have to insist not only on the staged reduction in emissions for each liable defendant, but also that the reduction not be replaced by any other provider. In more basic terms, the court would have to en-

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[121] Connecticut v. AEP, 582 F.3d 309, 341 (2d Cir. 2009).
[122] *Id.*at 346 (parentheses omitted). This is a direct reference to the Restatement (Second) of Torts §875.
[123] *Id.* (internal quotation marks and citation omitted).
[124] Massachusetts v. EPA, 549 U.S. 497, 525 (2007).

force either the more efficient production of electricity, or an overall reduction in the availability of electricity. It is true that federal courts have on occasion taken it upon themselves to enforce the law as *de facto* regulatory agencies,[125] but quite apart from the practical problems of regulation on an executive scale, there are separation of powers objections which will generally be insuperable where questions of climate change are concerned. It is difficult to see how a judicially supervised regulation of climate change, with all its attendant economic implications, could ever be consistent with the role of the executive agencies appointed to the task of environmental protection, or with the role of the legislature as the economic guardian of the nation.

I am aware that this line of argument could be said to be conflating standing requirements with those required to win on the merits; getting into court presents a lower hurdle than winning once there. However, it seems to me that where matters of climate change causation and redressability are concerned, the two hurdles need to be aligned as a matter of logic. Despite this, in *Kivalina* two of the three judges in the Ninth Circuit recognized the villagers' standing to sue, thus continuing the trend of generous construction of standing requirements. However, ultimately the court took the *AEP* lead in finding that compensation claims were displaced by the EPA's powers under the Clean Air Act.[126]

In summary, the present position seems to be that, in environmental justice cases aimed at local and tangible sources of pollution or at administrative failure, plaintiff citizen groups are not likely to have a problem with establishing constitutional standing. For them, the difficulties lie in obtaining recognition of the fact of disparate impact as an element of the 'concrete and particularized injury'. Climate justice litigants like those in *AEP* and *Kivalina* have been generously dealt with by the Second Circuit and Ninth Circuit respectively in terms of establishing standing at the pleadings stage.[127] However, no court has yet felt inclined to test the still higher barrier of establishing proximate cause at the merits stage (discussed further at §4.1.2. below).

Finally on the question of standing it must be pointed out that the doctrine is not ideally suited to the *prevention* of pollution or the observance of the precautionary principle that lies at the heart of environmental protection policy in most jurisdictions.[128] The test of standing requires

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[125] For a useful summary of the debates concerning 'judicial activism' when federal judges have in the past undertaken to reform public institutions, see Anne Richardson Oakes, *From Pedagogical Sociology to Constitutional Adjudication: The Meaning of Desegregation in Social Science Research and Law*, 14 MICH. J. RACE & L. 61 (2008).

[126] *Kivalina,* 696 F.3d 849 (9th Cir. 2012).

[127] Notwithstanding Pro J.'s dissent in *Kivalina. Id.* at 9-18. In *AEP* in the Supreme Court, the justices were split equally over the question of standing to sue. *See AEP*, 131 S.Ct. 2527.

[128] *See e.g.* Article 191, paragraph 1 of The Treaty on the Functioning of the European Union, 2010. OJ C 83/49, March 30, 2012. In the United States, the phrase 'precaution-

that particularized injury is "actual or imminent." On the face of it, an attempt to prevent future harm by these means is highly unlikely to succeed. Indeed, in *Korinsky v EPA,* -- another attempt, like *AEP*, to seek injunctive relief from climate change -- the suit failed in the Second Circuit on the basis that the plaintiff's future harm was "too speculative to establish standing."[129] On the other hand, the same court in *AEP* found that the plaintiffs had "sufficiently alleged future injury"[130] as part of the injury-in-fact. Whether this difference from *Korinsky* derives from the latter's lack of quasi-sovereign status (*Korinsky* was a *pro se* action) is a matter of speculation. In *AEP*, the Second Circuit was satisfied that the defendants' contributions to GHGs were contributing to climate change which was already causing injury *and would continue to do so into the future*: "the future injuries they predict are anything but speculation and conjecture: 'Rather, they are certain to occur because of the consequences, based on the laws of physics and chemistry, of the documented increased carbon dioxide in the atmosphere.' There is no probability involved."[131]

This shows a commendable confidence in the conclusions of the IPCC that rising carbon dioxide is indeed anthropocentric in origin and is a good example of the judicial application of the precautionary principle. However, this confidence may not be shared to the same degree by the Supreme Court. In *AEP*, even the majority opinion made reference (albeit without commendation) to the views of a prominent but widely criticized climate change skeptic.[132]

ii. Proximate Causation

There is a world of difference between the notion of causation at the pleading stage of proceedings and that at the merits stage. So far no public nuisance case relating to climate change has reached the merits stage, and were one to do so, the plaintiffs would face enormous difficulties in demonstrating causation to the necessary level of proof. Michael B. Gerrard, the prominent environmental lawyer and academic, has gone so far as to state, in the context of common law climate change litigation, that "proving a specific defendant's emissions led to a specific plaintiff's injury

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ary approach' is preferred. The United States has generally sought to avoid the use of the term 'precautionary principle' lest it be construed as a customary norm of international law (*See e.g.* World Trade Organization Panel Report. EUROPEAN COMMUNITIES – MEASURES AFFECTING THE APPROVAL AND MARKETING OF BIOTECH PRODUCTS. WT/DS291/R, WT/DS292/R, WT/DS293/R, (06-4318), 98-108, (2006).

[129] 192 Fed. Appx. 42 (2nd Cir, 2006) (cert. denied, 549 U.S. 1181).

[130] Connecticut v. AEP, 582 F.3d 309, 344 (2d Cir. 2009) (citation omitted).

[131] *Id.*

[132] AEP v. Connecticut, 131 S.Ct. 2527, 2533 n.2 (2011). Justice Ginsburg referred to a New York Times Magazine article of March 29, 2009 by Nicholas Dawidoff on the English-born physicist and climate change skeptic Freeman Dyson.

is probably impossible."[133] Thus while demonstrating causation for existing damage caused by a well-defined point source of pollution may be feasible, the difficulties are probably too great to offer much hope to climate change litigants relying on public nuisance.

iii. Is Public Nuisance a Suitable Vehicle for Achieving Environmental Redress?

Public nuisance has become a popular means of pressurizing corporations into action on questions relating to public health, including their contributions to climate change. There can be little question that this tactic is more designed to prompt corporations to action in the face of perceived government and regulatory inaction than any serious attempt to obtain compensation or injunctive relief on the merits.[134] The numerous obstacles to success on the merits in climate change litigation based on the common law have been well documented.[135]

Moreover, there is a good deal of debate as to the role that tort law, and particularly public nuisance, should play in environmental litigation, including climate justice cases. On the one hand Ewing and Kysar make the case for public nuisance "as a critical forum for the articulation of public understandings of morality."[136] Theirs is a justification of tort law as a vital mechanism in allowing citizens to use the courts to air grievances in circumstances where the political branches are prevaricating; the regulation of climate change being a perfect example. On the other hand, a recent paper has questioned the entire basis of public nuisance concluding that its status as a tort, both historically and conceptually, is open to question.[137] Professor Merrill's thesis is that public nuisance is not a tort at all, but a species of public action and as such it requires authority and guidance from the legislature as to its boundaries.[138] In his view, the courts should "disclaim any inherent authority based on the common law to declare that particular conditions are a public nuisance."[139] This contention is based on the view that the inclusion of public nuisance in the Restatement of Torts (Second) owed more to misinterpretation and poli-

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[133] Michael B. Gerrard, *What the Law and Lawyers Can and Cannot Do about Global Warming,* 16 SOUTHEASTERN ENVTL. L.J. 33, 42-43 (2007).
[134] *AEP*, 131 S. Ct. 2527, together with California v. General Motors Corp., 2007 WL 2726871 (N.D. Cal. 2007), represents a two-pronged, east-and-west strike on corporations considered to be the major culprits in the emissions of GHGs. On the use of public nuisance as a 'prod and plea' tactic see Benjamin Ewing & Douglas Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm,* 121 YALE L.J. 350 (2011).
[135] Gerrard, *supra* note 105.
[136] Ewing & Kysar, *supra* note 134, at 356.
[137] Thomas W. Merrill, *Is Public Nuisance a Tort?* 4 J. TORT L. 1 (2011).
[138] *Id.* at 6.
[139] *Id.*at 1, 29-43.

tics than legal principle – a view which he justifies at some length.[140] Professor Laurence Tribe and his colleagues have also considered the role of public nuisance in the context of climate change litigation and concluded that "worldwide climate change is a systemic phenomenon that is intractable to anything but a systemic political solution, one that the adversarial and insulated model of nuisance litigation is structurally incapable of providing."[141]

Hence, public nuisance might be a friable foundation for securing climate justice directly. Of course it might be far more successful *indirectly* as a means of forcing the hand of government or persuading industry and commerce to take action on climate change on its own cognizance (the "prodding and pleading" tactic espoused by Ewing and Kysar.[142]) If that is the purpose behind litigation then the apparent shortcomings of public nuisance and its concomitant procedural requirements may be less problematic. I return to this theme in §5 below.

IV. Judicial Deference

Decision making in the environmental protection field is immensely complex and requires the input of expertise from a wide range of disciplines. The courts have repeatedly made reference to their reluctance to substitute their own assessments for those of expert agencies appointed to the task by the legislative or executive branches. In *AEP,* Justice Ginsburg reiterated this approach:

> Indeed, this prescribed order of decision-making—the first decider under the [Clean Air] Act is the expert administrative agency, the second, federal judges—is yet another reason to resist setting emissions standards by judicial decree under federal tort law. …It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order … . The judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decision-making scheme Congress enacted. [143]

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[140] *Id.*at 20-29. Merrill has formed the opinion that public nuisance was "shoe-horned" into the Restatement of Torts (Second) partly as a result of environmental activism affecting (or perhaps "infecting") the American Law Institute in the 1970s. *Id*. at 24-25.

[141] Laurence H. Tribe et al., *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine,* 15 (Washington Legal Foundation Critical Legal Issues Working Paper Series Number 169 Jan.2010) available at http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe_WP.pdf.

[142] Ewing & Kysar, *supra* note 134.

[143] AEP. v. Connecticut, 131 S.Ct. 2527 2539-40 (2011) (citation omitted).

Carlton Waterhouse has analyzed how this deference extends not only to technical and scientific aspects of the decision but also to the consideration of disparate impact. He detects a hierarchy of deference in environmental justice cases which is at its highest where the decision under review is of a technical nature and originates at the Agency-Executive level and is at its lowest where a non-technical decision is made by a non-elected agency officer.[144] His analysis incorporates democratic process and motive review theories[145] both of which mandate considerable deference towards decision-makers (particularly elected ones).[146] He concludes that

> Using motive review theory, it appears that only two small categories of environmental decisions will typically violate the Equal Protection Clause … . Non-technical decisions made by elected bodies that include evidence of racial motive and a substantial disparate racial impact and non-technical decisions made by lower level agency officials that include evidence of racial motive and a significant disparate impact or highly disparate impact alone require the lowest level of deference and the least evidentiary burden. In these cases, courts ought to afford less deference and conduct a more searching review of the decisions rendered.[147]

Generally cases involving decision-makers at this level of Waterhouse's hierarchy appear to be rare. The majority of such decisions are made by bodies much higher in the hierarchy and therefore command more deference from the courts.

Thus whether environmental justice or climate justice is at issue in a case involving agency discretion in decision-making, plaintiffs usually face an uphill battle in persuading courts to interfere with that decision, even where disparate impact is beyond doubt.

v. Environmental Justice Regulations and Policies

The cumulative body of environmental justice regulations and policy vehicles across the United States, both at state and federal level, is considerable.[148] In principle, litigation against the federal government, states and

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[144] Waterhouse, *supra* note 35, at 93-102.

[145] *See* Sheila R. Foster, *Intent and Coherence*, 72 TUL. L. REV. 1065 (1998). The motive review theory is influenced by democratic process theory and specifically "comes out of the preference for democratic processes of decisionmaking and respect for other branches and levels of government. In its preference for majoritarian forms of decisionmaking, process theory counsels that judicial review is relatively undemocratic. Particularly with respect to constitutional issues, the judiciary is seen as a "counter-majoritarian" institution less responsive and accountable to majority will than either executive or legislative bodies." *Id.* 1101-1102. This, Foster suggests, accounts for the deference often displayed for executive agency decisionmaking.

[146] Waterhouse, *supra* note 35, at 97-98.

[147] *Id.* at 101 (citation omitted).

[148] BONORRIS, *supra* note 69.

federal or state institutions to enforce obligations under these regulations is an avenue open to those aggrieved by environmental or climate change burdens. However, as pointed out recently by Sheila Foster, very few, if any, of those regulations contain race-based decision-making 'input' criteria which would allow the possibility of disparate impact to be taken into account in the 'output' of that decision.[149] Foster points out that inclusion of race-based criteria would subject a policy to strict scrutiny analysis, a much less deferential standard than would otherwise be the case.[150] Regulations that do not contain race-based criteria will be subjected to intermediate rather than strict scrutiny[151] and hence policy makers avoid the inclusion of such criteria to minimize the possibility of judicial interference in decisions.[152] Thus directly challenging decisions made under environmental justice regulations or policies for failing adequately to account for disparate impact in the decision-making process, becomes difficult if not impossible.

B. THE CONCEPTUAL/JURISDICTIONAL LEVELS

There are profound jurisdictional and conceptual questions in relation to the use of law suits which seek redress for environmental injustice, whether they relate to traditional race-centred EJ campaigns against 'local' pollution, waste or toxicity, or to the climate justice suits directed at emitters of GHGs on a larger geographical scale.

The unequal distribution of environmental burdens is a consequence of the operation of liberal industrialized economies with their emphasis on liberty, freedom and the protection of acquired property. The legal system and the principles by which it operates have developed over a long period of time to ensure that these basic rights are upheld and extended to each individual. Ideally, this system is informed by notions of distributive justice such that the allocation of social goods is founded on "fair equality of opportunity" and that society strives for the most "extensive total system of equal basic liberties compatible with a similar system of liberty for all."[153] However, inevitably individuals' abilities to take advantage of liberty and opportunity differ according to their personal characteristics, so that some accrue more social goods than others. Moreover, having legitimately gained their share of social goods, citizens can look with some confi-

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[149] Sheila R. Foster, *Environmental Justice and the Constitution*, 39 Envtl. L. Rep. 10347, 10348 (2009).
[150] *See* Adarand Constructors Inc. v. Pena, 515 U.S. 200 (1995).
[151] *See* Foot, *supra* note 19, at 124.
[152] That is not to say that criteria that might act as proxies for race (such as health indicators or levels of deprivation) may not be included.
[153] RAWLS, *supra* note 32 §46, at 302.

dence to the legal system to protect their retention of them, and, generally speaking, the more they have gained, the greater can be their confidence.[154]

The distributive model of justice however, has not worked so well where social 'bads' are concerned. Generally speaking those with more of the social goods (such as wealth and its concomitants, health and education, to name but two) are better placed to exercise choice in the avoidance of the social 'bads' – including the environmental burdens of industrialized society. To a large extent, gaining the ability to avoid these social bads is the fruition of the promise of a free society and the very definition of the 'pursuit of happiness' for many Americans.[155]

However, when those who disproportionately suffer from environmental burdens look to the courts to redress this disparity, they are confronted with a set of rules and legal principles that have, to a large extent, been formulated to maintain the principles that led to the disparity in the first place – namely the liberal, property-owning, meritocratic values and beliefs that characterize society more widely.[156] Thus to ask the courts to redistribute those burdens is asking for much more than simply the redress of a particular grievance; it is to ask the courts to engage in social engineering, and in an area where they will have little of the requisite expertise. In most local environmental justice cases, the facility or industry complained of will, in the vast majority of cases, have already been subject to a protracted and complex decisionmaking process by the agency that decided it should be there in the first place. Generally that decision will have taken into account a variety of scientific, economic, social and environmental factors at a relatively high level of expertise. Moreover, these factors are not predicated on achieving the equitable distribution of environmental burdens but rather on a utilitarian assessment of cost effectiveness; what has been described as the monetizing of decisions through the use of contingent valuation surveys and other market-based criteria.[157] These might include: consideration of the effect on the value of property in the target neighborhood; compliance with zoning or planning requirements so that land use remains segregated and 'pristine' land does not become unnecessarily soiled by industrial use; application of rational scientific principles to

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[154] Marc Galanter, *Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change,* 9 LAW AND SOCIETY REVIEW, 95-160 (1974). Reprinted (with corrections) in R. COTTERRELL (ED.) LAW AND SOCIETY, 165-230 (1994).

[155] Indeed for most of the world at large.

[156] We might paraphrase Mark Scroggins here: things should be as fair as they can be, but not fairer. (The original phrase 'that everything should be as simple as it can be but not simpler' was attributed by Scroggins to Einstein in an Article in the New York Times, Jan. 8, 1950.

[157] *See* Clifford Rechtschaffen, *Advancing Environmental Justice Norms,* 37 U.C. DAVIS L. REV. 95, 104 (2003). The lack of concern for distributive justice in environmental decision making has also been highlighted by Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection,* 87 NW. U. L. REV. 787 (1993) and Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox,* 17 STAN. ENVTL. L. J. 3 (1998).

the assessment of whole population health effects;[158] proximity of ancillary industries, facilities or transport infrastructure that may be necessary to make the facility efficient and viable. The disparate effect on already burdened communities may be a factor to be considered, but it will be only one consideration alongside a range of others, and no greater weight is accorded to it than other stakeholders' interests. Moreover, within a community there will often be differing opinions on whether a particular proposed development is a benefit or a burden; one person may see investment and employment where another sees pollution and blight. Thus a decision-making body may be confronted with opposing views from the same community and must be seen to be fair to both. As Eileen Gauna has put it: "The utilitarian aspects of health and environment must be balanced against competing utilitarian considerations, such as the benefits of products and work that industry can provide."[159]

All too often, these latter considerations will predispose the decision in favor of locations that are highly likely also to contain the poorer sectors of society. "It appears … that environmental inequity is economically efficient."[160] In the United States particularly, such deprived locations will, in many cases, be characterized by higher proportions of people of color.

As discussed above[161] even where decisions do take account of impacts on already burdened communities, these will not routinely make reference to racial criteria for fear of subsequent judicial scrutiny of the decision. This highlights one of the frustrations for the environmental justice movement. There is abundant evidence that environmental burdens fall disproportionately according to race,[162] but the color-blind nature of Equal Protection and Title VI law and jurisprudence which is the legacy of *Bakke,*[163] *Adarand*[164] and *Sandoval*[165] militates against regulators or judges dealing

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[158] Rather than how those whole population risks are unequally distributed between discrete communities. *See* Rechtschaffen *supra* note 157, at 105.

[159] Gauna, *supra* note 157, at 22 (citation omitted). Although Gauna goes on to demonstrate that "utilitarian inquiry is incomplete" (*Id.* at 46), and that civic republicanism aimed at the public good "might obscure social context and power disparity" (*Id.* at 51) there is little evidence that her preferred subjective mixed model within which "agencies should recognize that health and healthy ecosystems have an ethical dimension that cannot be addressed adequately within a benefit-cost approach" (*Id.* at 53) has gained widespread acceptance or practice in the fourteen years since her analysis was published. Having said that Kerry Kumabe has described the operation of civic republicanism in practice in Hawaii: Kerry Kumabe, *The Public's Right of Participation: Attaining Environmental Justice in Hawai'i through Deliberative Decisionmaking*, 17 ASIAN AM. L.J. 181 (2010).

[160] Gauna, *supra* note 157, at 41.

[161] *See supra* notes 143 to 147 and associated text.

[162] *See e.g.* ROBERT D. BULLARD ET AL., *supra* note 15. However, it has been questioned whether this has arisen through "racist intent, institutionalized racism or the operation of market dynamics" (Walker, *supra* note 3 at 102).

[163] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[164] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[165] Alexander v. Sandoval, 532 U.S. 275, 285 (2001).

directly with the disparity, even where they might be minded to do so. Decision-making must be racially neutral unless a race reference can be shown to be "precisely tailored to serve a compelling governmental interest."[166] Otherwise judges will not interfere except in cases of evident racial animus. Where environmental justice is concerned, this has had the effect of perpetuating environmental racial inequalities whose origins can often be traced back to social inequalities generated by suppression perpetrated before the success of the civil rights movement.[167] The difficulty here is a social and political one rather than a legal one *per se*. *Bakke* and its progeny have given rise to the perception that racial equality in the United States is now a reality and that the *de jure* inequalities of the past will, with time, become more equitably distributed as this equality expresses itself.[168] This might well come about, in time, in respect of race,[169] though it is unlikely to do so in respect of deprivation unless a significant change in socio-economic priorities occurs first.

As we have seen, recent climate litigation and climate justice cases have turned to the common law in the hope of securing reductions in emissions from GHG-producing industries or compensation from those industries for the effects of climate change. The legal difficulties facing environmental or climate justice litigants have been alluded to above but there are also significant jurisdictional barriers. Despite the generosity of the Second, Fifth and Ninth Circuits of the U.S. Court of Appeals to suits of this kind,[170] there are influential judicial and academic commentators who consider that regulating climate change falls squarely in the domain of the

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[166] *Adarand,* 515 U.S. 200, 225 (1995).

[167] Rechtschaffen gives a specific example of how race-neutral decision making "… disadvantaged poor and minority communities by reinforcing the impact of prior discrimination." Rechtschaffen, *supra* note 157, at 123.

[168] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290-5 (1978) culminating in the statement that "It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others" *Id.* at 295. This line of argument -- however much it seeks constructively to 'draw a line' under the past -- underplays the social significance of the fact that racial discrimination did not originate in slavery for all minorities, and for those where it did, there is a greater legacy of historical prejudice and deprivation to be overcome.

[169] This may well take place under a time scale that is very much more protracted than the timescale for the onset of serious environment impact from climate change. The loss of biodiversity might also begin to exert effects every bit as serious as climate change before the end of the century; *see Global Biodiversity Outlook 3*, Secretariat of the Convention on Biological Diversity, Montréal (2010) available at http://www.cbd.int/doc/publications/gbo/gbo3-final-en.pdf.

[170] In Connecticut v. AEP, 582 F.3d 309, 334-47 (2d Cir. 2009); Comer v. Murphy, 607 F.3d 1049 (5th Cir. 2010) and Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012) respectively.

political question doctrine and is not within the remit of the courts.[171] Naturally there are equally influential opinions that hold the opposite view.[172]

The doctrine derives from the constitutional requirement to maintain the separation of powers between the branches of government in the United States so as to prevent the usurpation of the powers of the elected branches by an overpowerful judiciary. Article III of the U.S. Constitution is interpreted as reserving only "cases and controversies" to the scrutiny of the courts.[173] The leading case is *Baker v. Carr,* in the course of which Justice Brennan, for the majority, laid out six instances where the court should decline jurisdiction to avoid trespassing on political questions.[174] The Supreme Court has since held that these six instances "are probably listed in descending order of both importance and certainty."[175]

It seems that first and most important of these situations, "a textually demonstrable constitutional commitment … to … a political department," at present does not exist in respect of climate change; if it did then presumably the issue before the Supreme Court in *Massachusetts v. EPA* that such regulation is within the responsibilities of the EPA would itself have been a political question. Thus, it is the second of these instances, "a lack of judicially discoverable and manageable standards for resolving [the issue]" that would seem to have greatest relevance to the regulation of climate change.

Ewing and Kysar have argued forcefully that this second instance should *not* be used to oust public nuisance claims against climate change. They take the view that:

> [t]he claim that judicially manageable standards are lacking in a climate change suit is plausible only if conceived in "as applied" terms--as a claim that public nuisance doctrine cannot provide a sufficient framework for reasoned adjudication in the particular context of climate change. The problem with such an argument is that courts need not appeal to the political question doctrine to dispense with cases for that reason. Instead, they may, and routinely do, grant summary judgment for defendants on the merits--rejecting plaintiffs' suits as a matter of law.[176]

However, their reasoning here seems to miss the objection it purported to address. Merely because a nuisance claim can be rejected on the mer-

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[171] Tribe, *supra* note 141.
[172] Ewing & Kysar *supra* note 134.
[173] Baker v. Carr 369 U.S. 186, 198 (1962).
[174] *Id.* at 217, 710: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."
[175] Vieth v. Jubelirer 541 U.S. 267, 278 (2004).
[176] Ewing & Kysar, *supra* note 134, at 383.

its once it has been accepted at the pleading stage does not mean that it should have been accepted in the first place. Surely the purpose of the political question doctrine is to guide the courts as to the boundaries of their jurisdiction, whereas Ewing and Kysar's argument implies that where tort law is concerned there *are* no boundaries to the courts' jurisdiction. One can understand their open-to-all-comers-and-all-issues stance on public nuisance as part of their wider argument in support of the "historical role of tort law as a locus for the airing of grievances." [177] For Ewing and Kysar, the right of access to the law of tort, and to public nuisance in particular, in order for 'victims to channel through law some attempted response to, or retaliation against, their wrongdoer"[178] is implied "by state constitutional provisions guaranteeing 'open courts' and 'remedies' for injury" and was contemplated by the federal Constitution.[179] They maintain that common law tort claims should nearly always be considered justiciable regardless of the subject matter and support this view by reference to the Second Circuit's view that "[c]ommon-law tort claims are rarely thought to present nonjusticiable political questions".[180]

Whilst it is true that the political doctrine question has been rarely invoked in past tort actions, that of itself is not a strong argument that this should continue to be the case for all public nuisance cases in the future. It is submitted that climate change is a political question *par excellence* which presents unique political features not previously engendered by the campaigns against smoking, handguns, lead in paint or MTBE in gasoline.[181] None of these issues, important though they were, threatened everyone on the planet. The suggestion that public nuisance actions resulting in piecemeal and ad hoc adjudications, even against deep-pocketed defendants, will have any significant impact on the underlying political and economic causes of climate change is unrealistic. It is undoubtedly the case that the strategic use of public nuisance suits, and litigation in general, as a "prods and pleas" tactic against lackadaisical government may be effective[182] but the consequences may not necessarily redound to the benefit of the environment as a whole. There are those in Congress far more likely to respond to climate change litigation by seeking to limit the use of public nuisance (perhaps through an amendment to Restatement of Torts), than to recognize that this issue requires a reappraisal of the way society as a whole operates. Moreover, politicians are, by nature and especially in

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[177] *Id*. at 413.
[178] *Id.* at 374.
[179] *Id.* Here Ewing and Kysar are paraphrasing John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs,* 115 YALE L.J. 524 (2005).
[180] Ewing & Kysar *supra* note 176, 380 (quoting Comer v. Murphy Oil USA, Inc., 585 F.3d 855, 873 (5th Cir. 2009)).
[181] *See* Merrill, *supra* note 94, at 2-3.
[182] And not solely in the United States; *see* Jolene Lin, *Climate Change and the Courts,* 32(1) LEGAL STUDIES 35-57 (2012).

modern-day America, more likely to respond favorably to demands for change from the enfranchised populace than they are to remedies imposed by unelected judges.

In the (admittedly unlikely) event that a public nuisance claim for climate justice (like *Kivalina*) were ever to succeed on the merits and compensation awarded, what would be the likely consequences? Certainly a rush of similar claims, which are likely to increase exponentially as more and more of the effects of climate change are manifested. Large numbers of embattled defendants will no doubt join as many other defendants as possible to try and share out liability for the effects of emissions. It has been suggested that the numbers of defendants could be limited by a *de minimis* principle[183] but it is not clear where the threshold for the application of this principle would lie, or what rationale would be used to determine it, since practically everyone in industrial society contributes to greenhouse gases to some extent. Ultimately of course, joining almost anyone as a defendant could be considered just, in the sense that everyone who chooses to embrace the benefits of a fossil-fuel powered lifestyle bears some culpability for climate change, hence everyone could expect to share the cost of compensating those who bear the effects and be joined as a defendant. Whether the courts should be in the business of allocating this culpability *pro rata* through tort damages principles is highly questionable (even assuming it was possible since in effect everyone is potentially both defendant and plaintiff). One might also imagine a scenario where defendant energy companies are forced -- either as the direct result of successful tort litigation, or as a result of government action in response to it -- to reduce emissions, cut back production or increase prices. If this should result in local power outages, reduced street lighting, debilitation due to a reduced capacity to keep warm and so forth, would the aggrieved be entitled to air their grievances in a public nuisance suit and demand that the courts order the reversal of climate change measures?

Moreover, it seems profoundly unjust to target the utility companies, motor manufacturers and the other major GHG emitters who produce the emissions *at our behest*. Clearly there is a need to ensure that their operations should be as efficient and environmentally responsible as possible – which is the role of regulatory agencies -- but in the end their activities are undertaken in order to meet the energy and transport needs of a society that has chosen to embrace consumerism as a lifestyle - with all its attendant effects on the environment. Thus climate change is a consequence of politically-mediated social choice and the solution to it should result from a choice of a similar kind. This is achieved by exercising the political process, not prodding and poking through lawsuits, which may achieve some limited results, but they are likely to be knee-jerk unilateral responses

[183] *See* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012) (oral argument for the appellants) (Nov. 28, 2011).

rather than informed, considered, coordinated and international ones; the only type of responses that will ultimately achieve the difficult goals that are presented by climate change.

On the question of whether public nuisance claims for climate change should be regarded as falling within the political question doctrine I find I must agree with Professor Tribe and his colleagues who conclude that "government by injunction is neither accountable to majority will nor a product of the "consent of the governed." These bedrock democratic principles are what the separation of powers generally, and the political question doctrine specifically, protect.[184]

In summary, I have examined the legal and jurisdictional-conceptual difficulties that confront litigants in local environmental justice and climate justice claims and concluded that the courts and the legal principles under which they must operate are ill-suited to the resolution of either issue. The essentially political and social nature and origins of environmental degradation requires a political and social remedy that the courts will doubtless have a vital role to play in enforcing but which is not, and should not be, in the gift of the courts to create in the first place.

V. WHY PERSIST WITH LITIGATION?

Given the conclusions in the previous paragraph and the title of this essay it is necessary to ask what role litigation might have to play in securing environmental or climate justice in the future?

A. ENVIRONMENTAL JUSTICE LITIGATION

As discussed the door to environmental justice litigation based on disparate racial impact was gradually closed by *Davis, Arlington Heights, Feeney, Guardians Assurance* and finally shut altogether by *Sandoval* and *South Camden III*, so that absent strong evidence of racial *motivation* for a decision, evidence of disparate racial impact now has little purchase in litigation. Similarly at the administrative level, the result of *Adarand* has been the down-playing of racially-defined criteria in policy and decision-making. The fact that race was historically the focus of litigation in the environmental justice movement is understandable given the constitutional attention to equal protection and the success of the Civil Rights Movement in obtaining Title VI and similar provisions. Mounting challenges on the *real* basis of environmental injustice, namely poverty, or at least relative poverty, would have been much more difficult given that neither the Fifth Amendment, the Fourteenth Amendment, Title VI, nor 42 U.S.C. §1983 contain any mention of inequality based on deprivation.

In 1998, Eileen Gauna's excellent paper on environmental justice concluded that

[184] Tribe, *supra* note 141, at 16-17.

> Decision-making paradigms rest on foundations that promote environmental injustice."[185] This followed a detailed discussion of the predominant models of environmental decision-making that pertained at that time, namely the pluralist and neorepublican (or civic republican) models. In Gauna's analysis both were prone to subjugate the interests of environmental justice to the needs of other stakeholders in the decision. She traced this primarily to the expertise-driven nature of agency decision-making and its insensitivity to political considerations such as environmental injustice: "[e]nvironmental justice activism exists as a misfit in models of agency decision-making. Raising political questions, it is inconsistent with an expertise-oriented approach.[186]

Her suggested solution to this misfit was to improve the participation of environmental justice communities in the decision-making process such that a "strategic refocusing of deliberation" may occur wherein environmental justice concerns are not treated neutrally as simply another stakeholder interest among many others. Such a non-neutral approach will, according to Gauna, foster a process in which environmentally burdened communities' relative lack of power compared to other stakeholders – "the power disparity that must be addressed"[187] -- is taken into account. This power disparity however, resulted primarily from a lack of economic power, a power that communities of color lack for historical and political reasons. This disparity becomes even more significant in decision-making processes whose aim has traditionally been (and still is on the whole) to protect the environment in the most cost-effective way possible using utilitarian calculations based on expertise. The concerns of an economically "unimportant" interest group are almost certain to exercise less influence in such a system regardless of the justice of their cause.

Since Gauna's paper a great many environmental justice policies have been promulgated by states and state agencies, and by the EPA itself, which stress the involvement of environmentally burdened communities in decision making.[188] It is here that future litigation efforts to improve environmental justice need to be concentrated, particularly at the local and state level. Rather than ask the courts to force agencies to take account of something that they are not legally obliged to consider – namely disparate impact on racial groups (other than in the most egregious of cases) – they should be asked to hold agencies and state governments to the letter and

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[185] Gauna, *supra* note 157, at 72.
[186] *Id.* at 51.
[187] *Id.*
[188] *See e.g.* The California Resources Agency Environmental Justice Policy (at http://resources.ca.gov/environmental_justice_policy_20031030.pdf. (last visited Jan. 23, 2013) (emphasis added). Some states are less proactive in this respect: *see* Ohio EWHP, *Ohio EHP and Environmental Justice*, http://ohioepa.custhelp.com/app/answers/detail/a_id/1097/~/ohio-epa-and-environmental-justice (last visited Jan. 23, 2013). The Ohio EPA does stress public involvement in federal air permitting decisions but this is not, it seems, enshrined in policy. See Bonorris *supra* note 69 for a survey of such measures across the USA.

spirit of their stated commitments to environmental justice. After all, the EPA's definition of environmental justice (unlike the constitutional vehicles for equal protection) requires "… the fair treatment and meaningful involvement of all people regardless of race, color, national origin, *or income* with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[189] While *Adarand* may make it difficult for policies to take explicit race-based criteria into account, no such limitation applies to income.

B. *CLIMATE JUSTICE LITIGATION*

There is a distinct difference between climate change litigation and climate justice litigation in that the former often involves more powerful parties (such as states and land trusts[190]) seeking redress on behalf of large populations such as cities, states or groups of states. Such cases may also involve powerful GHG emitters seeking to avoid more stringent regulation.[191] Climate change litigation involving challenges to agency permitting decisions under the Clean Air Act and similar statutes has already achieved some degree of success.[192] As with environmental justice, litigation such as this which aims to hold agencies to their legal obligations and policy goals, and to promulgate improved regulation, may be the preferred route for climate justice litigants too.

Climate justice litigation based on public nuisance, as in *Kivalina*[193] resembles environmental justice in that it relates to the impact of climate change on discrete communities. Moreover, these are communities that are often the least able to adapt and the least to blame for the culprit emissions in the first place. However, Ewing and Kysar's elegant arguments for the use of public nuisance as a vehicle for climate justice notwithstanding,[194] as this essay now argues, this is not a role that the courts should be asked to fulfill, for two reasons: first and foremost, because in adjudicating on such matters the court crosses the boundary between the political and judicial spheres, and second, because the defendants would be unjustly penalized

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[189] Plan EJ 2014, *supra* note 2 (emphasis added).
[190] As in Massachusetts v. EPA, 549 U.S. 497 (2007); AEP v. Connecticut, 131 S.Ct. 2527 (2011).
[191] Coal. for Responsible Regulation, Inc. v. EPA, Nos. 09-1322 -10-1182, 2010 WL 5509187 (D.C. Cir. Dec. 10, 2010). On climate change litigation more generally see the extensive analysis by David l. Markell and J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?* 64 FLA. L. REV. 15 (2012).
[192] Nw. Envtl. Def. Ctr. v. Owens Corning Corp., 434 F. Supp. 2d 957 (D. Or. 2006). For details of the settlement achieved, *see* Markell & Ruhl, *supra* note 191, at 40 n.50.
[193] Native Village of Kivalina v. ExxonMobil Corp., 663 F.Supp.2d 863 (N.D. Ca. 2009); Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012).
[194] Principally as a means of discouraging overpassive government. *See* Ewing & Kysar, *supra* 134.

for pursuing an activity that is essential to the functioning of wider society.[195]

Of course, it is recognized that the courts in the United States have a long and distinguished history of upholding or expanding constitutional entitlements in the face of executive or legislative failure to do so and in an era of human rights, the role of the courts as guardian becomes increasingly important. This is especially so given the individual and anti-majoritarian nature of fundamental human or constitutional rights. In order that such rights be upheld as "trumps over some background justification for political decisions that states a goal for the community as a whole",[196] there must be a mechanism, independent of majoritarian-minded government, to ensure that such "trumping" actually occurs. Where the right already exists as a legal or constitutional entitlement, the courts' role in this regard is unobjectionable. In fact, Professor Dworkin has highlighted this as an essential foil to the "defects in the egalitarian character of democracy [which may be] in part irremedial".[197]

However, where a clear legal or constitutional entitlement does not exist, and so must be 'carved' out of some other legal or constitutional principle, then the court's role moves beyond that of guardian and becomes that of a legislature. At present in the United States there is certainly no general constitutional or legal right to an environment of a defined quality (not at federal level at least) as distinct from regulations that seek to achieve mandatory maximum levels of pollution in emissions, or minimum standards of air quality for example. Nor is there (yet) a consensus on the existence (still less the content) of a normative moral human right to an environment of a defined quality. Hence judicial activism that sought to carve out such a right from, for example, public nuisance or the public trust doctrine,[198] would be creating the right *de novo* and to that extent would usurp the role of the legislature, not merely hold it to account. It is conceded that there are many examples of exactly this kind of judicial activism where existing legal rights have been reinterpreted to encompass environmental considerations where they have not previously been recognized. Prominent examples include the expansion of Articles 8 and 2 of the European Convention on Human Rights in cases such as *Lopez Ostra v Spain*[199]*, Guerra v Italy*[200] *and Budayeva v Russia*[201] and the groundbreaking judicial activism of the Indian Supreme Court in such cases as *M.C.*

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[195] Notwithstanding the fact that it is a profitable activity.
[196] Ronald Dworkin, *Is There a Right to Pornography?,* 1 O.J.L.S. 177 (1981).
[197] RONALD DWORKIN, A MATTER OF PRINCIPLE 27 (1985).
[198] *See* Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision,* 45 U.C. DAVIS L. REV 741 (2012).
[199] Lopez Ostra v. Spain, 20 Eur. H.R. Rep. 277 (1995).
[200] Guerra v. Italy, 26 Eur. H.R. Rep. 357 (1998).
[201] Budayeva v. Russia, Eur. Ct of H. R. (App. nos. 15339/02, 21166/02, 20058/02, 11673/02, 15343/02) (2008).

Mehta v Kamal Nath.[202] I am not questioning whether this can be done by the judiciary - clearly it can; what I am questioning is whether it ought to be done in the context of global climate change where the outcome affects not only the parties to the decision, but, through its potential effects on hitherto lawful economic activity, the interests of countless other parties too.

C. *PRODDING AND PLEADING*

Given the limited chances of success of litigation in environmental and climate change described above, one might wonder whether such litigation is worth the candle. In and of itself, it probably isn't, but many cases are brought, not in the hope of winning, but rather to highlight government, regulatory and legislative inactivity and to prompt change in the face of the increasingly obvious, and serious, effects and consequences of climate change. Ewing and Kysar's article,[203] promoting the virtues of 'prods and pleas' to government by means of climate change litigation, has generated a considerable response, both supportive and critical.[204] Other commentators have also argued the benefits of climate litigation on a more global scale.[205]

Although Ewing and Kysar and Lin make good cases for the use of litigation as a means of persuading government(s) to action, I am not persuaded that this mechanism is anything other than a second rate and rather unpredictable means of securing change (though perhaps, and regrettably, the best available at present). Like Epstein, I take the view that litigation is best suited for what it was designed for, namely offering private remedies for local point source pollution or holding government and regulatory agencies to the letter of the regulations passed by federal and state legislature.[206] And like Zasloff, I consider that pleading with the current political constituency in Congress in respect of climate change is not likely to yield much in the way of results; Zasloff considers climate change litigation "the ultimate example of plea failure."[207] However, Zasloff does concede that forcing the hand of the legislature or executive – a "prod" in Ewing and Kysar's terms – has much to commend it when faced with political inaction

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[202] M.C. Mehta v. Kamal Nath, 1 S.C.C. 388 (1996).
[203] Ewing & Kysar, *supra* note 134.
[204] *See, e.g.* Tribe, *supra* note 141; Tristan L. Duncan, *The Past, Present and Future of Climate Change Litigation: How to Successfully Navigate the Shifting Landscape in* THE LEGAL IMPACT OF CLIMATE CHANGE (Aspatore 2012); Daniel A. Farber, *Preventing Policy Default: Fallbacks and Fail-Safes in the Modern Administrative State,* 121 YALE L.J. ONLINE 499, (2012); Jonathan Zasloff, *Courts in the Age of Dysfunction,* 121 YALE L.J. ONLINE 479 (2012); Richard A. Epstein, *Beware of Prods and Pleas: A Defense of the Conventional Views on Tort and Administrative Law in the Context of Global Warming*, 121 YALE L.J. ONLINE 317 (2011).
[205] Jolene Lin, *Climate Change and the Courts,* 32(1) LEGAL STUDIES 35-57 (2012).
[206] Epstein, *supra* note 204.
[207] Zasloff *supra* note 204, at 487.

in three situations (i) filibusters, (ii) a failure to take account of scientific evidence and (iii) in situations involving disadvantaged groups.[208] Creating a new cause of action based in public nuisance or the public trust doctrine in environmental or climate justice cases would be just such a "prod" of particular relevance to (ii) and (iii).

However, while I sympathize with Zasloff's evident frustration with the political health of the current Congress and its ostrich-like attitude to global climate change, I cannot share his view that judicial prodding of the legislative and judicial branches will necessarily achieve very much more than pleading with them. Nor do I think that the courts will necessarily be willing or able to prod to the extent that he considers necessary. As discussed above it is one thing to grant standing to climate and environmental justice litigants to air their grievances in court but where cases like *AEP* or *Kivalina* are concerned, it is quite another to decide in favor of the plaintiffs on the merits thereby creating a new cause of action. Such an outcome would no doubt "prod" the other branches but as already discussed in §4.2 it could also have unintended and far-reaching consequences which might be counterproductive in the long term. Moreover, whilst the courts are undoubtedly willing to engage in scientific matters, often at a very complex level[209], and have developed the *Daubert*[210] principles and the use of special masters[211] for this very purpose, this is not so evident in climate change cases. In *AEP*, the majority made reference to the climate skeptic position while making it clear that it "endorses no particular view of the complicated issues related to carbon-dioxide emissions and climate change."[212] This was as much a refusal to engage with the science as to apply it rationally. Clearly the Supreme Court does not share with the same conviction Zasloff's view that "the scientific consensus about the veracity of anthropogenic climate change is deep, broad, and robust."[213] The extent of engagement with the science in most climate change cases is to stick rigidly to precedent in deferring to the expertise of an executive agency (often the EPA), by finding that they have not acted arbitrarily or capriciously, or invoking the doctrine of displacement. And this despite the fact that "Federal courts have long been up to the task of assessing complex scientific evidence in cases where the cause of action was based either upon the federal common law or upon a statute. They are adept in balancing the equities and in rendering judgment."[214] This, I suggest, reflects the discomfort felt at having to deal with an essentially political issue. As a result, so far the high profile cases such as *Massachusetts, AEP* and *Comer* and *Kivalina,* have at most, been a "stroke" rather than a "prod."

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[208] *Id* at 489-98.
[209] *See e.g. The Consolidated Salmonid Cases* 791 F.Supp.2d 802 (E.D. Cal. 2011).
[210] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
[211] *See* FED. R. CIV. P. 53; FED. R. EVID. 706.
[212] AEP v. Connecticut, 131 S.Ct. 2527, 2533 n. 2.
[213] Zasloff, *supra* note 204, at 494.
[214] Connecticut v. AEP, 582 F.3d 309, 329 (2d. Cir. 2009).

Dealing with the global consequences of climate change (and in due course with the potentially even more serious consequences of depleted biological diversity) is a social and political matter which requires action at government and international levels. Whilst litigation may have a role to play in pointing out the deficiencies in government activity and policy-making, it should not result in law-making on a quintessentially political issue. There is a real danger in such an approach of piecemeal and uncoordinated responses and of the introduction of uncertainties and unintended consequences. Nor can we, in my view, afford the luxury of the time required to socially engineer a response to environmental and climate justice questions through the courts. Epstein points out the need for proper coordination of the response to climate change and reluctantly reaches the conclusion that this "requires (alas), a federal administrative agency … to orchestrate the effort."[215] I agree with him in principle, but I take issue with his view that the EPA should take the role of the conductor.[216] In my view his analogy would have more validity with the EPA cast in the role of leader of the orchestra with the legislature and executive as the conductor. The courts are there to ensure that the whole orchestra plays in tune. Unfortunately the conductor seems currently indisposed.

VI. CONCLUSION.

Fundamentally, environmental (and climate) injustice arises as a consequence of economic inequalities. In capitalist liberal economies based on enlightened self-interest, some degree of economic inequality is not only inevitable, it is essential to generate competition and prevent stagnation. Any student of natural sciences knows that most of the processes in a dynamic living system operate at non-equilibrium in order to keep the system going and economic systems are no different. Most theories of justice which have dominated western society advocate equality of opportunity but recognize that actual equality is not possible. To a large extent the operation of the law and the courts' enforcement of it are designed to perpetuate this reality while defending equality of opportunity so that citizens may 'help themselves.' Thus while the courts might be able to offer some redress from environmental inequality in particular cases and thereby 'prod and plea' the political branches into action, the equalizing of environmental burden is, in the final analysis, an economic and political responsibility best undertaken by the legislature and the executive.

This essay opened with De Tocqueville's observation on the American tendency to cast controversies into a legal forum. It is suggested that the resolution of this particular controversy is too important to be left to the law. As Schlosberg has noted:

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[215] *Id.* at 320.
[216] *Id.*

> For the environmental justice movement, the demand for more public participation and procedural equity in the development, implementation, and oversight of environmental policy is the key to address issues of distributional equity, recognition and capabilities. It is a focus on *the political process*, specifically demands for public participation and community empowerment, which is seen as the tool to achieve the broad aims of justice.[217]

[217] SCHLOSBERG *supra* note 3, at 75 (emphasis added).

OATH MARTYRS

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ABSTRACT

Taking oaths, or refusing to take them, or being prevented from taking them, or breaking them, have been critical matters, even life and death matters, for centuries. Why do lawyers and others in official proceedings swear oaths? What do oaths mean? Why are there provisions for affirmations rather than swearing? How can long forgotten stories of oath martyrs inform law students and lawyers today?

Part I of this article presents a short slide backwards into the long history of oaths, with emphasis placed on the role of religious belief in oaths. Infidels, the infamous, the indiscreet, the insane, interested parties: all were barred at various points from testifying under oath. As I teach and practice in Minnesota, some extra attention is paid to the evolution of oaths in Minnesota, placed in larger Anglo-American legal context.

Part II steps back to Tudor England to consider the stories of Thomas More (who, while in power, had no scruples about putting down religious dissenters), Thomas Cranmer (who, with a somewhat reluctant zeal, persecuted both Catholic and radical reformer for failure to swear oaths of loyalty), and the Anabaptist refugees from Flanders (persecuted not only for their refusal to take oaths, but also for being presumed to be violent revolutionaries).

Part III concludes with some reflections not only on oaths, promises, and truth, but on the other lessons as well that we can take from these lives: speaking truth to ourselves; speaking truth to one another as professional colleagues; and speaking truth to power.

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CONTENTS

I. INTRODUCTION

The "welcome" fall of the axe. The immolation of an offending hand. An Easter morning worship service interrupted by a police raid.

Taking oaths, or refusing to take them, or being prevented from taking them, or breaking them, have been critical matters, even life and death matters, for centuries. Why do lawyers and others in official proceedings swear oaths? What do oaths mean? Why are there provisions for affirmations rather than swearing? How can long forgotten stories about these issues inform law students and newly minted lawyers today?

The ancient practice of taking oaths retains its power. Most newsworthy are those events implicating not the taking, but rather the breaking, of oaths. Rogers Clemens, former ace pitcher, went on trial in the summer of 2011, accused of perjury when he testified in 2008 before Congress about performance enhancing drugs. The trial

promised to be a morality tale, with Clemens' best buddy and star pitcher Andy Pettitte scheduled to testify against him.[1] Federal prosecutors charged Clemens with one count of obstructing Congress, three counts of making false statements to Congress, and two counts of perjury (lying under oath) to Congress.[2]

Nifassatou Diallo, the hotel maid who accused the former head of the International Monetary Fund Dominique Strauss-Kahn of rape, reportedly lied under penalty of perjury both on her written asylum application and under oath while testifying orally.[3] That incident reignited debate over asylum fraud. A subsequent report in the *New Yorker* magazine involved not only alleged exaggeration and falsehood by an otherwise *bona fide* asylum seeker, but also questionable assistance by the person's attorney, paralegal, and possibly even the journalist covering the story.[4]

But these contemporary stories pale next to those of Thomas More (Catholic saint martyred in 1535 at the chopping block by reformer Henry VIII for his refusal to take one oath in particular), his nemesis Thomas Cranmer (burned at the stake in 1556, by Henry's Catholic daughter Queen Mary in part for taking too many oaths), and a small group of religious refugees vainly seeking safety in England (beaten, deported, or burned in 1575 by Henry's other daughter, the Protestant Queen Elizabeth, for refusing to take any oaths at all). At issue was not so much whether the protagonists were lying, but how their pursuit of truth conflicted with those in power at the time. At the heart of those conflicts were different conceptions of oaths.

Part I of this article presents a short slide backwards into the long history of oaths, with emphasis placed on the role of religious

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[1] Juliet Macur, *Best Friend and Ex-Teammate to Confront Clemens at Trial*, N.Y. TIMES, July 5, 2011.

[2] *The Charges Against Roger Clemens,* N.Y. TIMES, July 5, 2011. The presiding judge declared a mistrial after the prosecutor presented inadmissible evidence to the jury during opening arguments. Juliet Macur, *Clemens Judge Declares Mistrial*, N.Y. TIMES, July 15, 2011. In his 2012 retrial, Clemens was acquitted on all charges. *Roger Clemens Found Not Guilty*, ESPN.COM NEWS SERVICE, http://espn.go.com/mlb/story/_/id/8068819/roger-clemens-found-not-guilty-all-six-counts-perjury-trial.

[3] Jim Dwyer & Michael Wilson, *Strauss-Kahn Accuser's Call Alarmed Prosecutor*, N.Y. TIMES, July 1, 2011; *Letter From District Attorney to Defense in Strauss-Kahn Case*, N.Y. TIMES, July 1, 2011, available at http://www.nytimes.com/interactive/2011/07/01/nyregion/20110701-Strauss-Kahn-letter.html; William K. Rashbaum & John Eligon, *Hotel Housekeeper Sues Strauss-Kahn*, N.Y. TIMES, Aug. 8, 2011, http://www.nytimes.com/2011/08/09/nyregion/nafissatou-diallo-sues-strauss-kahn.html. Both asylum officers and immigration judges have the authority to administer oaths in the asylum application process. 8 C.F.R. § 208.9(c) (2011) ("The asylum officer shall have authority to administer oaths …"); 8 C.F.R. § 1003.34 (2011) ("Testimony of witnesses appearing at the hearing shall be under oath or affirmation.").

[4] Suketu Mehta, *The Asylum Seeker*, THE NEW YORKER, Aug. 1, 2011, at 32 *et seq.*

belief in oaths. Infidels, the infamous, the indiscreet, the insane, interested parties: all were barred at various points from testifying under oath. As I teach and practice in Minnesota, some extra attention is paid to the evolution of oaths in Minnesota, placed in larger Anglo-American legal context.

Part II steps back to Tudor England to consider the stories of Thomas More (who, while in power, had no scruples about putting down religious dissenters), Thomas Cranmer (who, with a somewhat reluctant zeal, persecuted both Catholic and radical reformer for failure to swear oaths of loyalty), and the Anabaptist refugees from Flanders (persecuted not only for their refusal to take oaths, but also for being presumed to be violent revolutionaries).

Part III concludes with some reflections not only on oaths, promises, and truth, but on the other lessons as well that we can take from these lives: speaking truth to ourselves; speaking truth to one another as professional colleagues; and speaking truth to power.

But why even write about oath martyrs? Personal reasons spurred the research: a marble statue of St. Thomas More (the patron saint of lawyers and widowers) stands outside the law school courtroom where we swear in students preparing to work in our legal clinics. Thomas More returned me to Thomas Cranmer (one of More's interrogators), himself later burned as a heretic just steps from where I lived centuries later as a graduate student in Oxford.

Co-religionists of mine had resurrected the memory of the martyred Anabaptist refugees in Britain today. The London Mennonite Centre provided a refuge and home away from home to me as a student. The Centre and the religious community at its core were indirect spiritual descendants. Oath taking permeates my professional life, as immigrants swear on applications, take loyalty oaths, and sign affidavits under penalty of perjury. My multiple identities – Mennonite, lawyer, refugee advocate – thus swirl around the topic.

II. Fast Forward: A Short, Somewhat Personalized History of the Oath from 1295 to 2011

A. Why I Love and Hate the Lawyers' Oath of Office

Each semester, new students in our legal clinic cap off an intensive orientation with a ceremony in our moot court room. We invite distinguished members of the bench or bar to address the students and administer the same oath that the students will take to become members of the Minnesota bar:

> You do swear that you will support the Constitution of the United States and that of the state of Minnesota, and will conduct yourself as an attorney and counselor at law in an upright and courteous manner, to the best of your learning and ability, with all good fidelity as well to the court as to the client, and that you will use no

> falsehood or deceit, nor delay any person's cause for lucre or malice. So help you God.[5]

This provision of Minnesota law has remained virtually unchanged since it original 1863 version.[6] The legislature belatedly changed the phrase "upright, courteous, and gentlemanly" to "upright and courteous" in 1905,[7] as women had been admitted to the bar since 1878. The Minnesota lawyers' oath is not unusual; several other states share very similar language.[8] Minnesota law imposes duties on attorneys as well, which include that "[e]very attorney at law shall observe and carry out the terms of the attorney's oath . . . and . . . employ, for the maintenance of causes confided to the attorney, such means only as are consistent with truth, and never seek to mislead the judges by any artifice or false statement of fact or law."[9]

Our ceremony always stirs deeply mixed emotions for me. The ceremony accomplishes the goals imagined for it by my colleague Neil Hamilton who suggested it a decade ago: it drives home to students the solemnity and seriousness of our work, and impresses upon them that clinic is not merely a course, but the practice of law. As a profession, we enter into a public trust.[10] Outside of the moot courtroom, a marble statue of Thomas

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[5] MINN. STAT. § 358.07(9) (2011).

[6] MINN. GEN STAT. Chap. 72, § 5 (1863), *available at* https://www.revisor.mn.gov/statutes/?id=72&year=1863. It is quite likely that Minnesota's oath is based on the "do no falsehood oath" that has been around since at least the 15th century. JOSIAH HENRY BENTON, THE LAWYER'S OFFICIAL OATH AND OFFICE 28 (1909).

[7] MINN. STAT. § 2679(9) (1905), *available at* https://www.revisor.mn.gov/data/revisor/statute/1905/1905-048.pdf#search="2680." In 1878, Martha Angle Dorsett (1851-1918) became the first female lawyer in Minnesota, after having been denied admission initially in 1877, as state law had prevented women from becoming attorneys. The U.S. Supreme Court had upheld such statutes. Bradwell v. Illinois, 83 U.S. (16. Wall) 130 (1872). Dorsett and her husband lobbied the legislature to change that, and were successful in doing so in 1878. Dorsett was ranked the 23rd most influential lawyer in Minnesota history by Minnesota Lawyer Magazine. Jessica Thompson, *Minnesota's Legal Hall of Fame,* MINN. LAW & POL., undated http://www.lawandpolitics.com/minnesota/Minnesotas-Legal-Hall-of-Fame/9fe5f62c-aded-102a-ab50-000e0c6dcf76.html, visited Mar. 6, 2012; WILLIAM J. WERNZ, MINNESOTA LEGAL ETHICS: A TREATISE 19 (2011). Lena Smith, the first African American woman lawyer in Minnesota, opened her own law practice in 1921, ranked 87 on the list. *Id.* Professor Ann Juergens tell her story in sparkling detail in a 2001 article. Ann Juergens, *Lena Olive Smith: A Minnesota Civil Rights Pioneer*, 28 WM. MITCHELL L. REV. 397 (2001), *available at* http://ssrn.com/abstract=1558025.

[8] *See, e.g.,* Alabama, Ala. Code § 34-3-15 (1975), Delaware, 10 Del. C. § 1907 (2012) Maine – 4 M.R.S. § 806 (2011); Massachusetts - ALM GL ch. 221, § 38 (2012); Oklahoma - 5 Okl. St. § 2 (2012); New Hampshire - RSA 311:6 (2012).

[9] MINN. STAT. § 481.06 (2011).

[10] "Essentially, society and members of a learned profession form a social compact whereby members of a profession agree to restrain self-interest, to promote ideals of public service, and to maintain standards of high performance while the society in return al-

More, martyr and patron saint of lawyers, stands silent witness to the solemnity of oath taking.

Neil regularly attends our event, and as a scholar of the professions, he shares with the students a brief history of the professional oath – that it stretches back to medieval times. Students and scholars in the four great professions of law, medicine, the ministry, and the professoriate regularly were required to renew their oaths to their professions.[11] We invite our students to bring along family and friends, and the moment takes on the feel of a commencement ceremony. We all dress up in our courtroom best. A guest of honor, often a judge in full regalia, shares words of wisdom.[12] Coupled with the reception that follows, the event hopefully provides a meaningful start to the term, and in a very real sense, a start to the students' legal careers. But what does the oath mean? According to commentators:

> It is made up of two elements. The first of these is a promise to perform some act or to tell the truth; and the second of these is a sanction – a divine sanction. For the promise is made in the presence of divinity who will punish intentional falsehood.[13]

And oaths have sometimes been divided into two types:

> An oath is a solemn appeal to a divinity to warrant the truth of a statement or the performance of a promise. This definition reveals two types

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lows the profession substantial autonomy to regulate itself through peer review." Neil Hamilton, *Recalling the Attorney's Oath*, MINN. LAWYER, Dec. 20, 1999, *available at* www.minnlawyer.com.

[11] Hamilton, *supra* note 10. Critics of the practice of medieval oath taking, however, saw the proliferation of oaths as counterproductive:

> In England, especially [oaths] were greatly multiplied, and perjury became frightfully common. Besides the judicial oath, there were oaths of office, oaths of allegiance, military oaths, and custom house oaths. Every petty officer and subordinate must take an oath of some sort, which was forgotten about as soon as pronounced. Even in the universities the students were obliged on entering to take an oath to keep or support all the statutes, privileges and customs of the college. Yet of these statutes and customs . . . they knew or could be expected to know little or nothing. The fact is that many of them were obsolete, and every member violated the oath almost as soon as taken . . . . [O]ne of them required that within the college a student should speak no language but Latin. Yet he spoke English every day.

Benjamin P. Moore, *The Passing of the Oath*, 37 AM. L. REV. 554, 556 (1903). *See also* PETER ACKROYD, THE LIFE OF THOMAS MORE 41 (1998). In the Oxford of Thomas More's day, "only Latin was permitted in conversation" in college life. *Id.* Oaths have certainly become less common today, perhaps restoring a bit of their gravitas.

[12] *See, e.g.*, *Jerry Lane Guest Speaker for the Fall 2010 Swearing In Ceremony,* UNIV. OF ST. THOMAS INTERPROF'L CTR FOR COUNSELING & LEGAL SERVICES (Dec. 30, 2010), http://www.stthomas.edu/ipc/news/Fall2010SwearingInCeremony_JerryLan.html.

[13] Alan & Eleanor Kreider, Schrag Lecture II at Messiah College: *Economical with the Truth: Swearing and Lying – An Anabaptist Perspective* (Mar. 1, 2001), *available at* http://www.anabaptistnetwork.com/files/Economical%20with%20the%20truth%20-%20Alan%20&%20Eleanor%20Kreider.pdf, at 3.

> of oaths: the assertory or testimonial oath, designed to aver the truth of what is said or written; and the promissory oath, such as one which pledges allegiance.[14]

The lawyers' oath hence falls into the second category. And "So Help Me God" is not like a prayer before an exam, but a request for divine punishment. Older definitions of the oath, which allude to the implications of using such language, include "A religious asseveration, by which a person renounces the mercy of heaven if he do not speak the truth," and "A solemn invocation of the vengeance of the Deity upon the witness if he do not declare the whole truth so far as he knows it."[15] A more contemporary definition is simply "a solemn declaration or undertaking (often naming God)."[16]

B. THE "RELIGIOUSLY SCRUPULOUS" AND THE RISE OF THE AFFIRMATION

i. Mennonites and Oaths: or How to Become a Junior Park Ranger While Keeping the Faith

My mixed emotions about the oath stem from my religious tradition, one in which the taking of oaths is forbidden. I come from a long line of religious dissenters – the Anabaptists – for many of whom swearing an oath violates the demands of Jesus found in Matthew 5:33-36: "Do not swear at all . . . . Let your word be 'Yes, Yes' or 'No, No'; anything more than this comes from the evil one." (NRSV).[17] The matter of the oath has

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[14] BRYAN NIBLETT, DARE TO STAND ALONE: THE STORY OF CHARLES BRADLAUGH 152 (2010).

[15] Moore, *supra* note 11, at 555. An asseveration is a solemn declaration. *Asseverate*, OXFORD POCKET AMERICAN DICTIONARY OF CURRENT ENGLISH 41 (2002).

[16] *Oath,* OXFORD POCKET AMERICAN DICTIONARY OF CURRENT ENGLISH 542 (2002).

[17] A recent iteration of this position is found at *Confession of Faith in a Mennonite Perspective (1995) – Article 20. Truth and the Avoidance of Oaths*, MENNONITE CHURCH USA, http://www.mcusa-archives.org/library/resolutions/1995/1995-20.html (last updated Feb. 13, 2003):

> We commit ourselves to tell the truth, to give a simple yes or no, and to avoid swearing of oaths.
>
> Jesus told his disciples not to swear oaths at all, but to let their yes be yes, and their no be no. [1] We believe that this teaching applies to truth telling as well as to avoiding profane language. [2] An oath is often sworn as a guarantee that one is telling the truth. This implies that when one has not taken an oath, one may be less careful about telling the truth. Jesus' followers are always to speak the truth and, in legal matters, simply to affirm that their statements are true.
>
> Jesus also warned against using oaths to try to compel God to guarantee the future. In faith, we commit our futures to God. [3]
>
> Throughout history, human governments have asked citizens to swear oaths of allegiance. As Christians, our first allegiance is to God. [4] In baptism we pledged our loyalty to Christ's community, a commitment that takes precedence over obedience to any other social and political communities.

at times been a matter of life and death – during the Reformation period refusal to swear an oath was seen as a subversive act. Following the spirit and practice of many of my religious forbears, I do not swear oaths in court or in other official proceedings, but rather affirm that I will tell the truth or perform my duties faithfully.[18] Closely akin to the oath are pledges of allegiance and the singing of the national anthem, something I also try to respectfully avoid – "Throughout history, human governments have asked citizens to swear oaths of allegiance. As Christians, our first allegiance is to God."[19]

These issues arise at everyday events, and seem to most people to be as natural as the air we breathe. Dissenting from these practices can provoke bemusement. On a recent family vacation, we toured three spectacular national parks (Grand Canyon, Mesa Verde, Zion), each with wonderful "Junior Ranger" programs.[20] Our elementary age daughter diligently filled out each of the booklets, and then approached Park Rangers in order to claim her badges. Ordinarily, children as young as four are "sworn in" to be Junior Rangers, but when those moments arrived, we politely informed the rangers that we do not swear but that we affirm, and we don't raise our right hands at such moments. The Park Service Rangers invariably accommodated after receiving assurances that she was indeed committed to being a good Junior Ranger.[21]

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[1]Matt. 5:33-37; James 5:12. [2] Eph. 4:15, 29. [3] Matt. 5:34-36. [4] Acts 5:29.

[18] I also endeavor to avoid "all profane oaths," as called for in the Mennonite Confession of Faith, but must confess that the practice of law sometimes prompts the use of expletives. I usually regret and do a form of penance for such inexcusable slips of the tongue – I put donations to Minnesota Justice Foundation in a jar on my desk. But failing to live up to a standard (not cursing) is one thing; celebrating the breaking of a standard (the official swearing of oaths) is another – hence my misgivings about the ceremony:

> We follow the Anabaptist-Mennonite tradition, which has usually applied Jesus' words against taking oaths in these ways: in affirming rather than swearing in courts of law and in other legal matters, in a commitment to unconditional truth telling and to keeping one's word, in avoiding membership in oath-bound or secret societies, in refusing to take oaths of allegiance that would conflict with our ultimate allegiance to God through Christ, and in *avoiding all profane oaths*."

Id. at Commentary 2 to Article 20 (emphasis added).

[19] *Id*.

[20] *See, e.g.*, *Be a Junior Ranger*, GRAND CANYON NATIONAL PARK, *available at* http://www.nps.gov/grca/forkids/beajuniorranger.htm (last visited Mar. 1, 2012).

[21] The so-called "oaths" interestingly do not contain any of the problematic language historically associated with oaths: "I am proud to be a Mesa Verde Junior Ranger. I promise to be a good steward of Mesa Verde National Park and all national parks. I will pick up litter, conserve water and energy, and recycle whenever I can. I also promise to be respectful of other cultures whose way of life may be different from my own." MESA VERDE JUNIOR RANGER BOOKLET, *available at* http://www.nps.gov/meve/forkids/upload/meve_jr_ranger_booklet.pdf (last visited Aug. 14, 2011).

Small scale acts of conscience can be much more provocative, however, when played out on a larger stage or done corporately. Mahmoud Abdul-Rauf, a basketball player with the Denver Nuggets, faced a firestorm of criticism, as well as a suspension by the National Basketball Association, for refusing in 1996 to stand for the national anthem during games because of his Muslim beliefs. His suspension was lifted when he agreed to stand, but was allowed to look downward and pray rather than participate in the singing of the song.[22] More recently, a small Mennonite college in Indiana faced national criticism in 2011 for reviving its custom of not playing the national anthem before sporting events.[23] The action was tagged as Anti-American and unpatriotic by opponents.[24]

The "religiously scrupulous" have been exempted from swearing oaths in Minnesota for as long as the oath statutes have been on the books. The current formulation reads as follows:

> If any person of whom an oath is required shall claim religious scruples against taking the same, the word 'swear' and the words 'so help you God' may be omitted from the foregoing forms, and the word 'affirm' and the words 'and this you do under the penalties of perjury' shall be substituted therefor, respectively, and such person shall be considered, for all purposes, as having been duly sworn.[25]

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[22] Jason Diamos, *Abdul-Rauf Is Calm In Face of Controversy*, N.Y. TIMES, Mar. 21, 1996, *available at,* http://www.nytimes.com/1996/03/21/sports/pro-basketball-abdul-rauf-is-calm-in-face-of-controversy.html.

[23] Press Release, Goshen College, Goshen College Board of Directors Ask for Alternative to Playing the National Anthem, (June 6, 2011), *available at* http://www.goshen.edu/news/pressarchive/06-06-11-anthem620.html; *Goshen College National Anthem Decision Background*, GOSHEN COLLEGE, *available at* http://www.goshen.edu/anthem/background/ (last visited Mar. 1, 2012).

[24] Stephanie Samuel, *Mennonite College Denies Banning National Anthem*, CHRISTIAN POST, June 9, 2011, *available at* http://www.christianpost.com/news/a-mennonite-college-seeks-less-divisive-athem-alternative-51005/; Todd Starnes, *National Anthem Banned at Mennonite College's Sporting Events, Sparking Outcry*, FOX NEWS, June 7, 2011, *available at* http://www.foxnews.com/us/2011/06/07/national-anthem-banned-at-mennonite-colleges-sporting-events-sparking-outcry/. Ironically, the college president initially had allowed the playing of the national anthem in order to be welcoming and hospitable to non-Mennonite minorities at the school. Mark Oppenheimer, *A Pacifist College Considers the National Anthem,* N.Y. TIMES, Sept. 17, 2011, at A15.

[25] MINN. STAT. § 358.08 (2011). See also Minn. R. Civ. P. 43.04 ("Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof."). The original 1863 formulation reads as follows: "In administering any oath, the word " swear" may be omitted and the word " affirm" substituted, whenever the person to whom the obligation is to be administered is religiously scrupulous of swearing or taking an oath in the prescribed form; and in such case the words " so help you God" may be omitted and the words "under the pains and penalties of perjury" substituted, and every person so affirming shall be considered for every legal purpose, privilege, qualification or liability as having been duly sworn." MINN. GEN. STAT., Chap 72, § 6 (1863), *available at* https://www.revisor.mn.gov/statutes/?year=1863.

By the time Minnesota reached statehood in 1858 and revised its code in 1863, the custom of religious exceptions to the oath was fairly well established in the United States. At the time of Declaration of Independence, the American colonies "generally provided for the affirmation of Quakers; some included Dunkers and Mennonites, and a few all persons having religious scruples against swearing."[26] The religious liberties enjoyed in the United States were largely due to the suffering and persistence of English Quakers.

ii. What do Quakers Have to Do with It? How a Religious Minority Established Alternatives to the Oath

> In Christendom you simply couldn't get away from the oath. The oath was omnipresent. . . . Christians swore oaths in law courts to validate truthfulness. They swore oaths in cities; many cities had an annual Swearing Day, when everyone gathered in front of the city hall and swore obedience and loyalty to the urban community and its rulers. They swore oaths in the countryside, where serfs swore loyalty to their masters and vassals swore fealty to their lords. They swore oaths in the marketplace to vouch for the honesty of weights, the fairness of prices and the integrity of contracts. They even swore oaths in the universities, where students upon matriculation swore to obey statutes of the university. . . . Generally speaking it was the less powerful people who were required to swear oaths, apprentices to masters, vassals to lords, townsmen to the town council, students to the professors.[27]

During the Reformation, German theologian Andreas Bodenstein von Karlstadt seems to have been the initial proponent of opposition to oaths in general. He repudiated his own monastic vows, argued against vows of celibacy and extended this reasoning to the swearing of all oaths.[28]

The Quakers (the Society of Friends) are credited with carving out the affirmation exception, both in the United States and the United Kingdom enduring in Britain "the most cruel persecutions and imprisonments rather than violate what they believed to be the plain command of the Master."[29]

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[26] Thomas Raeburn White, *Oaths in Judicial Proceedings and their Effect upon the Competency of Witnesses,* 51 AM. L. REG. 373, 423 (1903) *quoted in* Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America,* 70 OHIO ST. L.J. 1, 39-40 (2009) (inadvertently refers to White as "Tyler").

[27] Alan & Eleanor Kreider, *Economical with the Truth: Swearing And Lying – An Anabaptist Perspective,* Schrag Lecture II, Messiah College, 1 March 2001, *available at* http://www.anabaptistnetwork.com/files/Economical%20with%20the%20truth%20-%20Alan%20&%20Eleanor%20Kreider.pdf (citations omitted).

[28] CALVIN AUGUSTINE PATER, KARLSTADT AS THE FATHER OF THE BAPTIST MOVEMENTS 101-02 (1984); *see* Gerhard Hein & Calvin A. Pater, *Karlstadt, Andreas Rudolff-Bodenstein von (1486-1541), GLOBAL ANABAPTIST MENNONITE ENCYCLOPEDIA ONLINE (*1987), *available at* http://www.gameo.org/encyclopedia/contents/K3759.html.

[29] Moore, *supra* note 11, at 557.

Those struggles took place against the backdrop of centuries of use of the oath in the variety of settings mentioned in the quote above.

In 1682, William Penn had created the Pennsylvania colony and sought to eliminate the swearing of oaths entirely and replace them with affirmations. The British parliament reined Penn in in 1693, by re-establishing the oath in Pennsylvania while continuing to allow for affirmations for Quakers and a few other religious sectarians. Starting in 1688, parliament began creating exceptions for Quakers in England itself, which it extended to a few other sectarian groups in 1696.[30]

Jeremy Bentham, who held the Quakers in high regard, thought that "this exception in favor of Quakers was made because they of all the people in England were recognized to be the most truthful."[31] Another prominent thinker and writer of the times beheld the Quakers both with esteem and distain. While in exile in London from 1726 to 1728, Voltaire encountered members of the sect. One Quaker leader told Voltaire:

> We never swear, not even in court, feeling as we do that the name of the Most High should not be bandied about in the wretched contests of mankind. When it is necessary for us to appear before a magistrate in the affairs of others (for we ourselves do not carry on lawsuits) we affirm the truth with a *yes* or a *no*, and the judges accept our word though so many Christians forswear themselves on the very Gospel.[32]

Why create the exception? The official rationale for the 1695 Act was straightforward: "diverse Dissenters commonly called Quakers refusing to take an Oath in Courts of Justice and other Places are frequently imprisoned and their Estates sequestered by Process of Contempt issuing out of such Courts to the Ruin of themselves and their Families."[33] While allowed to take an affirmation in civil cases, ("I do declare in the Presence of Almighty God the Witnesse of the Truth of what I say"), Quakers were still prevented from giving evidence in criminal cases, serving on juries, or to hold public office.[34] Those restrictions would eventually be lifted.

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[30] Moore, *supra* note 11, at 557-62; Milhizer, *supra* note 26, at 37-40.
[31] White, *supra* note 26, at 421.
[32] Voltaire, PHILOSOPHICAL LETTERS 7(Bobs Merrill Co. 1961, trans. Ernest Dilworth) (1732). Voltaire writes humorously of the same conversation he had with the Quaker over their opposition to baptism. "I took care not to dispute anything he said, for there's no arguing with an Enthusiast. Better not take it into one's head to tell a lover the faults of his mistress, or a litigant of the weakness of his cause – or to talk sense to a fanatic." *Id.*, at 5. According to a translator's note, Voltaire later identifies the Quaker as Andrew Pitt. Pitt took some exception to the Voltaire's sometime biting account of their conversations, and "assured Voltaire that God was offended at the fun made of the Quakers." *Id*., at 3.
[33] *An Act that the Solemne Affirmation and Declaration of the People called Quakers shall be accepted instead of an Oath in the usual Forme*, 7 STAT. OF THE REALM 152 7 & 8 Gul. III c. 34 *(1695-1701)*, *available at* http://www.british-history.ac.uk/report.aspx?compid=46841 (1695-96) (Old English spellings revised).
[34] *Id*.

Another rationale was that the numbers of Quakers and other sectarians had risen to such a level that excluding them from jury service, being witnesses and commercial dealings requiring oaths was too costly to society.[35]

C. *MINNESOTA'S OATH FROM 1863 TO THE FLYING FRISBEE REFORMS OF 1905: INFIDELS AND ATHEISTS WELCOME IN COURT*

> If the witness be an infidel, or infamous, or of non-sane memory, or not of discretion, or a party interested, or the like, he can be no good witness.[36]

Those words, in a 1628 treatise by the renowned jurist Sir Edward Coke, memorialized principles that he believed had long held sway in English common law. The "infamous" comprised criminal convicts;[37] the "indiscreet" were children (i.e. incapable of discerning between good and evil);[38] the insane were those incapable of testifying for presumably obvious reasons, and interested parties were presumed to be incapable of telling the truth. But of most interest to me are the role of religious belief in oaths and the historical restrictions on the "infidel" taking oaths.

Until quite recently, the word "infidel" had fallen out of common use. With the rise of militant Islam and the reaction to terrorism, the word has made a resurgence.[39] The word has Latin roots, meaning and lack of *fides*, or faith. It has taken on multiple meanings, ranging from no belief in a

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[35] Moore, *supra* note 11, at 557.

[36] THOMAS COVENTRY, A READABLE EDITION OF COKE UPON LITTLETON lxiii (1830), *available at* http://books.google.com/ (last visited Mar. 4, 2012).

[37] In 1913, "infamy" was defined in Webster's as "[b]randed with infamy by conviction of a crime; as, at common law, an infamous person cannot be a witness." *Infamy,* ONLINE DICTIONARY, http://onlinedictionary.datasegment.com/word/infamous (last visited Mar. 4, 2012).

[38] "Discretion" was primarily defined in 1856 in Bouvier's as "the ability to know and distinguish between good and evil; between what is lawful and what is unlawful." The secondary legal definition struggled with an issue that remains with us today – when are children to be held accountable?:

> The age at which children are said to have discretion, is not very accurately ascertained. Under seven years, it seems that no circumstances of mischievous discretion can be admitted to overthrow the strong presumption of innocence, which is raised by an age so tender. 1 Hale, P. C. 27, 8; 4 Bl. Coin. 23. Between the ages of seven and fourteen, the infant is, prima facie, destitute of criminal design, but this presumption diminishes as the age increases, and even during this interval of youth, may be repelled by positive evidence of vicious intention; for tenderness of years will not excuse a maturity in crime, the maxim in these cases being, ***malitia supplet aetatem.*** At fourteen, children are said to have acquired legal discretion. 1 Hale, P. C. 25.

JOHN BOUVIER, A LAW DICTIONARY 474 (6th ed. 2004, 2d prtg. 2006) (1856), available at http://books.google.com, (last visited Mar. 4, 2012).

[39] The Somali-Dutch atheist feminist Ayann Hirsi Ali's 2007 book INFIDEL is a prominent example.

God or gods at all, to simply not believing in God the way a particular faith tradition does. Christians and Muslims appear to be the main religious groups that have used or still use the word.[40]

A seminal British case in 1744 grappled with these questions, repudiating some but not all of Sir Edward Coke's conclusions. Belief in just about any god would do, but in what we would now call dicta, the court opined that utter lack of faith would prohibit taking an oath and thus giving testimony.[41]

Just over a hundred years later, Minnesota lawmakers took the step of providing for alternatives to the oath for atheists and infidels. The statute has gone through interesting permutations since statehood in 1863. From 1863 until 1905, "an infidel, or any person not a believer in any religion" called as a witness in a case, were allowed to take an alternative promise and declaration rather than an oath. It is not entirely clear from the sentence structure whether "infidels" and "persons not believers in any religion" were considered two distinct categories, or one in the same, but the effect was the same – they both could testify.

> The last formulation of the provision appeared in 1894:
>
> § 5643. Form of oath in case of infidels, etc.
>
> When an infidel, or any person not a believer in any religion, is offered as a witness, the following form of oath shall be used: You do honestly and sincerely promise and declare that the testimony you shall give relative to the cause now under consideration shall be the whole truth and nothing but the truth, and this under the pains and penalties of perjury; and any person so promising and declaring shall be considered as having been duly sworn.[42]

The Minnesota legislature completely revised the code in 1905 and eliminated that provision entirely.[43] Sorting out precisely why the legislature eliminated that section of the law is difficult to determine,[44] as the wholesale recodification effort resulted in a massive number of amend-

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[40] *Infidel*, DICTIONARY.COM, http://dictionary.reference.com/browse/infidel (last visited Aug. 19, 2011).
[41] Omychund v. Barker, (1744) 26 Eng. Rep. 15 (Ct. Ch.); 1 Atkyns 21.
[42] MINN. STAT. § 5643 (1894), *available at* https://www.revisor.mn.gov/statutes/?id=72&year=1894.
[43] Chapter 48 of the 1905 Minnesota Statutes has sections on oaths (§ 2679) and an affirmation in lieu of oath (§ 2680). In prior codifications of the Minnesota statute, a section on infidels had followed. It vanishes in the 1905. MINN. STAT. ch. 48 (1905), *available at* https://www.revisor.mn.gov/statutes/?id=48&year=1905.
[44] REV. L. OF MINN., ch. 108, Express Repeal of Existing Laws (1905), *available at* https://www.revisor.mn.gov/statutes/?id=108&year=1905.

ments, often with little debate but not without controversy.[45] Opponents decried its rapid passage. One senator claimed:

> You're attempting to pass laws that not a member of this senate knows anything about—a bill plastered with conflicting amendments of the house and the senate judiciary committee. Why do you want to pass this code so precipitately? It took the German empire twenty years to build a code, the Napoleonic code was fifteen years in preparation. Yet you must pass a code in two days.[46]

The tension over the code revision and other weighty matters must have been great that year. On the last day of the session, the people's representatives "celebrated" by staging a near riot:

> The staid and dignified senate frisked and gamboled a little, tossing a few bill files here and there with feminine awkwardness. The house went the limit and two members thereof will take home scars to show to their constituents.[47]

House staff had removed inkwells, name plates, and paste pots from all the desks, having caught wind of the potential levity to come. They had failed, however, to remove the 18 inch circular rubber mats at each desk, "capable of being hurled through the air like a discus."[48] The air grew thick with the black mats, the injured took refuge in the smoking rooms, and even women enjoying the scene from the gallery became targets for the proto-frisbees.[49] But we digress.

Eliminating the "infidel provision" might lead one to assume that the legislature intended to eliminate the exception, but just the opposite resulted. While case law is slim, the Minnesota Supreme Court in 1926 addressed a related provision of law that was also eliminated by the 1905 statute. Peterson, a criminal defendant, claimed reversible error because the trial court excluded evidence about a particular prosecution witness. The witness evidently had sworn to the normal oath, which at the time included (as it still does today) the phrase "So help me God." The defendant wished to impugn the prosecution witness by providing evidence that the "witness did not believe in our form of government, advocated its destruction and the substitution of a Soviet republic, believed our courts did not properly administer justice, and did not believe in God."[50]

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[45] *Lawmakers on their Final Lap*, ST. PAUL GLOBE, April 17, 1905, at 1, 10. The judiciary committee chair introduced the massive recodification bill (HF 43) on January 20, 1905. *Senate Amends and Passes the Code*, ST. PAUL GLOBE, April 8, 1905, at 10.
[46] *Senate Amends and Passes the Code*, *supra* note 45.
[47] *Horse Play Marks Close of Session,* ST. PAUL GLOBE, April 18, 1905, at 1.
[48] *Id.* at 10.
[49] *Id.*
[50] State v. Peterson, 167 Minn. 216, 222 (1926).

The defendant reached all the way back to invoke Coke's evidentiary maxim that only believers in God could take the oath.[51] The Minnesota Supreme Court upheld excluding evidence about the witnesses religious beliefs (or lack thereof) on three grounds. First, it found that in most U.S. states, "no religious opinion [was] required to render a witness competent." Second, it observed that the Minnesota Constitution "reflecting a spirit of toleration," stated that "Nor shall any person be rendered incompetent to give evidence in any court of law or equity in consequence of his opinion upon the subject of religion."[52] Finally, it cited the repeal of section 5658 of the Minnesota statutes, which had stated in relevant part that that persons shall not be excluded as witnesses "on account of their religious opinions or belief, although in every case the credibility of the witness may be drawn in question."[53] The court concluded:

> It would seem, therefore, that the belief of the witness in reference to God is no longer a subject which in this state affects his credibility, and under the Constitution he is competent as a witness. Our statutes authorize a method of having the witness sworn in accordance with the peculiar ceremonies of his religion, if there are any (section 9818, G. S. 1923); and, where a witness takes the usual oath without objection, he must be recognized as a competent witness to give testimony in our courts.[54]

The original purpose of that portion of section 5658[55] appears to have been to allow testimony by witnesses that had historically been prevented from doing so (such as people with criminal convictions, parties with an interest in the litigation at hand, and people formerly excluded for their lack of orthodox religious belief). The phrase "although in every case the credibility of the witness may be drawn in question" may have been inserted nonetheless to allow impeachment on those very grounds.[56] The Peterson court assumes the deletion of the statute was meant to eliminate the

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[51] *Id.* at 222. It's interesting that counsel argued only that a belief in God was needed, not that the belief needed to be Christian in nature, as Coke had done. *Id.*

[52] *Id.* at 222. Article 1, §17 still reads the same as it did in 1926. MINN. CONST. Art. 1, §17, *available at* https://www.revisor.mn.gov/constitution/#article_1 (last visited July 27, 2011).

[53] Peterson, 167 Minn. at 222-23.

[54] Peterson, 167 Minn.at 223. Section 9818 has been supplanted by MINN. STAT. § 595.06 (2011), which still reads in relevant part: "[T]he court may inquire of any person what peculiar ceremonies the person deems most obligatory in taking an oath."

[55] It read, more fully, as follows: "All persons, except as hereinafter provided, having the power and faculty to perceive, and make known their perceptions to others, may be witnesses; neither parties nor other persons who have an interest in the event of an action are excluded, nor those who have been convicted of crime, nor persons on account of their religious opinions or belief; although, in every case, the credibility of the witnesses may be drawn in question . . ." MINN. STAT. § 5658 (1894), *available at* https://www.revisor.mn.gov/statutes/?id=73&year=1894.

[56] White lists Minnesota as one of 15 states at the time expressly allowing credibility to be attacked by unbelief or atheism. White, *Oaths in Judicial Proceedings*, *supra* note 26, at 412.

opportunity for impeachment on grounds of belief – that such a provision was no longer needed or wanted.

That rationale can easily be extended to the elimination of § 5643, the section addressing the "form of oath in case of infidels, etc." – the state had progressed so far beyond such distinctions that they no longer needed to be explicitly stated.

III. TAKING A STEP BACK: OATH MARTYRS IN TUDOR ENGLAND

Thomas More, an unashamed Catholic, lost his head in 1535 to Henry VIII for refusing to swear an oath placing the King above the Church. Thomas Cranmer, the Archbishop of Canterbury who had provided the legal framework for Henry VIII's annulment of his marriage from Catherine of Aragon, bravely faced a fiery death at the stake in 1556 as a Protestant under the Catholic Queen Mary. In 1575, Protestant Queen Elizabeth sanctioned the immolation of Flemish Anabaptists Hendrik Terwoodt and Jan Pieters for, among other things, refusing to swear oaths of allegiance. Oaths played a role in all of their deaths. They have become celebrated martyrs by their respective faith communities.

A. THE UBIQUITOUS NATURE OF OATHS IN LATE MEDIEVAL EUROPE

Tudor England, and late medieval Europe, also provides fertile ground for considering oaths:

> [F]or early modern Europeans, oaths defined and legitimated the relationships between governing authorities and their constituents or subjects, regulated the relationships between fellow citizens and fellow peasants, and served as the glue that held both urban and rural sociopolitical structures in place. The existence of a community without an oath was unthinkable. Thus the refusal of the oath seemed like a repudiation of society. It invited . . . charges of anarchy and insurrection, and virtually guaranteed persecution.[57]

As mentioned above, oaths undergirded virtually every aspect of society – in rural areas, in university, in pledging fealty to lords and kings, in commercial settings, as well as in the courts. Oaths were a form of social ordering and social control.[58] To mess with the oath was to mess with power.

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[57] Edmund Pries, *Oath Refusal in Zurich from 1525-27: The Erratic Emergence of Anabaptist Practice*, *in* ANABAPTISM REVISITED 61 (Walter Klaassen ed., 1992).
[58] Krieder & Krieder, *supra* note 27, and accompanying text.

B. *Anabaptists and Social Upheaval during the Early Reformation Era*

Most have heard of Catholic and Protestants, but who were the Flemish (i.e., Dutch) Anabaptists? An Anabaptist was "a member of a 16th-century Protestant movement promoting the doctrine of adult baptism on the grounds that only adults can accept and declare their faith on their own behalf." The word Anabaptist means "re-baptizer"[59] and originally was used as a hostile epithet. Indeed, re-baptism under the Justinianic Code of 529 A.D. was punishable by death, a sentence which some Reformation era local jurisdictions implemented with some zeal.[60]

While the religious descendants of the original Anabaptists (the Mennonites and the Quakers) are recognized as pacifist, some armed revolutionaries in the Reformation era were tagged as Anabaptists. Indeed, the Catholic Encyclopedia online still opens its entry on the Anabaptists as a "violent and extremely radical body of ecclesiastico-civil reformers which first made its appearance in 1521 at Zwickau, in the present kingdom of Saxony, and still exists in milder forms."[61]

Most historians, however, place the beginnings of the Anabaptist movements in 1525,[62] *after* the Peasant Revolt in Germany of 1524-25.[63] While it was not a unified movement, George Hunston Williams grouped it among the Radical Reformers, in contrast to Roman Catholicism and the Magisterial (Protestant) reformers.[64] While useful to make sense of a tumultuous era, the three part division (Catholic, Protestant, and Anabaptist) masks considerable diversity within each.

According to the Oxford Dictionary of British History, radical Anabaptist groups like those at Münster from 1533-35 "served to smear the whole movement and 'anabaptist' became a term of abuse. Henry VIII thought them 'a detestable sect' and burned a number."[65] Radical Anabaptists did claim historical center stage during the Münster uprising:

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[59] Greek *ana* means "again," and *baptizo*, "baptize;" hence "rebaptizers." Nicholas Weber, *Anabaptists,* CATHOLIC ENCYCLOPEDIA, vol. 1 (1907), *available at* http://www.newadvent.org/cathen/01445b.htm (last visited July 14, 2011).

[60] Harold S. Bender, Robert Friedmann & Walter Klaassen, *Anabaptism*, GLOBAL ANABAPTIST MENNONITE ENCYCLOPEDIA ONLINE (1990), *available at* http://www.gameo.org/encyclopedia/contents/A533ME.html.

[61] Weber, *supra* note 59.

[62] Bender, Friedmann & Klaasen, *supra* note 60.

[63] Harold S. Bender & James M. Stayer, *Peasants' War, 1524-1525*, GLOBAL ANABAPTIST MENNONITE ENCYCLOPEDIA ONLINE (1987), *available at* http://www.gameo.org/encyclopedia/contents/P44.html.

[64] G.H. WILLIAMS, THE RADICAL REFORMATION (1962).

[65] A DICTIONARY OF BRITISH HISTORY (John Cannon, ed., 2009). Oxford Reference Online, *available at* http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t43.e116 (last visited Aug. 15, 2011).

> Anabaptist governments ruled Münster, the major city of Westphalia, [Germany] for 16 months from February 1534 to June 1535, under continuous siege by the bishop of Münster, who received military assistance from both Catholic and Lutheran rulers. During the siege the Anabaptists instituted a harsh internal regime based on community of goods and polygamy, and attempted with some limited success to win military assistance from Anabaptists in Westphalia and the Netherlands.[66]

Early in the takeover of the city, Münster became a refuge to which persecuted Anabaptists flocked for protection. But fanatical leaders seized control of the movement and brutally crushed any internal opposition. Many of the more moderate leaders escaped the city. The combined Catholic and Lutheran siege succeeded when a traitor allowed the bishop's army into the city. Nearly all males were killed. The three central leaders were tortured, displayed throughout the country, and executed in January 1536. Their executioners displayed their bodies in cages hanging from the tower of St. Lambert's Church in Münster.[67] The cages hang there still.[68]

Out of the wreckage of revolutionary tumult emerged a pacifist, nonresistant Anabaptism led by Menno Simons and others. The taint of subversion and treason nonetheless was to follow Anabaptists virtually everywhere they went. Against this backdrop of suspicion, subversion, and religious and social upheaval, our protagonists (More, Cranmer, and the Flemish Refugees) faced oaths from very different perspectives.

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[66] Cornelius Krahn, Nanne van der Zijpp & James M. Stayer, *Munster Anabaptists*, GLOBAL ANABAPTIST MENNONITE ENCYCLOPEDIA ONLINE (1987), *available at* http://www.gameo.org/encyclopedia/contents/M850.html. The occupation of Münster came ten years after the Peasants' Revolt of 1525. While often attributed to the Anabaptists, that war actually predated the formation of Anabaptism. *See* Bender & Stayer, *supra* note 60. Historian Horst Buszello provides a detailed account:

> The Peasants' War was a social revolution in Germany which, though preceded by a 100-year history of tension and occasional outbreaks, broke out in full bloody revolutionary form in June 1524, and was relatively suppressed by May 1525 . . . . Hubmaier has been blamed as the originator, and as the author of the Twelve Articles (October 1524) of the peasants, but both charges have been disproved by sound scholarship. The Anabaptists were nowhere implicated; in fact the origin of Anabaptism in 1525 at Zürich came months after the war began. Some of the disillusioned participants (Melchior Rinck) and fellow travelers (Hans Hut) later joined the Anabaptists (1526-1527) . . . the vicious attacks on the revolutionaries by Luther in which he strongly took the side of the nobles, led to the turning away of the mass of the peasantry from the Reformation. In this disillusioned mass it would be probable that some turned to Anabaptism, which was already critical of Luther and the state church system, and whose offer of the free church with local lay leadership would certainly find sympathy among the peasants.

Horst Buszello, *Peasants' War, 1524-1525*, GLOBAL ANABAPTIST MENNONITE ENCYCLOPEDIA ONLINE (1959), http://www.gameo.org/encyclopedia/contents/P44.html.

[67] Krahn et. al., *supra* note 66.

[68] *St. Lambert's Church, Münster (GER), available at* http://www.panoramio.com/photo/12217228 (last visited Aug. 16, 2011).

C. THE CATHOLIC THOMAS MORE (D. 1535): RESISTING THE BLAST OF MEN'S MOUTHS

"*The King's good servant, but God's first.*"

Perhaps the quintessential "Conscientious Objector," Thomas More refused to swear the oath of succession acknowledging the lawfulness of Henry VIII's marriage to Anne Boleyn and abjuring allegiance to the Pope. This omission led to his execution and his famous last words.

i. More's Minneapolis Marble – A Higher Purpose

A rather imposing statue of St. Thomas More stands watch outside of our moot courtroom. The University of St. Thomas law school, reopened in 2001 after an ill-fated first effort during the depression, is a self-consciously faith-based and Catholic institution "dedicated to integrating faith and reason in the search for truth through a focus on morality and social justice."[69]

The law school's founders expended considerable expense on visible expressions of faith, including the More marble.[70] The crane intended to lower the statue in place could not fit into the intended alcove, leading to a day of creative maneuvering by the movers to get the statue into place. Thomas More does not go where Thomas More does not want to go. Now nearly a decade on, mythology has already built up around the statue – students rub Thomas' right foot as good luck prior to taking exams.[71]

In their concern over exams, students perhaps overlook what lies at More's left foot. It is his gold chain of livery, the Collar of Esses with the Tudor Rose, a symbol of devotion to the King's service. The collar appears in the most famous portrait of More, that by Hans Holbein, done in 1527 as More reached the height of his influence and power.[72]

When More in April 1534 was sent to the Tower of London, he refused to give the collar over to his family for safekeeping, quipping that "For if I were taken in the field by my enemies, I would they should somewhat fare the better by me."[73] While Irrera's sculpture portrays More at his sartorial heights (rather than as the unshaven and unshorn prisoner

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[69] Univ. of St. Thomas Sch. of L. Mission Statement, *available at* http://www.stthomas.edu/law/about/mission/default.html (last visited Aug. 20, 2011).
[70] The Center for Thomas More Studies, http://thomasmorestudies.org/g-c6.html (last visited July 21, 2011). The statute was sculpted by Leo Irrera. According to conversations I have had with colleagues who viewed its installation, workers ensconced the 2004 marble statue of More in the law school atrium with some difficulty.
[71] That myth is featured in the virtual tour of the law school, UST Law School website, http://www.stthomas.edu/law/admissions/visit/default.html (last visited July 20, 2011).
[72] Holbein, Hans the Younger, *Sir Thomas More* (1527), WEB GALLERY OF ART, http://www.wga.hu/frames-e.html?/html/h/holbein/hans_y/1528/4more.html (last visited Mar. 4, 2012).
[73] William Roper, *The Life of Thomas More*, *in* TWO EARLY TUDOR LIVES 239 (Richard Sylvester & Davis Harding eds., 1962), *quoted in* ACKROYD, *supra* note 11, at 365.

facing execution), the sculptor clearly alludes to the moment when More abandons devotion to secular power and looks heavenward – More has removed the livery chain while he fingers with his right hand a crucifix hanging around his neck.

Also at his feet lie copies of several of his most well-known works – including *Utopia* (in which he reflected on the challenges, rewards and temptations of public service) and *De Tristitia Christi* ("The Sadness of Christ") – composed in the last months of his life while incarcerated in the Tower of London.[74]

More's characteristics – truth telling wielder of state power as well as victim of it – combined with his marble presence outside our moot court room where all of the swearing takes place, made him a prime candidate for study for me.

ii. Conscience and Reflection: The Foundations of More's Fortitude

More has been called the patron saint of lawyers for his fidelity to the truth no matter the cost.[75] Sitting on my desk is a shortened version of the supplication St. Thomas reportedly prayed as a lawyer, given me as a gift while in law school. A slightly different rendition, which I favor a bit more than the one on my desk, begins as follows:

> Give me the grace good Lord,
>
> to set the world at naught;
>
> to set my mind fast upon Thee
>
> and not to hang upon the blast of men's mouths.[76]

The ability to withstand the blast does not come overnight. While best known for his refusal to take the oath, the strength to take such a stand came in part from his personal piety and commitment to regular prayer and reflection. In his home in Chelsea, More built a library and chapel. According to Ackroyd, he required a chapel "to fulfill the injunction of Thomas à Kempis that 'if thou desirest true contrition of heart, enter thy secret chamber and shut out the tumults of the world.'"[77] It was there that "More scourged himself with a leather thong."[78] Perhaps a bit much for the modern ear, but the man took self-reflection seriously. While he was imprisoned in the Tower of London, awaiting his trial and inevitable exe-

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[74] ACKROYD, *supra* note 11, at 380-82.
[75] *Saint Thomas More*, SQPN, http://saints.sqpn.com/saint-thomas-more/ (Aug. 13, 2010). He's also, *inter alia*, the patron saint of adopted children, civil servants, court clerks, difficult marriages, large families, politicians, widowers, and step-parents. *Id.*
[76] The full prayer is available at *A Prayer of St. Thomas*, http://www.stthomasmoresociety.com/faith.php#prayerof (last visited Aug. 16, 2011).
[77] ACKROYD, *supra* note 11, at 254.
[78] *Id.*

cution, More wrote in 1534 one his most enduring works, the *Dialogue of Comfort against Tribulation*. An oft quoted passage emphasizes the need for self-reflection, and even penance, in order to fulfill one's calling in life:

> Let him also choose himself some secret solitary place in his own house, as far from noise and company as he conveniently can, and thither let him sometime secretly resort alone, imagining himself as one going out of the world, even straight unto the giving up of his reckoning unto God of his sinful living. . . . There let him beseech God of his gracious aid and help, to strength his infirmity withal, both in keeping him from falling, and when he by his own fault misfortuneth to fall, then with the helping hand of his merciful grace to lift him up and set him on his feet in the state of his grace again.[79]

iii. More's Use of the Oath to Prosecute Heretics

My meditative life pales next to More's, and there is much to commend is his spiritual discipline. But to me, a descendant of religious dissidents, More also gives me the jitters due to his rather stern approach to "heretics" when he held the reins of state power.[80] I have not found instances in which More directly persecuted Anabaptists, who reportedly had arrived from Holland in 1532, around the time More stepped down as Lord Chancellor.[81] More' continental friend Erasmus, however, did write to More about the spread of Anabaptism already in 1528. More saw Anabaptism as intrinsic to the Reformation, and wrote to an opponent of Luther that "[t]he past centuries have not seen anything more monstrous than the Anabaptists, or more numerous than such baneful curses."[82]

More vigorously did pursue other religious dissenters ("our evangelycall Englysshe heretykes"), and burnings occurred under his watch and with his approval. From January 1530 until he resigned as Lord Chancellor in the spring of 1532, More imprisoned heretics in his own house, established networks of spies, participated personally in the detailed interrogation of suspects in the Star Chamber and worked to disrupt the community of "new men" in Antwerp and staunch the flow of heretical books into the country.[83]

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[79] Joseph W. Koterski, *Preface* to ST. THOMAS MORE: SELECTED WRITINGS xii (John F. Thornton & Susan B. Varenne, eds., Vintage Spiritual Classics ed. 2003), *citing to* A DIALOGUE OF COMFORT AGAINST TRIBULATION, Bk. II, ch. 16, *in* COMPLETE WORKS OF THOMAS MORE, vol. 12, 164-65 (Louis Martz & Frank Manley eds., 1976).

[80] "[More] epitomized, in modern terms, the apparatus of a state using its powers to crush those attempting to subvert it. His opponents were genuinely following their consciences, while More considered them the harbinger of the devil's reign on earth." ACKROYD, *supra* note 11, at 302.

[81] Irvin B. Horst, Harold S. Bender & Alan Kreider, *England,* GLOBAL ANABAPTIST MENNONITE ENCYCLOPEDIA ONLINE (2011) http://www.gameo.org/encyclopedia/contents/E565.html.

[82] IRVIN HORST, THE RADICAL BRETHREN: ANABAPTISM AND THE ENGLISH REFORMATION 40 (1972).

[83] *See generally* ACKROYD, *supra* note 11, at 277-307.

While Peter Ackroyd, the noted More biographer, argues that accounts of More directing the beating and torturing heretics are overblown,[84] as Lord Chancellor he did campaign against the so-called "new men" and their "seditious dogma" (even as King Henry himself was reportedly reading heretical texts). More "derived a certain satisfaction" at the fate of the burning of the first heretical priest, whose "spiryte of errour and lyenge" had taken the priest's soul "strayte from the short fyre to ye fyre euerlastyng."[85]

Ackroyd recounts More's approval of burning as the method of punishment of heretics ("in that respect [he] was no different from most of his contemporaries"), tracing its use in England as far back as 1210. Ackroyd details the burnings of five people under More's watch, including that of James Bainham, a lawyer and member of the Middle Temple. At that time, lawyers had become "vociferous opponents of clerical power." After extensive interrogation, including disputed reports of being placed on the rack and flogged, Bainham the "iangler" (or "empty talker") confessed to possession of heretical books. He recanted, was released, but "relapsed into heresy" and was burned at the stake in Smithfield. Among his last words: "I come hither, good people, accused and condemned for a heretic, Sir Thomas More being my accuser and my judge. . . the Lord forgive Sir Thomas More, and pray for me, all good people."[86]

One particular interrogation session in 1530 reveals not only More's skill as an investigator and prosecutor, but also his attitude towards the oath. More's informants had fingered a merchant named Richard Webb. More catches Webb in one lie, and Webb "pytuously prayed me forgyue hym that one lye."[87] The interrogation continued.

> *Richard Webb*. In good faith sir, there is not in all mine answers any one thing untrue but that.
>
> *Thomas More*. Well, Webb, in faith if that be true, then will I wink at this one and let it go for none.
>
> *Richard Webb*. I would not be so mad to say as I do, and forsake your favour so foolishly.
>
> *Thomas More*. Well, when saw you Robert Necton?
>
> *Richard Webb*. Now by my soul, sir, as I have showed your lordship upon my oath, I saw him not this half year to my remembrance.
>
> *Thomas More*. Was yesterday half a year ago? And were you not with him at saint Catherine's? Are you not now shamefully foresworn?[88]

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[84] ACKROYD, *supra* note 11, at 298.
[85] *Id.* at 299-301 (citations omitted).
[86] *Id.* at 306-07 (citations omitted).
[87] *Id.* at 301-02.
[88] *Id.*

To "foreswear," in that context, was to commit perjury.[89] More clearly lets one instance of perjury go in order to catch Webb in another lie. As Lord Chancellor, More "was permitted to apply equity and moral judgment to the strict application of the law," [90] in other words, to allow one offense in the interest of justice. But he uses the breaking of the oath to heap an eternal punishment on top of temporal ones.

As mentioned above, oaths in medieval Europe were often imposed on the less powerful. A decree by the Star Chamber in 1529 targeted "deceitful" immigrants, "An Exemplificacon of a Decre made in the Sterre Chamber conceringe Straungers Handye craftsmen inhitinge this Realm of Englond."[91] On being appointed by the King as Lord Chancellor in November 1529, More presided over the Chancery and the Star Chamber.[92] Even before being elevated to Lord Chancellor, More had served on the Council of the Star Chamber beginning in 1516.[93] Thus, he was likely sitting on the Star Chamber when, in February 1529, parliament passed a law ratifying the decree.[94] The inhabiting strangers in question were foreigners – and the decree sought to control where they could gather, how they could operate businesses, how many foreigners they themselves could employ, and to tax them. The decree required foreigners to:

> Present themselves in the Comon Halle or metyng place of the said craftes, and there to receive and take their othe [oath] and be sworne upon the Holy Evangelyst [the Bible] before the Mayster and Wardeyns of their said crafts, to be faythfull and trewe to the Kyng our Soveraigne Lorde and his heires Kynges of England and to be obedient to hym and them and his and their Lawes.[95]

The nativist impulses resurgent in today's political environment are certainly nothing new. The rationale for the action was to restrain the:

> excessyve nombre and unresonable behavour of the same straungers artificers [foreign craftsmen] . . . whiche contynuall resort and repayre in to this oure said Realme dayly increased, to the great detriment of our own natural Subjectes Artificers [native craftsmen], . . . by occasion that dyvers of the said Subjectes for lacke of occupation fall unto ydleness, and also for the reformacion of sondry dysceytes and falshodes practysed by the straungers artyficers in ther said handycraftes to the great damage and losse of us and of all our said natural Subjectes.[96]

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[89] *Forswear,* THE FREE DICTIONARY, http://www.thefreedictionary.com/forsworn (last visited Aug. 16, 2011).
[90] ACKROYD, *supra* note 11, at 294.
[91] 3 STAT. OF THE REALM 298, 21 Hen. VIII. c. 16 (1529) (*available at* HeinOnline).
[92] ACKROYD, *supra* note 11, at 294.
[93] *Id.* at 182.
[94] An Acte ratefyinge a Decree made in the Sterre Chamber concerninge Straungs Handicraftsmen inhitinge the Realme of Englonde, 3 STAT. OF THE REALM 297, 21 Hen. VIII. c. 16 (1529) (*available at* HeinOnline).
[95] *Id.*
[96] *Id.* at 298.

Not only did the foreigners illegally trade in bacon, cheese, powdered beefs, and mutton, but they presumably salted their wealth away back to their homelands, and funneled funds into the hands of the Realm's enemies. They allegedly caused the deaths of native subjects of the realm, who, falling into unemployment, resorted to theft and murder and "consequently in great nombres be put to deth." Wow. The foreigners also ate way too much corn,[97] leading ostensibly to great hunger among the native born subjects. Failure to take loyalty oaths carried dire consequences.

iv. More's Refusal of the Oath

We know well, however, that the powerful could also be caught up by oaths. More resigned from his post as Lord Chancellor in May 1532. Even as he took office in late 1529, it was broadly known that More did not support the King in his "great matter," i.e., the annulment of his marriage to Catherine of Aragon. A bevy of scholars, including Thomas Cranmer, marshaled documents and opinions in support of the monarch's position.[98] Henry VIII also began gathering evidence and arguments to support his growing belief that he, rather than the pope, was the head of the Church of England.[99] In early 1532, anti-clerical legislation passed the House of Commons under direct personal pressure from the King. By May 1532, Henry displayed to members of parliament the oath the prelates made to Pope at the time of their consecration, and accused them of being half-subjects at best. The King demanded the submission of the clergy and that all ecclesiastical law receive royal assent. The efforts of More and others to stand against the reforms had failed, and More resigned.[100]

While More left public office, he did not retire entirely from public engagement. His refusal to attend the coronation of Anne Boleyn in 1533 angered the King, and he continued to write prolific tracts in defense of the Catholic Church in response to attacks by the King's polemicists[101]

In February of 1534, Henry VIII's principal minister Thomas Cromwell summoned More for an informal conversation, ostensibly about More's relationship with Elizabeth Barton, the nun executed only months earlier for treason. In reality, it was as much about More's opinions on the King's "great matter" and papal supremacy. Cromwell had been tasked with either convincing More to accept Henry's supremacy over the church, or gathering sufficient evidence of More's disloyalty. More cleverly pointed Cromwell to Henry VIII's own earlier defense of papal supremacy (the 1521 treatise *Assertio Septem Sacramentorum*) as the book that convinced More of papal supremacy.[102]

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[97] *Id.* at 299.
[98] ACKROYD, *supra* note 11, at 314.
[99] *See id.* at 315-23.
[100] *Id.* at 326-29.
[101] *See, e.g., id.* at 332, 347-49.
[102] *Id.* at 349-52.

Robert Bolt's characterization of the encounter in "A Man For All Seasons" is no doubt highly fictionalized, but it underscores the dichotomy between day-to-day speech and speech under oath, a dichotomy implicit in the oath which Anabaptists would reject. The dialogue picks up as More has mentioned the King's book:

> *Cromwell.* The book published under the King's name would be more accurate. You wrote that book.
>
> *More.* I wrote no part of it.
>
> *Cromwell.* I do not mean you actually held the pen.
>
> *More.* I merely answered to the best of my ability certain questions on canon law which His Majesty put to me. As I was bound to do.
>
> *Cromwell.* Do you deny that you *instigated* it?
>
> *More.* It was from first to last the King's own project. This is trivial, Master Cromwell.
>
> *Cromwell.* I should not think so if I were in your place.
>
> *More.* Only two people know the truth of the matter. Myself and the King. And, whatever he may have said to you, he will not give evidence to support this accusation.
>
> *Cromwell.* Why not?
>
> *More.* Because evidence is given on oath, and he will not perjure himself. If you don't know that, you don't yet know him.[103]

A few days later, a small committee of the Star Chamber (which included now Archbishop Cranmer as well as Cromwell and Lord Chancellor Audley) summoned More for additional conversation. More refused even to sit down, and when he again stated that he had shared his thoughts on the royal marriage directly to the King and would say no more, they declared that "never was there servant so villainous, nor subject to his prince so traitorous as he."[104]

On March 23, 1534, parliament passed the Act of Succession, by which it annulled Henry's marriage to Catherine of Aragon, established the royal succession of Anne Boleyn's children, and eliminated Rome's authority to weigh on marital matters,[105] thereby "destroy[ing] the jurisdiction and authority of the Pope."[106] Subjects of the realm were compelled to make a corporal oath to "truly, firmly, and constantly, without fraud or guile, observe, fulfil, maintain, defend, and keep, to their cunning, wit, and utter-

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[103] ROBERT BOLT, A MAN FOR ALL SEASONS93 (1960) (bold added; italics in original).
[104] ACKROYD, *supra* note 11, at 354.
[105] 3 STAT. OF THE REALM 471, 25 Hen. VIII. c. 22 (1534) (available at HeinOnline). A modern English version of the Act is available at The First Act of Succession, A.D. 1534, http://www.luminarium.org/encyclopedia/firstactofsuccession.htm (last visited Aug. 17, 2011).
[106] ACKROYD, *supra* note 11, at 356.

most of their powers, the whole effects and contents of this present Act."[107] Those obstinately refusing to make the oath would be guilty of high treason and therefore subject to a most gruesome form of the death penalty.

According to Holinshed, on March 30, 1534,

> the parlement prorogued, and there euerie lord, knoght, and burges, and all other were sworne to the act of succession, and subscribed their names to a parchment fixed to the same. The parlement was prorogued till the third of Nouember next. And after this were commissioners sent into all parts of the realme, to take the oath of all men and women to the act of succession. Doctor Iohn Fisher, and sir Thomas More knight, and doctor Nicholas Wilson parson of St. Thomas apostles in London, expreslie denied at Lambeth before the archbishop of Canterburie, to receive that oath. The two first stood in their opinion to the verie deathe (as after ye shall heare) but doctor Wilson was better aduised at length, and so dissembling the matter escaped out of further danger.[108]

The archbishop whom Fisher and More refused was none other than Thomas Cranmer. The oath to which the parliament, and henceforth subjects of the realm, swore to was the following:

> Ye shall swear to bear your Faith, Truth, and Obedience, alonely to the King's Majesty, and to the Heirs of his Body, according to the Limitation and Rehearsal within this Statute of Succession above specified, and not to any other within this Realm, nor foreign Authority, Prince, or Potentate; and in case any Oath be made, or hath been made, by you, to any other Person or Persons, that then you to repute the same as vain and annihilate; and that to your Cunning, Wit, and uttermost of your Power, without Guile, Fraud, or other undue Means, ye shall observe, keep, maintain, and defend, this Act above specified, and all the whole Contents and Effectxs thereof, and all other Acts and Statutes made since the Beginning of this present Parliament, in Confirmation or for due Execution of the same, or of any thing therein contained; and thus ye shall do against all Manner of Persons, of what Estate, Dignity, Degree, or Condition soever they be, and in no wise do or attempt, nor to your Power suffer to be done or attempted, directly or indirectly, any Thing or Things, privily or apertly, to the Let, Hindrance, Damage, or Derogation thereof, or of any Part of the same, by any Manner of Means, or for any Manner of Pretence or Cause. So help you God and all Saints.[109]

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[107] The First Act of Succession (1534), *available at* http://www.luminarium.org/encyclopedia/firstactofsuccession.htm (last visited Aug. 17, 2011). A "corporal oath" is defined as a "solemn oath; - so called from the fact that it was the ancient usage for the party taking it to touch the corporal, or cloth that covered the consecrated elements." *Corporal oath*, WEBSTER'S REVISED UNABRIDGED DICTIONARY (1913), *reproduced at* THE FREE DICTIONARY, http://www.thefreedictionary.com/Corporal+oath (last visited Aug. 17, 2011).

[108] RAPHAEL HOLINSHED, ET AL. HOLINSHED'S CHRONICLES OF ENGLAND, SCOTLAND AND IRELAND, Vol. III, 792 (1807). www.archive.org.

[109] OATH OF ALLEGIANCE TO HENRY VIII AND HIS SUCCESSORS, 1534, HLRO Original Journal, H.L., vol. 1, 174-75 (Mar. 30, 1534), *available at*

Representatives of the realm spread out over England to enforce the oath in late 1534. By early 1535, it became clear to More's opponents and the King that More remained among prominent hold-outs, along with Bishop John Fisher.[110] In April 1535, More was summoned to Lambeth Palace. While at Lambeth Palace under interrogation, More said

> My purpose is not to put any fault either in the Act or any man that made it, or in the oath or any man that swears it, nor to condemn the conscience of any other man. But as for myself in good faith my conscience so moves me in this matter, that though I will not deny to swear to the succession, yet unto the oath that here is offered to me I cannot swear, without the jeopardizing of my soul to perpetual damnation.[111]

His official tormenters then presented him with a printed roll showing the names of Lords and members of the House of Commons who had taken the oath, to which More again replied: "I myself cannot swear, but I do not blame any other man that has sworn."[112] While this might be taken as an invocation of Luke 6:37 ("Do not judge, and you will not be judged; do not condemn, and you will not be condemned. Forgive, and you will be forgiven,") the stance appears to be as much an effort to reduce the reaction to his refusal to take the oath. As Lord Chancellor, More certainly had been in the business of judging others.

Archbishop Cranmer subsequently made a written appeal to the King through Cromwell, to allow both More and Fisher to sign modified oaths – in which they would agree to the Act of Succession but not to the preamble of the oath with its "condemnation of the Bishop of Rome and of the King's first marriage." Henry rejected the suggestion, fearful that others might be encouraged to follow the example. Indeed, Cranmer thought such a compromise would induce former Queen Catherine and her daughter Mary to agree to the Act of Succession as well.[113] Neither Catherine nor Mary would swear the oath in 1535. While Cranmer did not succeed in negotiating a resolution for More and Fisher, he did convince Henry to

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http://www.nationalarchives.gov.uk/pathways/citizenship/citizen_subject/transcripts/oath_allegiance.htm; pdf of original at http://www.nationalarchives.gov.uk/pathways/citizenship/citizen_subject/docs/oath_allegiance.htm (last visited Aug. 17, 2011).

[110] Even though Nicholas Wilson, mentioned in the quote from Holinshed above, eventually acquiesced, Ackroyd portrays him as a holdout paraded before More and hauled off to the Tower as an example of what would happen if More refused the oath. ACKROYD, *supra* note 11, at 262. Ackroyd makes Wilson as one of three exemplars for More after More's arrest: Wilson, the unrepentant sent to the Tower; Rowland Phillips, broken and intimidated orthodox vicar willing to sign the oath; and Hugh Latimer, Lutheran fellow traveler laughing and rejoicing now that reform had come. *Id.* at 361-62. Latimer, of course, was a close associate of Archbishop Cranmer, and would be burned by Queen Mary in 1555.

[111] ACKROYD, *supra* note 11, at 360-61.

[112] *Id.* at 361.

[113] DIARMAID MACCULLOCH, THOMAS CRANMER 124-25 (1996); JASPER RIDLEY, THOMAS CRANMER 74-76 (1962).

change his decision to send Mary to the Tower. According to one report, "Henry granted Cranmer's request, and spared Mary, but he told Cranmer that he would live to regret it."[114]

On July 1, 1535, More stood trial for treason for refusing to take the oath. I will not rehash all of the details, but two excerpts of More's defense bear comment. More famously confronted Solicitor General Richard Rich after Rich testified against More. The conversation forming basis of that testimony is of some dispute,[115] but I'm more interested in the confrontation at trial. More contested Rich's testimony by stating in part:

> In good faithe, master Riche, I am soryer for your periurye then for my own peril. And yow shall vnderstand that neyther I, nor no man else to my knowledge, ever took you to be a man of such credit as in any matter of impourtance I, or any other, would at anye tyme vouchsafe to communicate with you.[116]

More, while certainly focused on his own defense in confronting Rich, is also confronting him as a fellow attorney. An obligation to the truth by lawyers dated back to the oaths lawyers were required to take as early as the late 13th century. Robert Winchelsea, the Archbishop of Canterbury, issued a statute in 1295 which included an oath of office for lawyers:

> Advocates . . . may swear similarly the [Judge's] oath . . . they will observe the aforesaid customs and statutes, as far as they affect them, that they will bring no case to trial, unless they believe it to be true and honest, upon the information on the part of their clients; that, in receiving informations from their clients, they will elicit from them, with all possible caution, the truth of the case, and they will clearly show their clients the dangers to which they expose themselves in legal proceedings as far as they know, declining to prosecute any further desperate, bad cases; and as soon as the cases or surrounding conditions show themselves to be unjust (dishonest) from the point of view of the law, they shall relinquish them entirely.[117]

That statute evidently remained in effect during More's time.[118]

While Robert Bolt's depiction of More and his appeal to conscience focused on the individual against the state, More's scholastic worldview, as hinted at in his final revelation, would have been quite different. "The traditional Catholic position on conscience focuses on the judgments an individual makes in applying the objective norms of morality in order to determine the rightness or wrongness of an action."[119] After More resigned

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[114] RIDLEY, at 76-77. In 1536, following the death of her mother, Mary did succumb to pressures from Henry. *Id.*

[115] ACKROYD, *supra* note 11, at 388-390.

[116] *Id.* at 395.

[117] Quoted in BENTON, THE LAWYER'S OFFICIAL OATH, *supra* note 6, at 23-24 (1909). I am grateful to Neil Hamilton for pointing me to this oath. Hamilton, *supra* note 10.

[118] G. R. Elton, *The Commons' Supplication of 1532: Parliamentary Manoeuvres in the Reign of Henry VIII*, 66 ENG. HIST. REV. 507, 518 (1951).

[119] Koterski, *supra* note 79 at xiv.

himself at his trial to losing, he unburdened his conscience, a conscience not dependent on his own individuality, but on its obedience to a norm larger than himself. The other oath martyrs we will meet clung to the same belief that they were remaining true to the faith – ironically, More would have found their position to be untenable.

More had remained silent about his opposition to the King, in the hope that such silence would save him. It had not.

> I will now in discharge of my conscience speake my minde plainlye and freely touching my Indictment and your Statute withal. Forasmuch as, my Lorde, this Indictment is grounded vppon and acte of parliamente directly repugnant to the laws of gode and his holy churche , the supreme gouerment of whiche, or of any parte whereof, may no temporal prince presume by any law to take vppon him, as rightfully belonging to the See of Rome, a spirituall preheminence by the mouth of our Sauiour himself, personally present vppon the earth . . . . No more then the city of London, being but one poore member in respect of the whole realme, make a lawe against an acte of parliament to bind the whole realme. No more might this realme of England refuse obediens to the Sea of Roome then might a child refuse obediens to his own natural father.[120]

More's death sentence for treason was an unpleasant but not unusual one – hanging until half dead, disembowelment, castration, followed by being quartered and decapitated, with body parts distributed about the realm at the King's pleasure.[121] While beheading strikes one not initially as a pleasant departure from this earth, in light of this alternative, Henry VIII's commutation of the sentence to one blow of the axe takes on the glow of macabre mercy.

v. The Same Page of History: Henrician Executions of Catholics and Anabaptists

Holinshed's *Chronicles of England, Scotland, and Ireland*, published in the late 16th century, have served an excellent source of raw material for scholars. Holinshed's account of More's death begins on page 783 of volume III. The page opens with the grisly execution of a rebellious and treasonous son of an Irish earl. Holinshed then juxtaposes the examination and burning of Dutch Anabaptists discovered in London in May 1535 with the executions not only of More, but also of Bishop Fisher and three monks who had also refused to swear the oath:

> The fiue and twentith daie of Maie [1535] was in saint Paules church at London examined ninetéene men and six women borne in Holland, whose opinions were, first, that in Christ is not two natures, God and man: secondlie, that Christ tooke neither fleshe nor bloud of the virgin Marie: thirdlie, that children borne of infidels

[120] Quoted in ACKROYD, *supra* note 11, at 397.
[121] *Id.* at 398.

> shall be saued: fourthlie, that baptisme of children is to none effect: fiftlie, that the sacrament of Christ's bodie is but bread onelie: sixtlie, that he, who after his baptisme sinneth wittingly, sinneth deadlie, and cannot be saued. Fourtéene of them were condemned, a man & a woman of them burned in Smithfield, the other twelue were sent to other townes there to be burnt.
>
> On the nineteenth of Iune were three monks of the Charterhouse hanged, drawne, and quartered at Tiburne, and their heads and quarters set vp about London, for denieng the king to be supreme head of the church: their names were Exmew, Middlemoore, and Nudigate. Also on the one and twentith of the same month, and for the same cause, doctor John Fisher bishop of Rochester was beheaded for denieng of the supremacie, and his head set vpon London bridge, but his bodie buried within Barking churchyard. The bishop was of manie sore lamented, for he was reported to be a man of great learning, and of a verie good life. The pope had elected him a cardinall, and sent his hat as far as Calis, but his head was off before his hat was on: so that they met not. On the sixth of Iulie was sir Thomas Moores beheaded for the like crime, that is to wit, for denieng the king to be supreme head. And then the bodie of doctor Fisher was taken vp, and buried with sir Thomas Moores in the Tower. This man was both learned and wise, and giuen much to a certaine pleasure in merie taunts and iesting in most of his communication, which maner he forgat not at the verie houre of his death.[122]

So the Protestants at the heart of the Reformation in England simultaneously struck in two directions, creating martyrs on both the left and right. In March of 1535, a royal proclamation had ordered heretical foreign Anabaptists to leave England within twelve days. In the myriad of heretical crimes charged against the Dutch refugees in May 1535, nowhere to be found is the refusal to take the oath. Their spiritual crimes, however, were more than sufficient to lead to at least some of their deaths.[123] It is quite possible that the refugees did oppose the taking of oaths. In the early 1530s, authorities arrested several English and Flemish persons for importing hundreds of copies of an "Anabaptist book," most likely what has now come to be known as the Schleitheim Confession of 1527 from Switzerland, which contained an article refuting use of oaths.[124]

While Holinshed reports that the authorities captured twenty five heretics, they executed only fourteen at various parts of the realm.[125] No doubt their deaths were to serve notice that uprisings similar to the one then ongoing at Münster (mentioned above) would

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[122] HOLINSHED ET AL., vol. III, *supra* note 107, at 793.
[123] HORST, *supra* note 82, at 60-62.
[124] *Id.* at 49-51.
[125] Horst considers various diplomatic and historical accounts of the executions – the number arrested varies from 20 to 25, and those executed from 10 to 14. *Id.* at 60-62.

not be countenanced in England, even though there was no evidence of these refugees harboring violent tendencies.[126] Henry VIII deported some, if not all, of the remaining number to their deaths in the Low Countries at the hands of the Catholic Regent, Mary, Queen of Hungary. Their expulsion served to signal Henry's continuing orthodoxy (notwithstanding the notable exception on the question of papal supremacy) to an important trading partner.[127]

Executing the three Carthusian monks from Charterhouse in London in 1535 was part of the campaign to undermine religious orders that resisted taking the oath. More's spiritual foundation rested on his earlier training with the Carthusian order,[128] and Cromwell intimated that More was responsible for their deaths. This prompted More's famous rejoinder: "I do nobody harme, I say non harme, I thynke non harm, but wish euerye body good. And yf thys be not ynough to kepe a man alyue, in good faith, I long not to lyue."[129] And the execution of Fisher, even after having been elevated to cardinal by the Pope, sent a very clear signal of Henry's break with Rome.

At the center of all of these events stood the subject of our next vignette, Archbishop Thomas Cranmer.[130]

D. THE PROTESTANT THOMAS CRANMER (D. 1556) – ONE TOO MANY OATHS

And forasmuch as my hand hath offended, writing contrary to my heart, therefore my hand shall first be punished,

for when I come to the fire it shall first be burned.

And as for the pope, I refuse him as Christ's enemy, and Antichrist, with all his false doctrine.[131]

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[126] "Most radicals were peaceful, thoughtful folk." MACCULLOCH, *supra* note 113, at 145.
[127] *Id.* at 146 (1996) (citation omitted).
[128] ACKROYD, *supra* note 11, at 96-100.
[129] *Id.* at 385.
[130] "Thomas Cranmer was at the forefront of efforts to counter the ideas and activities of the Anabaptists." MACCULLOCH, *supra* note 113, at 146.
[131] JOHN FOXE, FOXE'S BOOK OF MARTYRS 314 (Hendrickson Publishers 2004). Foxe's work was originally published in 1563. He subsequently published a number of editions, each a bit different that the last, with much ink being spilled about the reasons and significance of each edition. *See, e.g.* Ryan Netzley, Book Review, 51 J. OF BRITISH STUDIES 1009-1011 (2012), (reviewing Elizabeth Evenden & Thomas S. Freeman. RELIGION AND THE BOOK IN EARLY MODERN ENGLAND: THE MAKING OF JOHN FOXE'S "BOOK OF MARTYRS" (2012)); Mark Rankin, Book Review, 65 RENAISSANCE QUARTERLY 607-608 (2012) (review of same book). Subsequent reprints after his death often have taken on the polemic of the age in which they are published, with embellishments added on to the original work. *See, e.g.,* John Foxe, AN ABRIDGMENT OF THE BOOK OF MARTYRS : TO WHICH ARE PREFIXED, THE LIVING TESTIMONIES OF THE CHURCH OF GOD, AND FAITHFUL MARTYRS, IN DIFFERENT AGES OF THE WORLD; AND THE CORRUPT FRUITS OF THE FALSE CHURCH, IN THE TIME OF THE APOSTACY. TO THIS WORK IS ANNEXED, AN ACCOUNT OF THE JUST JUDGMENTS

Famous last words, indeed. As Henry VIII's archbishop, Cranmer had been the very first person to sign the Oath of Succession in 1534. Not only did the underlying Act of Succession establish Henry as head of the English Church, it ratified the divorce of Henry from Catherine and established the offspring of Anne Boleyn as the heirs to the throne. No wonder Catholic Queen Mary (daughter of Catherine), upon gaining power in 1553, held a bit of a grudge. Cranmer was convicted first of treason (for supporting the succession of Lady Jane Grey following the death of King Edward VI) and then heresy, and burned at the stake in 1556. This notwithstanding the fact that Cranmer, at considerable risk to himself, had intervened in 1534 to save Mary herself from the Tower and its punishments for failing to take the oath of succession.[132]

Cranmer took oaths, he broke them, he defended them, and eventually, he was undone by them. While history has not always treated him kindly, Cranmer's flawed character has lessons for us. Cranmer began public life as an apologist for Henry VIII in his "great matter," the annulment of his marriage to Catherine of Aragon. A Catholic priest, Cranmer then embraced the ideas of the German reformers, even marrying in secret while on official posting in Germany in 1532. Elevated from relative obscurity to Archbishop of Canterbury in 1533, Cranmer presided over the church of England for more than twenty tumultuous years, serving and surviving the mercurial Henry VIII and his successor child king, Edward VI (who ruled from 1547-1553). Credited with primary authorship of what became the Thirty Nine Articles of the Anglican Church and the Book of Common Prayer, Cranmer met his fate at the hands of Queen Mary, Catherine and Henry's Catholic daughter.[133]

Popular culture has often depicted Cranmer in less than flattering light. In the Showtime series "The Tudors," Hans Matheson plays Cranmer initially as a humble, timid, and shrinking scholar, easily manipulated by the likes of Thomas Cromwell.[134] Apologists have portrayed him as either saint or scoundrel, depending on their opinion of the larger ideological struggles involved.[135]

i. Cranmer Suppresses Oath Heresy under Henry VIII and Edward VI

Cranmer, like More, had no problem with imposing the death penalty for heresy. In addition to speaking approvingly of the executions of Anabap-

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OF GOD ON PERSECUTORS, &C. ALSO, A CHRISTIAN PLEA AGAINST PERSECUTION FOR THE CAUSE OF CONSCIENCE (New York : Printed and sold by Samuel Wood, 1810)

[132] RIDLEY, *supra* note 113, at 76-78, 320.

[133] *See, e.g.*, *Thomas Cranmer (1496-1556)*, ENCYCLOPEDIA BRITANNICA, Vol. VII 377 (11th ed., 1910), *available at* http://www.luminarium.org/renlit/cranmerbio.htm (last visited Mar. 5, 2012).

[134] *Thomas Cranmer*, THE TUDORS WIKI, *available at* http://tudorswiki.sho.com/page/Thomas+Cranmer (last visited Mar. 5, 2012).

[135] MACCULLOCH, *supra* note 113, at 1.

tists in 1535 and again in 1538 under Henry VIII,[136] he reportedly convinced King Edward VI to burn his first heretic in 1550.[137] Like More and his Catholic contemporaries, "[m]ost evangelicals . . . felt no problem in seeing the most obstinate heretics burned." The exception proved the rule: John Foxe, the prominent martyrologist of the English reformers, was unusual in his deploring execution based on religious dissent.[138]

According to Diarmaid MacCulloch, one of Cranmer's leading biographers, "Cranmer was prepared to put a good deal of effort into argument and persuasion of the heretically inclined, and sometimes, . . . it succeeded, no doubt to his delight."[139] But the record is mixed. Another biographer reports that Cranmer would show mercy to Catholics on the one hand, while harshly punishing Anabaptists on the other. Henry Moore, a Catholic vicar resistant to the Reformation, would cause his church bells to be rung whenever a reformer preached in his church, drowning out the sermon. An army officer arrested Moore, but Cranmer "rebuked [Moore] a little" rather than imprisoning him. On the other hand in April 1551, Cranmer sent a Dutch surgeon to the fire who as an Anabaptist had fled to England to escape the threat of persecution in both Flanders and Paris.[140]

The historian Irvin Horst, himself a Mennonite, tends to agree with MacCulloch and writes that during the Edwardian era, "Cranmer was not only lenient but also dilatory in taking the anabaptists in hand."[141] Horst notes several instances in which Cranmer, using "counsel and debate" rather than imprisonment and the stake to induce recantations by Anabaptists in 1549.[142] But recantations were the goal – refusal could lead to a fiery death.

The harsh reaction to Anabaptists under Henry's reign may have given way to more subtle persuasion under Edward VI, but the reformers still attacked both the religious left and right. While the general pardon issued in 1547 at the beginning of Edward's reign included Anabaptists, a similar pardon issued in 1550 explicitly excluded them.[143] Enumerated among the

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[136] *Id.* at 146, 231; HORST, *supra* note 81, at 86-89.
[137] MACCULLOCH, *supra* note 113, at 476.
[138] *Id.*
[139] *Id*.
[140] RIDLEY, *supra* note 112, at 320-21.
[141] HORST, *supra* note 82, at 101.
[142] *Id.* at 102-03.
[143] *Id.* at 101. The 1550 exclusion of heretics may have been influence by Ket's Rebellion of 1549, in which peasants rose up against unjust and exorbitant rents in Norfolk by landlords, who also extended their grazing rights by unfair means. Thomas More had earlier described the economic oppression as "a conspiracy of rich men seeking their own commodities." Detractors of Ket's Rebellion lumped the revolutionaries with Anabaptists. Horst concludes that while Anabaptists in England may have been sympathetic to the unjust nature of the situation, they were pacifist and not directly involved in the uprising. *Id.* at 103-08.

points of heresy *not* to be forgiven was the belief "That yt ys not leffull for a Chrystyan man to take an Othe before any Judge."[144]

a. *Article 38 of 1553 – Just Say No to "Vain and Rash Swearing," But Say Yes to the Magistrate's Oath*

> As we confess that vain and rash swearing is forbidden Christian men by our Lord Jesus Christ, and his apostle James; so we judge that Christian religion doth not prohibit, but that a man may swear when the magistrate requireth, in a cause of faith and charity, so it be done, according to the Prophet's teaching, in justice, judgement, and truth.
>
> Article 38, 1553[145]

Thomas Cranmer fortified the new English Protestant faith by memorializing its doctrine. Shortly after the death of Henry VIII and the ascension of Edward VI to the crown, Cranmer published a series of homilies (several credited directly to his authorship) in July 1547 ostensibly to "remedy the grievous shortage of reliable preachers."[146] These homilies have been seen largely through the prism of the battle between traditionalists (led by Cranmer's opponent Bishop Gardiner) and the reformers over issues like faith, salvation and good works.[147] Nonetheless, one of the homilies addresses the oath, a point of contention not with the Catholic loyalists but with the Anabaptists. The homily underscored the role the oath played in preserving societal order:

> By lawful oaths, which Kings, Princes, Judges, and Magistrates doe swear, common laws are kept inviolate, Justice is indifferently ministered, harmless persons, fatherless children, widows, and poor men, are defended from murderers, oppressors, and thieves, that they suffer no wrong, nor take any harm. By lawful oaths, mutual society, amity, and good order is kept continually in all commonalties, as Boroughs, Cities, Towns, and Villages.[148]

Swearing falsely on the Bible, and thus committing perjury, the homily gravely warns will bring on the everlasting wrath of God:

> And although such perjured men's falsehood bee now kept secret, yet it shall bee opened at the last day, when the secrets of all men's hearts shall bee manifest to all the world. And then the truth shall appear, and

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[144] *Id.* at 92, 101. *See* 4 STAT. OF THE REALM 125-128, 3 & 4 Edw. VI c. 24 (1550) (available at HeinOnline).

[145] *42 Articles of 1553*, *in* GERALD LEWIS BRAY, DOCUMENTS OF THE ENGLISH REFORMATION 308-09 (1994).

[146] MACCULLOCH, *supra* note 112, at 372.

[147] *Id.* at 372-76; RIDLEY, *supra* note 112, at 264-71.

[148] *A Sermon Against Swearing and Perjury*, *available at* CHURCH SOCIETY, http://www.churchsociety.org/issues_new/doctrine/homilies/iss_doctrine_homilies_07.asp (last visited Mar. 12, 2012). While Cranmer is not credited with authorship of this homily, the "opinions expressed in [all of] them may be assumed to be those of Cranmer." RIDLEY, *supra* note 111, at 266.

> accuse them: and their own conscience, with all the blessed company of Heaven, shall bear witness truly against them. And Christ the righteous Judge shall then justly condemn them to everlasting shame and death.[149]

Cranmer pushed the reforms beyond simple sermonizing. The Forty-Two Articles of 1553, shaped primarily by him, were "the most important codification of doctrine during the English Reformation until 1558."[150] Aside from solidifying the doctrines of the fledgling Church of England, "the articles undertook a major frontal attack against anabaptist doctrines" indicating that by the end of Edward VI's reign Anabaptism had become a serious threat to the social order.[151] Besides repudiating heretical views on the incarnation, baptism, civil magistrates, the common purse, and participation in war, the articles endorsed the swearing of oaths, as indicated in Article 38 above.[152] The articles were promulgated in June 19, 1553, but as King Edward VI died on July 6, that version of the articles was never instituted.[153]

Under the reign of Queen Elizabeth I, the Forty Two Articles underwent considerable revision. Parliament and the Canterbury Convocation of clergy approved the resulting Thirty Nine articles in 1571.[154] Notwithstanding revisions to other articles, article 39 on the oath has nearly identical language to Article 38 of 1553.[155]

Whether with velvet glove or iron fist, the orthodoxy of the oath (which in actual fact differed little from the historic position of the Catholic Church) was to be enforced. And it would be through oaths that Cranmer himself would meet his fate.

ii. Tied Up in Oaths - Cranmer Condemned as Traitor and Heretic

Thomas Cranmer was a survivor. As a priest in the diplomatic service of King Henry VIII, he married clandestinely in 1532. Later that year, he found himself seated as Archbishop of Canterbury, and had to keep the fact of his marriage closely guarded. In the internecine religious struggles of England in which the theological positions of the sovereign evolved dramatically over the years Cranmer somehow managed to survive. In 1539, he had sent his family to Germany for safekeeping as Henry turned back some Protestant reforms. Following Henry's death in 1547, a nine year old Edward VI assumed the throne, and Cranmer and company pushed out the Reformation much further than Henry VIII had wished to go.

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[149] RIDLEY, *supra* note 112, at 266.
[150] HORST, *supra* note 81, at 170.
[151] *Id.*
[152] *Id.* at 170-75.
[153] BRAY, *supra* note 144, at 284.
[154] *Thirty Nine articles*, ENCYCLOPÆDIA BRITANNICA ONLINE, *available at* http://www.britannica.com/EBchecked/topic/592588/Thirty-nine-Articles (last visited Aug. 24, 2011).
[155] BRAY, *supra* note 144, at 308-09.

When Edward VI died in 1553, Cranmer reluctantly supported the ill-fated Lady Jane Grey as Queen. Following that decidedly unsuccessful reign of only a few weeks, Henry's daughter Mary assumed the throne. While other opponents of Mary were rounded up, Cranmer remained free until he took provocative steps to assert reformed positions concerning the mass.

Unlike other reformers, Cranmer decided to stay in England, notwithstanding the fact that others urged him to leave.[156] According to one of his biographers, Cranmer "thought he could do far more as a martyr in England than as a refugee abroad," and he would soon enough get his wish.[157] In September 1553, Queen Mary's new government (composed of former friend and foe alike) imprisoned Cranmer in the Tower of London.

Cranmer faced charges of both treason and heresy. Prior to his treason trial, the new parliament overturned the annulment of Catherine and Henry's marriage – an annulment arranged by Cranmer so many years earlier. A special commission consisting of peers and common law judges tried Cranmer for treason on November 13, 1553, along with four other unrepresented and soon to be infamous persons (the ex-Queen Lady Jane, her husband, and her two brothers-in-law, Ambrose and Henry).[158]

A man carrying an axe aloft led the five to trial at the Guildhall. The charges were simple: declaring Jane to be Queen, and sending reinforcements to battle Mary's troops. Cranmer surprised the court by initially pleading not guilty, claiming he had only followed the wishes of the dead King Edward. Chief Justice Morgan told him that "no one, not even the King, could authorize a man to break the law."[159] According to one observer, Cranmer "was put to utter dismay after hearing [William] Staunford, the Queen's counsel, outline his treachery to him, and openly confessed his crime." Cranmer would later say that he had "confessed more. . . than was true."[160] The court sentenced Cranmer to the same sentence as Thomas More and Carthusian priests; hanging, disembowelment, quartering and beheading.[161]

But Queen Mary wanted Cranmer condemned and punished as a heretic, and so a man already legally dead was to face additional disputations and trials as the person so responsible for leading so many not simply to their deaths, but to eternal damnation. But to try Cranmer and his colleagues for heresy required a re-establishment of the authority of Rome over the church in England, a process which would take a year to complete.[162]

Cranmer took solace and strength from the good fortune of being jailed with close colleagues in the Reformation movement, including the Bishops Hugh Latimer and Nicholas Ridley. The three who would come to be known as the Oxford Martyrs "would now be singled out as a representative

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[156] MACCULLOCH, *supra* note 112, at 548; RIDLEY, *supra* note 112, at 342-54.
[157] RIDLEY, *supra* note 112, at 354.
[158] *Id.,* at 343-61 (for treason charges and trial); *Id.* at 362-381 (for heresy charges and trial).
[159] *Id.* at 357.
[160] MACCULLOCH, *supra* note 112, at 554-55.
[161] RIDLEY, *supra* note 112, at 357-58.
[162] MACCULLOCH, *supra* note 112, at 558, 570-71.

symbol of everything the new Catholic establishment hated."[163] The three would be tried in Catholic-friendly Oxford, away for the dangers of unruly London. In April 1554, a warm-up of sorts was staged – a disputation between the three accused and a tribunal of experts over the nature of the Eucharist. Prosecutors planned to use material from the disputation in a formal heresy trial later. While the tribunal denounced the trio as heretics, the proceedings so lacked even the pretense of fairness that no official version of the event ever was published. Following the tribunal, "many distinguished scholars" made repeated but unsuccessful attempts to change Cranmer's mind.[164]

The appointment of Reginald Pole as the new Archbishop plus the reconciliation of England to papal obedience in November 1554 paved the way for a proper trial. In June 1555 Rome issued a mandate for the trial and appointed a former adversary of Cranmer's as Inquisitor-General, Bishop Brooks. The mandate also ordered Cranmer to appear in Rome within eighty days – a difficult feat, indeed, as he was imprisoned in Oxford's Bocardo prison at the time, and was not likely to be issued a travel pass to Rome. Three royal proctors were added to the prosecutorial team.[165]

Needless to say, just as Bishop Fisher's hat never arrived *from* Rome in 1535, so Cranmer never arrived *in* Rome. Trial commenced in Oxford on September 12, 1555, his whole career under scrutiny – "his perjured papal oaths, his marriage, his public writings."[166] Here I focus on how the invocation of oaths was used during the trial.

As the trial began, Bishop Brooks accused Cranmer of immediately betraying the Pope's trust upon appointment as Archbishop in 1533. Cranmer responded then, and throughout the trial, by repudiating the authority of Rome to try an English subject. Cranmer pushed the "incompatibility of papal canon law with the law of the realm – 'Whosover sweareth to both, must needs incur perjury to the one.'" While such an argument in 1555 may have been helpful in his defense against the supremacy of Rome, the fact that had taken an oath to the Pope in 1533, and then another to Henry in 1534 seemed to prove Brooks' point. The royal proctor and civil lawyer Thomas Martin drove that home.[167] The argument nonetheless required some chutzpah, as it implicitly implied that Queen Mary's oaths at her own coronation might also put her soul at risk.[168]

But Thomas Martin "pressed [Cranmer] hard on whether all oaths, good or bad, ought to be obeyed."[169] Martin later brought out the notarized instruments of Cranmer's loyalty oath to the papacy in 1533 when he

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[163] *Id.* at 560-61.
[164] *Id.* at 563-69.
[165] *Id.* at 573-74, 579.
[166] *Id.* at 575.
[167] RIDLEY, *supra* note 112, at 372.
[168] MACCULLOCH, *supra* note 112, at 576.
[169] *Id.* at 577.

became Archbishop. A skilled trial lawyer, Martin's cross-examination of Cranmer on the oath deserves quoting at length:

Martin. You say that you have sworn once to King Henry VIII against the Pope's jurisdiction, and therefore you may never forswear the same; and so ye make a great matter of conscience in the breach of the said oath. Here I will ask you a question or two. What if you made an oath to a harlot, to live with her in continual adultery, ought you to keep it?

Cranmer. I think no.

Martin. What if you did swear never to lend a poor man one penny, ought you to keep it?

Cranmer. I think not.

Martin. Herod did swear whatsoever his harlot asked of him he would give her, and he gave her John Baptist's head. Did he well in keeping his oath?

Cranmer. I think not.

Martin. Jephtha, one of the judges of Israel, did swear unto God that if he would give him victory over his enemies he would offer unto God the first should that came forth of his house. It happened that his own daughter came first, and he slew her to save his oath. Did he well?

Cranmer. I think not.

Martin. So sayeth St. Ambrose, *De Officiis*: "It is a miserable necessity which is paid with parricide." Then, Master Cranmer, you can no less confess, by the premises, but that you ought not to have conscience of every oath, but if it be just, lawful, and advisedly taken.

Cranmer. So was that oath [to Henry].

Martin. That is not so. For first it was unjust, for it tended to the taking away of another man's right. It was not lawful, for the laws of God and the Church were against it. Besides, it was not voluntary; for every man and woman were compelled to take it.

Cranmer. It pleaseth you to say so.

Martin. Let all the world be judge. But sir, you that pretend to have such a conscience to break an oath, I pray, did you never swear, and break the same?

Cranmer. I remember not.

Martin. I will help your memory. Did you never swear obedience to the see of Rome?

Cranmer. Indeed I did once swear unto the same.

Martin. Yea, that you did twice, as appeareth by records here ready to be showed.

Cranmer. But I remember I saved all by protestation that I made by counsel of the best learned men I could at that time.

> *Martin.* Hearken, good people, what this man saith. He made a protestation one day to keep never a whit of that which he would swear the next day. Was this the part of a Christian man?[170]

Cranmer's self-justification, even as recorded by a hostile Catholic observer at the time, was that "he had done what he had done 'to improve the corrupt ways of the Church as Primate of the realm.'"[171] In 1533, following his oath to the Pope, he immediately had modified that oath in swearing to Henry. He had promised "not to obstruct 'the reformation of the Christian religion, the government of the English Church, or the prerogative of the Crown or the well-being of the same commonwealth . . . . and prosecute and reform matters wheresoever they seem to me to be for the reform of the English church."[172] MacCulloch characterizes Cranmer's reference in the colloquy above to the "counsel of the best learned men" as accepting "the fairly dubious procedural fudges of his scruples about papal authority concocted by the King's civil lawyers."[173]

In his closing statement, Bishop Brooks lashed out at Cranmer, returning to a point that Cranmer had made earlier about Brooks himself: that Brooks had sworn an oath against the pope during his university career. "I knew not then what an oath did mean, and yet to say the truth, I did it compulsed, compulsed I say by you, master Cranmer; and here were you the author and cause of my perjury."[174] It seems odd for a prosecutor to claim ignorance of the law as a defense, blaming another for his own failure in following what he now saw as an illegal law.[175]

Perjury – the failure to keep an oath - carried dire eternal consequences, even according to the homily approved by Cranmer only a few short years before. The tribunal convicted Cranmer of heresy, partly based on that perjury. The eighty day clock requiring his presence in Rome started ticking – Cranmer could not be punished until that clock ran out, but the authorities had no intention of letting him make that Italian appointment.[176]

Cranmer appealed to the Queen, a fruitless but interesting exercise. Among many other arguments, Cranmer tried to justify his rejection of Bishop Brooks' jurisdiction by saying Brooks was twice perjured – once "as

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[170] RIDLEY, *supra* note 112, at 372-73.
[171] MACCULLOCH, *supra* note 112, at 578.
[172] *Id.* at 578.
[173] *Id.* at 77.
[174] *Id.* at 578.
[175] Ironically, the metaphysical poet John Donne, himself a convert to Protestantism, would decades later argue "with English Catholics in *Pseudo-Martyr* that it was quite thinkable for them to swear allegiance to their Protestant King . . . . [I]t was quite possible for a given subject in a given country like England to swear loyalty to a secular ruler like James and yet also swear loyalty to the spiritual ruler of another state like [Pope] Paul V." Anthony Raspa, *Introduction*, *in* JOHN DONNE, PSEUDO-MARTYR I (Anthony Raspa ed., 1993) (1610). Donne's great grandmother was the sister of Thomas More. *Id.* at xxxviii.
[176] RIDLEY, *supra* note 112, at 379.

having broken his oath against Rome [taken while at university] by becoming a Roman judge, and by taking contradictory oaths to the Queen and to the Pope when he became bishop."[177] Cranmer's odd defense seemed to support his own conviction, although Cranmer likely continued his belief that he had relied on legal counsel in taking those contradictory oaths back in the 1530s. The appeal achieved little, as Mary was intent on making a very clear example of Cranmer and his friends.[178]

Bishops Latimer and Ridley faced trial within the month, and were convicted as well. Convictions served the government's purpose, but recantations would be of even more use to persuade those still loyal to the Reformation. They brought in a theological ringer, a Spanish theologian Pedro de Soto, to convince the three of their errors. Ridley and Latimer, however, "went defiant to their deaths," their burnings in October 1555 on Broad Street in Oxford observed by Cranmer.[179] Latimer's last words were "Be of good comfort, Master Ridley, and play the man. We shall this day light such a candle, by God's grace, in England, as I trust shall never be put out."[180]

The sight terrified Cranmer, and constant pressure – from theologians, his own Catholic sister, his attendants and jailers – wore away his defenses. Over the next few months, he would sign no fewer than six recantations. After the first three, troubled by his conscience, Cranmer tried a procedural Hail Mary. During his official "disgrading" in a church in Oxford (the removal of his standing as Archbishop, Bishop, and Priest, literally layer by layer in the Church), Cranmer called out to demand an appeal to the next General Council of Bishops, as his suit was against the Pope, and that no man should be the judge in a matter in his own case. Martin Luther had once tried a similar tactic. When that procedural move went nowhere, Cranmer tried another tepid recantation.[181]

Following the issuance of Cranmer's death warrant, what seemed to be his last reserves of resistance crumbled. He abandoned his appeal to the Council of Bishops, and on February 26, 1555 came his fifth recantation, this one accompanied with outbursts of tears and requests for absolution.

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[177] MACCULLOCH, *supra* note 112, at 580. In his letter to the Queen, Cranmer made his point in the following way: "But forasmuch in the time of the prince of most famous memory king Henry 8th your grace's father, I was sworn never to consent, that the bishop of Rome should have or exercise any authority or jurisdiction in this realm of England, therefore lest I should allow his authority contrary to my oath, I refused make answer to bishop [Brooks] of Gloucester sitting here in judgment by the pope's authority, lest I should run into perjury." 1 Howell's State Trials 823 (1816) (Letters of Dr. Thomas Cranmer, Archbishop of Canterbury to the Queen's Highness).

[178] MACCULLOCH, *supra* note 112, at 580-83; RIDLEY, *supra* note 112, at 378-79.

[179] MACCULLOCH, *supra* note 112, at 580.

[180] *Id.* at 581-82. King has raised the interesting question as to whether this quite famous quote was a later added embellishment by John Foxe or one of his sources. The quote does not appear in the original 1563 edition of the *Book of Martyrs*, but does in the 1570 edition. John King, FOXE'S 'BOOK OF MARTYRS' AND EARLY MODERN PRINT CULTURE 54-56 (2006).

[181] MACCULLOCH, *supra* note 112,. at 581-98.

His captors gave him the *Dialogue of Comfort*, Thomas More's reflections written in the Tower under sentence of death. But the captors who drafted Cranmer's recantation had botched it politically by having Spaniards witness it rather than Englishmen, and a sixth recantation had to be issued.[182]

March 21, 1556, the final day of Cranmer's life, can only be described as bizarre, even by the standards of the day. Before his execution for heresy by burning (rather the disembowelment and quartering reserved for traitors), Cranmer was to publicly admit his sins and give proof that he had returned to the true Catholic Church.

Because it was unusual to burn a heretic who had recanted (hence the famous line by the ever witty Latimer – "Turn or Burn"),[183] Dr. Henry Cole delivered a sermon to a packed University Church in Oxford to give reasons for the fire to come even though the prisoner had repented. Most startling among them was that of blood vengeance – the execution of the Duke of Northumberland (who had been convicted of treason for supporting Lady Jane Grey) served as retribution for the death of the laymen Thomas More. Cranmer's death would serve to balance out the death of Bishop Fisher. Other accounts go even further – that Fisher was such a good man that the deaths of Ridley, Hooper and Ferrar (three other priests recently executed) were insufficient to balance the scales, and Cranmer needed to be added.[184]

But that startling argument was upstaged when Cranmer proceeded to pull a back-up speech out of his cloak when it came his time to recant. Rather than staying on script and publicly repenting, he repudiated his recantations, creating a furor in the church. Speaking the words which open this section of the paper, Cranmer spoke ill of the hand which had written or signed "all such bills . . . since my degradation" and called the Pope the Ant-Christ. He literally then ran to stake. According to all accounts, as the fire started he did indeed stick his hand into the heart of the flame for it to be consumed first.[185]

Cranmer has been much vilified for his willingness to bend his conscience to save his own skin. His biographers, however, have aptly pointed out that when it was clear that there was no way to escape death, Cranmer made a clear choice of conscience.[186]

The Oxford Martyrs quickly came to be seen either as villains or heroes to the faith in the ideological and theological struggles of the era. Well beyond the 16th century, they have continued to inspire the Anglican faithful. In the 1840s, defenders of traditional Anglicanism, a mixture of Evangelicals and old-fashioned High Churchmen, erected the Martyrs' Memorial in Oxford only steps from the original site of the burnings. They did so in an effort to staunch innovations in Anglican doctrine from ultra-

[182] *Id.* at 594-98.
[183] RIDLEY, *supra* note 112, at 284.
[184] *Id.* at 406-07; MACCULLOCH, *supra* note 112, at 600-01.
[185] RIDLEY, *supra* note 112, at 408; MACCULLOCH, *supra* note 112, at 603.
[186] RIDLEY, *supra* note 112, at 409-10; MACCULLOCH, *supra* note 112, at 601-05.

High Church proponents of the 'Oxford Movement', whom they saw as introducing Roman Catholic practices and doctrine.[187]

While visiting Oxford in 2008, I captured photographic evidence that the Oxford Martyrs continue to inspire at least the artistic imagination. A futile but elegant attempt to cover the mess of renovation of the Ashmolean Museum involved oversized photos of celebrities and local residents holding favorite objects from the museum.[188] Colin Dexter, the best-selling author of the *Inspector Morse* novels, chose an artifact from the Bocardo prison – a manacle. Dexter sets his murder mystery novels in Oxford. Kevin Whateley and Laurence Fox, actors in the BBC spinoff series from the novels who play police inspectors, pose with a giant key from the prison and the band that bound Cranmer around his waist. The handwritten messages on the celebrity foreheads reinforce the heroic iconography of the Oxford martyrs, with none of the less pleasant facts.[189]

E. The Anabaptist Refugees of London (1575): Refusing All Oaths

> *Furthermore, to the question put to us, whether we would not be willing to swear any oath, we reply that we do not find ourselves free in our conscience, that we may do this, because, as is written, Christ says: . . "but I say to you, Swear not at all; neither by heaven; for it is God's throne: nor by earth; for it is his footstool."*
>
> Plea for Mercy to Queen Elizabeth I, April 10, 1575[190]

When I needed a weekend away from graduate studies in the late 1980s, I often took refuge at the London Mennonite Center. While Anabaptists never gained even a tiny foothold in Britain until the mid-20th century, the martyrs of 1575 have been rediscovered and claimed by the new Mennonites of Britain. An historian and co-director of the Center, Alan Kreider, authored a piece in 2000 in a compendium that indirectly tied the stories of the London martyrs to contemporary Anabaptist Christians in the United Kingdom.[191]

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[187] My thanks to Professor Diarmaid MacCulloch for his helpful information on the history of the memorial. E-mail from Diarmaid MacCulloch, Professor, Univ. of Oxford, to author (Sept. 27, 2011, 13:48 (GMT) (on file with author). *See also Martyrs' Memorial, Oxford*, SACRED DESTINATION, *available at* http://www.sacred-destinations.com/england/oxford-martyrs-memorial (last visited Sept. 11, 2011).

[188] *My Ashmolean, My Museum*, ASHMOLEAN, *available at* http://www.ashmolean.org/myashmolean/gallery-i.php# (last visited Mar. 5, 2012).

[189] *Id. See also* Stan Evers, *Thomas Cranmer*, GRACE MAGAZINE, *available at* http://www.gracemagazine.org.uk/articles/historical/cranmer.htm (last visited Mar. 5, 2012).

[190] Made by Hendrick Terwoort & Jan Pieterss. THEILEMAN J. VAN BRAGHT, THE BLOODY THEATER OR MARTYRS MIRROR OF THE DEFENSELESS CHRISTIANS: THE STORY OF SEVENTEEN CENTURIES OF CHRISTIAN MARTYRDOM, FROM THE TIME OF CHRIST TO A.D. 1660, at 1018 (Joseph. H. Sohm trans., Herald Press, 31st prtg. 2010) [hereinafter MARTYRS MIRROR].

[191] Alan Kreider, *When Anabaptists Were Last in the British Isles*, *in* Alan Kreider & Stuart Murray, COMING HOME: STORIES OF ANABAPTISTS IN BRITAIN & IRELAND 176-92 (2000).

On Easter Sunday, April 3, 1575, the constable of London "fiercely and insolently" interrupted a worship service of some twenty-five to twenty-seven Flemish Anabaptists, "called them devils" and later "drove them before him as sheep are led to the slaughter, and conducted them to prison."[192]

Soon thereafter, the authorities summoned the prisoners to appear before the bishop and others at St. Paul's Church in London to answer four questions:

1. Whether Christ, our Saviour, had not assumed His flesh from the body of Mary?
2. Whether it is lawful for a Christian to swear an oath?
3. Whether Christians ought to have their children baptized?
4. Whether it is lawful for a Christian to administer the (criminal) office of the magistracy?[193]

How the prisoners would answer those questions would determine their fates.

i. From the Fire into the Frying Pan – Dutch and Flemish Refugees

But why in the world would a group of Anabaptists have sought refuge in Tudor England in the 1570s? We have already seen how both Catholic and Protestant regimes did their brutal best to put down or expel Anabaptists. In 1535, just weeks before Thomas More faced execution, twenty five Anabaptists burned around the country. Thomas Cranmer and others then led a concerted effort in the late 1540s and early 1550s to suppress Anabaptism.

In 1560, scholars estimated there were about 10,000 refugees but the number climbed threefold in the next two years. "In the years of Alva's persecution (1568-73), the number was at least fifty thousand."[194] Philip II of Spain had dispatched the Duke of Alva to the Low Countries in 1567 to put down iconoclastic riots against the Catholic Church, resulting in the flight of thousands of refugees of various stripes.[195] It is quite possible that

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[192] *Twenty Persons at London, in England, namely Fourteen Women Driven From City: A Youth Scourged Behind a Cart; One Died in Prison; Two, Named Hendrick Terwoort and Jan Pieters, Burnt Alive and Two Others, after Enduring Much Misery, Escaped from Prison; All of Which Took Place under the Reign of Queen Elizabeth, in the Year 1575*, *in* MARTYRS MIRROR, *supra* note 184, at 1008 [hereinafter *Twenty Persons*]. The exact number arrested is difficult to determine from the contemporaneous accounts. Kreider puts the number at 26. Kreider, *supra* note 191, at 176; Duke put the number at 27. Alastair Duke, *Martyrs with a Difference: Dutch Anabaptist Victims of Elizabethan Persecution*, 80 NEDERLANDS ARCHIEF VOOR KERKGESCHIEDENIS 263-281 (2000).

[193] *Twenty Persons*, *supra* note 192, at 1008-09.

[194] CORNELIUS KRAHN, DUTCH ANABAPTISM 215 (2d. ed. 1981).

[195] *The Breaking of the Images (1566),* THE HISTORY OF THE NETHERLANDS, *available at* http://www.historici.nl/overview/history/en/ontstaan,1566.html (last visited Mar. 5, 2012).

the Flemish Anabaptists caught in London that Easter Sunday of 1575 were among those who had fled Alva's armies, as earlier refugees had fled persecution following the 1525 Münster uprising.[196] Two of the Flemish refugees later pleaded for their lives in a letter to Queen Elizabeth, and referred to their refugee status:

> Our country and kindred, and our property, we had to leave (partly, because of the great tyranny), and fled as lambs before wolves, only for the true evangelical faith of Jesus Christ, and not for sedition or heresy, as the Münsterite errors or abominations were, and as (God forbid!) were reported of us. . . . There should be nothing found [in us] but a true faith in full accordance with the Gospel of Jesus Christ, and an unblamable life, seeking to provide bread for our wives and children . . . .Mark well that God commands to love the stranger as one's own self. Who is in misery and dwelling in a strange country, that likes to be despised, and driven out of it with his fellow believers, and suffer great loss besides?[197]

Their reference to the Münster uprising, an event that had occurred a full four decades earlier, testified to the ongoing terror that such labels could arouse. The scriptural passages they relied upon to seek mercy continue to enliven current debates about immigration policy: "Moses says: 'If a stranger sojourn with thee in the your land, ye shall not vex him; but the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself.' Lev. 19:33, 34."[198]

ii. Anabaptists and the Oath – A Multiplicity of Views

The Flemish refugees may well have taken inspiration from the 1527 Schleitheim Articles, one of the earliest and most influential articulations of Anabaptist theology and practice.[199] The primary author of the Confession, Michael Sattler, had been ordained a Benedictine priest and had risen to the rank of prior, but left the Catholic church in the midst of the religious ferment of the 1520s in Germany and Switzerland. Court records from Zurich indicate that he was released after he "swore an oath that he would have nothing to do with Anabaptism in the future."[200] This occurred in March 1525 and November 1525, after he had come to the attention of the authorities as a result of disputations between Protestants and Anabap-

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[196] *Anabaptism*, CATHOLIC ENCYCLOPEDIA (1913), *available at* http://www.newadvent.org/cathen/01445b.htm (last visited July 12, 2011) ("Another result of the capture of Münster seems to have been the appearance of the Anabaptists in England . . . Their following there was in all probability largely composed of Dutch and German refugees.").

[197] *Two Letters Written by These Imprisoned Friends, as We Have Found Them in a Small, Old, Printed Book, in* MARTYRS MIRROR, *supra* note 184, at 1012, [hereinafter *Two Letters*].

[198] *Id.*

[199] *Schleitheim Confession (Anabaptist, 1527)*, GLOBAL ANABAPTIST MENNONITE ENCYCLOPEDIA ONLINE, http://www.gameo.org/encyclopedia/contents/S345.html (last visited Aug. 17, 2011).

[200] C. ARNOLD SNYDER, ANABAPTIST HISTORY AND THEOLOGY 60 (1995).

tists.[201] Sattler, his wife, and others were captured, tried and executed in Austrian territory in early 1527, shortly after the Schleitheim meeting. Among the nine charges brought against Sattler was "that he declared that men should not swear before a magistrate."[202]

Sattler addressed seven topics in the Schleitheim Articles, and three of them corresponded closely to the charges later against the London Anabaptists in 1575: Sattler believed that Christians should not swear oaths (Article 7); that children should not be baptized (Article 1); and that Christians should not hold the office of magistrate (Article 6).[203] Article 7 on the oath read in part:

> We have been united as follows concerning the oath. The oath is a confirmation among those who are quarreling or making promises. In the law it is commanded that it should be done only in the name of God, truthfully and not falsely. Christ, who teaches the perfection of the law, forbids His [followers] all swearing, whether true or false; neither by heaven nor by earth, neither by Jerusalem nor by our head; and that for the reason which He goes on to give: "For you cannot make one hair white or black." You see, thereby all swearing is forbidden. We cannot perform what is promised in the swearing, for we are not able to change the smallest part of ourselves.[204]

The Schleitheim approach to the oath, and to society at large, did not represent the only Anabaptist position,[205] but did stake out one clear theological and sociological path at the time: separatism from the world. A "Two Kingdoms" theology developed, of which refusal of the oath and refusal to serve in government was integral.[206] The purist approach of the Schleitheim Confession proved "catastrophic in the sixteenth century political context, especially in city states where oaths of all sorts were routinely administered."[207]

As "catastrophic" as such an approach proved to be, it was one that became embedded in the psyche of some strains of Anabaptism, persisting in migrations around the world.[208] Even as Mennonites in the United States

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[201] Gustav Bossert, Jr., Harold S. Bender & C. Arnold Snyder, Sattler, Michael *(d. 1527)*, GLOBAL ANABAPTIST MENNONITE ENCYCLOPEDIA ONLINE (1989), *available at* http://www.gameo.org/encyclopedia/contents/S280.html (last visited Sept. 11, 2011).
[202] *Id. See also* C. Arnold Snyder, *Rottenberg Revisited: New Evidence Concerning the Trial of Michael Sattler*, 54 MENN. Q. REV. 208-28 (1980); Stuart Murray, *Michael Sattler: An Early Swiss Anabaptist Martyr*, ANABAPTISM TODAY (Oct. 1997), *available at* http://www.anabaptistnetwork.com/book/export/html/161.
[203] *Schleitheim Articles (1527)*, *supra* note 199.
[204] *Article VII, Concerning the Oath, in Id.*
[205] SNYDER, ANABAPTIST HISTORY, *supra* note 200, at 185-200. Snyder details at least five different positions concerning the oath and the sword in Swiss-German-Austrian Anabaptism in the earliest years of the movement. *Id. See also* Pries, *supra* note 55.
[206] SNYDER, ANABAPTIST HISTORY, *supra* note 200, at 61-62.
[207] *Id. supra* note 200, at 186.
[208] *See, e.g.*, "The meticulous concern of the Kansas-Nebraska (Old) Mennonites [in the 1870s] to keep separate from the kingdom of this world included not only rejection of light-

took a more active role in political life during the early 20th century, one Mennonite leader wrote that among possible Mennonite contributions to American Christianity were rejection of the oath and the "peace idea."[209]

iii. The Trials and Tribulations of the London Anabaptists

But the outcome indeed was catastrophic for most of the London Anabaptists arrested that Easter morning in 1575. Questioning by the ecclesiastical authorities, as well as visits from the Dutch church, created pressure to recant from April to June 1575.[210]

A letter to the Lord Mayor from the Privy Council on May 20, 1575 directed the Bishop of London to confer with others and proceed judicially against certain "Anabaptiste straingers . . . either for corporall punishement or banishement, as shall be thought metest and as he shall be directed."[211]

Five of the prisoners recanted, reportedly having been "seduced by the diuell the spirit of error and by false teachers his ministers," recanted "damnable and detestable heresies." In addition to professing "agreeably" on the other three questions, each man stated that "it is lawfull for a Christian man to take an oath." They also agreed to join the Dutch church in London, "henseforth vtterlie abandoning and forsaking all and euerie anabaptisticall error."[212] The authorities had created the Dutch church in order to channel the new religionists into an approved Protestant alternative.[213] While foreswearing Anabaptism to save their skins, three of the five eventually later left the Dutch church and returned to their "errant" ways.[214]

Women made up the greatest number of those arrested. The authorities examined all twenty or so members of the group (men and women) in

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ning rods, insurance, and worldly amusements, but also the raising of the hand when rendering public affirmation in place of the oath. Some even had scruples against use of the words *solemnly* or *under the pain and penalty of the law* in the affirmation, for the 'Savior had commanded to let your 'yea be yea, and no more.'" JAMES C. JUHNKE, A PEOPLE OF TWO KINGDOMS: THE POLITICAL ACCULTURATION OF THE KANSAS MENNONITES 40 (1975), *citing to Conference Record Containing the Proceedings of the Kansas-Nebraska Mennonite Conference, 1876-1914* at 29 (L.O. King et al. eds.).

[209] *Id.,* at 66, *citing to* Edmund George Kaufman, Social Problems and Opportunities of the Western District Conference Communities of the General Conference of Mennonites of North America 165-174 (1917) (unpublished M.A. thesis, Bluffton College and Mennonite Seminary) (on file with the Bluffton University Library system), at 165-74.

[210] Duke, *supra* note 192, at 268.

[211] Acts of the Privy Council, at 389-90 (1575), *available at* http://www.british-history.ac.uk/ (last visited Mar. 5, 2012).

[212] RAPHAEL HOLINSHED, ET AL., HOLINSHED'S CHRONICLES OF ENGLAND, SCOTLAND AND IRELAND, VOL. IV, 326-27 (1807), *available at* http://www.archive.org/stream/chroniclesofengl04holiuoft#page/326/mode/2up (last visited Mar. 5, 2012).

[213] Duke, *supra* note 192.

[214] Duke, *supra* note 192, at 266.

late May 1575. All refused to recant. The fourteen women were sent to Newgate, the prison for those guilty of capital offenses. Efforts to convert the women failed, but rather than executing them, the authorities deported them (along with a "young lad," who was beaten on the way to the dock) to Holland. They had thought they were on their way to execution.[215]

Women were not necessarily exempted from the stake. Michael Sattler's wife, Margaretha, refused the opportunity to recant and died only days after her husband in 1527. Both Catholic (most notably Elizabeth Barton) and Radical women (for example, Ann Askew) faced the death penalty.[216] I have been unable to find out what happened to the fourteen women on their arrival in the Netherlands; as we saw in the earlier deportation of Anabaptists by Henry VIII, deportation did not necessarily mean freedom. It very well could mean execution at the hand of another ruler.

On June 2, Bishop Sandys of London called the remaining five men before him and presented the option so succinctly summarized by Latimer twenty years earlier – turn or burn. The prisoner Jan Pietersz replied that burning was a "small matter" – outraging Sandys, who promptly expelled them from the church. Another prisoner, Henrik Terwoort, replied "How can you expel us from your church, when we have never been one with you?" To which the bishop replied, "That this was all the same. . . [for] in England there was no one that was not a member of God's church." The prisoners were condemned and handed over to the secular authorities for punishment.[217] The exchange underscored not just that the prisoners were foreigners, but that they considered themselves to be beyond the automatic membership in a state church.

The two lead prisoners' own letters to the Queen in the following weeks served only to seal their fates rather than soften her heart.[218] Like the much more famous last words by Thomas More ("The King's good servant, but God's first"), the Anabaptists went to lengths to show respect for temporal authorities, but within limits. In a fairly combative letter attributed to the two martyred men, they write that "we desire to obey the magistracy in all things not contrary to the Word of God."[219]

In a second more conciliatory letter, in which Pietersz and Terwoodt plead for their lives, they recite scripture acknowledging the role of a magistracy appointed by God for the good of society. "Hence we would kindly beg your majesty, that you would rightly understand our meaning: that is, we do not despise the august, noble, and gracious queen, and her wise council, but esteem her majesty worthy of all honor, and we also desire to

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[215] Kreider, *supra* note 191, at 177.
[216] ACKROYD, *supra* note 11, at 367-68; James Gairdner, *Anne Askew, in* THE DICTIONARY OF NATIONAL BIOGRAPHY, Vol. II, 190-92 (Leslie Stephen ed., 1885), *reproduced at* http://www.luminarium.org/encyclopedia/askew.htm (last visited Sept. 18, 2011).
[217] Kreider, *supra* note 191, at 178.
[218] Duke, *supra* note 192, at 271.
[219] *Two Letters*, *supra* note 197, at 1014.

be subject to her in all that we can."[220] In that letter, they would not back down on the taking of oaths, echoing the Schleitheim article of nearly fifty years earlier:

> [W]e do not find ourselves free in our conscience, that we may do this [i.e., swear any oath], because, as is written, Christ says (matt. 5:33): "Ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shall perform unto the Lord thine oaths: but I say unto you, Swear not at all; neither by heaven; for it is God's throne: nor by earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt theou swear by they head, because thou canst make one hair white or black. But let your communication be, Yea, yea; Nay, nay; for whatsoever is more than these cometh of evil." Further, also James teaches us (Jas. 5:12), saying: But above all things, my brethren, swear not; neither by heaven, neither by the earth, neither by any other oath: but let your yea be yea; and you nay, nay." For these reasons we dare not swear.[221]

Members of the Dutch Church exerted considerable effort to save the remaining five men, as did the famed Protestant martyrologist John Foxe. While they succeeded in getting the executions stayed, they labored in vain to convince the prisoners to temper their positions enough to have their lives spared:[222]

> What they had achieved with the prisoners one day would be undone the next thanks to the pertinacity of Jan Pietersz . . . described contemptuously as 'an old clodpoll totally lacking in any understanding of the Scriptures'. . . . [Pietersz] refused to be overawed by the political experience and theological training of his Calvinist opponents and maintained his fellow prisoners' morale.[223]

Of the remaining five prisoners, one died in prison, two were eventually released, but Pietersz and Terwoort faced a gruesome execution. On July 17, the two were burned at the stake at Smithfield, their sufferings "prolonged because no gunpowder was attached to their bodies."[224]

The condemned men, unlike More and Cranmer, were not men of position. Pietersz, aged about 50, had fixed carts and wagon wheels. His first wife had been burnt in Ghent before he arrived in London. He left nine children in the care of his second wife, who herself had lost her first husband to the fires of persecution in Ghent as well. Terwoort, a goldsmith, was 35 at his death and had been married less than six months.[225]

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[220] *Another Letter of the Prisoners: In Which We Vindicate Ourselves of That Which is Reported of Us. . .,*" *in* MARTYRS MIRROR, at 1017, 1018 [hereinafter *Another Letter*].
[221] *Id.* at 1018.
[222] *Id.* at 179.
[223] Duke, *supra* note 192, at 271-72 (citations omitted).
[224] *Id.,* at 272.
[225] *Id.* at 267; Kreider, *supra* note 191, at 179.

IV. LESSONS LEARNED FROM THE OATH MARTYRS

> [I]n teaching the martyr stories, we shouldn't ask children what they'd die for; we should ask them what they'd live for. What is so important to bring into being that we will cast aside all fear, whether it be fear of painful death, poverty, or social rejection? What are we being called to? When, like the ancestors of our faith, should we speak up bravely, regardless of the consequences?[226]

What to make of these stories? What can lawyers, including newly minted ones and lawyers in training, take away from stories many centuries old? Martyrs continue to fascinate through their convictions, their character traits, the reason they suffered, and frankly, because of the ways that they suffered. The martyrologies of the Reformation era emerged out of the ideological and religious struggles of their day. Catholics and Protestants engaged in martyr wars, each side claiming the other had created "pseudo-martyrs," false martyrs that may have died gruesome deaths, but not for the right cause. Anabaptists created their own martyrologies, but their heroes were only willing to die for their beliefs (rather than also kill to defend them). For that reason, and also because they tended to withdraw from the "world," they felt little reason to attack the claims of martyrdom of their religious opponents. And perhaps Catholics and Protestants felt little need to bother with pseudo-martyrs unwilling to kill for their faith.[227]

What common threads do we find in these stories? Theological belief certainly does not unite them – but then, early Protestant and Anabaptist martyrologies were not marked by the confessional unity enjoyed by Catholic counterparts. Rather, they identified a few core characteristics and glossed over other rather significant disputes.[228] Cranmer and More clearly did not see eye to eye. Both would have had little time for the Flemish Anabaptists.

But the broad theme I find from these stories is truth – seeking after eternal, universal and even more mundane truths, and remaining true to them (however defined) in the face of life-threatening opposition. The individuals take inspiration and strength from others, and hold fellow travelers to account as well. And, when push comes to shove, they lack no courage in speaking truth to power at the highest levels. They did not invite suffer-

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[226] Kirsten Eve Beachy, *Editor's Reflection, Tongue Screws and Testimonies, Poems, Stories, and Essays Inspired by the Martyrs Mirror,* HERALD PRESS, http://www.heraldpress.com/titles/tonguescrews/reflection.html (last visited Mar. 5, 2012).

[227] BRAD S. GREGORY, SALVATION AT STAKE: CHRISTIAN MARTYRDOM IN EARLY MODERN EUROPE 329-40 (1999).

[228] *See, e.g.*, *Id.* at 337. In 1615, Mennonite martyrologist Hans de Ries maintained that "what really mattered . . . were not the disagreements among Swiss, German, and Dutch Anabaptist martyrs, but their practice of believer's baptism and their membership in nonpersecuting churches." *Id.*

ing, and often went to great lengths to avoid it. When it came, they endured as best they could, sometimes with true gallows humor.

Greed, hubris, arrogance, sheer terror; all these, in addition to high ideals, motivated the martyrs considered here. These folks had character flaws, and notwithstanding them (and perhaps because of them), they were able to rise above the ordinary and accepted to remain true to themselves and their core beliefs. Their flaws make them accessible to ordinary mortals like me. Their courage in the face of tribulations provides some inspiration or insight for living a principled professional life.

Michael Eric Dyson's unvarnished biography of Martin Luther King, Jr. comes to mind – Dyson breathes life back into an icon by revealing the temptation and personal failures that King confronted and overcame. King's heroism thus flows not from his superhuman character, but in part from his all too human failings.[229]

A. TRUTH TO SELF

This above all: to thine own self be true,
And it must follow, as the night the day,
Thou canst not then be false to any man.
WILLIAM SHAKESPEARE, HAMLET, act 1, sc. 3.[230]

The preamble to the Model Rules of Professional Responsibility states that beyond the rules themselves, "a lawyer is also guided by personal conscience and the approbation of professional peers."[231] The characters in our story are studies in steadfastly or rather errantly seeking personal conscience.

The Thomas More Society for lawyers has chapters around the world. The Lawyer's Prayer to St. Thomas More, even for those not inclined to pray to saints, or to pray at all, provides quite a nice summary of the lawyer's calling:

> I pray, for the glory of God and in the pursuit of His justice, that I, with You, St. Thomas More, may be trustworthy with confidences, keen in study, accurate in analysis, correct in conclusion, able in argument, loyal to clients, honest with all, courteous to adversaries, *ever attentive to conscience.* Sit with me at my desk and listen with me to my clients' tales.

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[229] *See generally* MICHAEL ERIC DYSON, I MAY NOT GET THERE WITH YOU: THE TRUE MARTIN LUTHER KING, JR. (2000).

[230] Polonius' words to his son Laertes provide sound advice. The advice is all the more ironic coming from a deceitful and scheming father like Polonius, who spied on his own children for Hamlet.

[231] ABA MODEL RULES OF PROF'L CONDUCT pmbl. (7) (2010) [hereinafter ABA MODEL RULES], *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html (last visited Mar. 1, 2012).

> Read with me in my library and stand always beside me so that today I shall not, to win a point, lose my soul.
>
> Pray for me, and with me, that my family may find in me what Your family found in You: friendship and courage, cheerfulness and charity, diligence in duties, counsel in adversity, patience in pain—their good servant, but God's first. Amen.[232]

More drew strength from his times of contemplation and prayer. He anticipated that confrontation with Henry would come over the oath, but years of structured contemplative practice prepared him for the challenges to come.

Two friends and mentors of mine, Richard and Ruth Anne Friesen, spoke of developing a spirituality for the long haul. As refugee advocates in the heated battleground of South Texas in the mid-1980s and early 1990s, Richard and Ruth Anne and their colleagues developed a knack for confronting government power within the bounds of the law.[233] Much of that strength came from a daily practice of prayer, reflection, and journal writing. Like More, who in his writings and reflection often looked to historical figures caught in similar circumstances, Richard and Ruth Anne taught me to take inspiration from earlier refugee pioneers in much more difficult settings.[234]

As for More and Cranmer, friends and foes worked to spare them death if they just compromised. Cranmer had opportunities to flee to mainland Europe for months after Mary came to power. More's own daughter encouraged him to compromise, as she and her mother had done – that God would look on the inner conscience rather than the outward actions. More rejected these efforts.[235] And we have heard of how most of

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[232] *A Prayer to St. Thomas More*, ST. THOMAS MORE SOCIETY OF SAN DIEGO, *available at* http://www.stthomasmoresociety.com/faith.php#prayerto (last visited Mar. 1, 2012) (emphasis added).

[233] For a history of the Overground Railroad (a network established to assist Central American refugees), see Gavin R. Betzelberger, *Off the Beaten Track, On the Overground Railroad: Central American Refugees and the Organizations that Helped Them*, 11 LEGACY 17 (2011), *available at* http://opensiuc.lib.siu.edu/legacy/vol11/iss1/3. For the religious origins of the Overground Railroad, see especially *Id.* at 23-25. For success in both confronting US policy while also staying in the relatively good graces of the US immigration service, see *Id.* at 29. For detailed descriptions of the Overground Railroad's activism (including that of Richard and Ruth Anne Friesen) informed by prayer and spirituality, see Don Mosley (with Joyce Hollyday), WITH OUR OWN EYES: THE DRAMATIC STORY FO THE CHRISTIAN RESPONSE TO THE WOUNDS OF WAR, RACISM, AND OPPRESSION 97-123 (1996).

[234] Among the stories from which they took inspiration was Phillip Haile's LEST INNOCENT BLOOD BE SHED: THE STORY OF THE VILLAGE OF LE CHAMBON AND HOW GOODNESS HAPPENED THERE (1979), the story of how a French Huguenot village in France protected Jewish refugees during Nazi occupation.

[235] HORST, *supra* note 81, at 41 ("For More … the Christian faith was essentially an ethical understanding. The desired outcome of true theology was a way of life and not metaphysical speculation.").

the Flemish refugees resisted efforts by well-meaning compatriots that tried to convince them to recant.

Our protagonists shared some personal characteristics. Stubbornness, even orneriness, seems to have been one of them. Thomas More engaged in scatological rhetorical combat with Martin Luther, calling him a shit-devil, an arse, and a drunkard.[236] "He was always precise and shrewd, but there is a suspicion at times that he was playing some kind of game."[237] Cranmer proved a feisty and combative debater when drawn into theological disputes – while he was being worn down by his interrogators in Oxford, he might falter but repeatedly rallied from psychological defeat to surprise his captors. And pertinacious "old clodpoll"[238] Jan Pietersz rallied his co-religionists in the face of well-intentioned efforts to change their minds.

As for the early modern true believers in Tudor England, Gregory posits that they could have been hardly anything but stubborn in their beliefs and actions.[239] While I do not entirely buy his argument that the times virtually demanded martyrdom, and that there were no logical ways out of the box of killing and dying for beliefs,[240] the willingness to stick to one's core beliefs was a shared characteristic of many martyrs across the spectrum.

As we have seen, Thomas More refused to take the oath, withstanding great pressure from not only political foes, but family and friends as well.

The resort to conscience by More, and likely Cranmer and the Anabaptist refugees, was not the individualistic liberal notion of conscience, but one based on communion with others and tradition.[241]

B. TRUTH TO COLLEAGUES

As lawyers, we govern one another. The public has entrusted us with the duty to discipline one another, and in most states, that practice falls to a disciplinary board. According to the Rules preamble, "Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer

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[236] "This is not, perhaps, the normal language of a saint." ACKROYD, *supra* note 11, at 230.
[237] ACKROYD, *supra* note 11, at 55.
[238] Duke, *supra* note 192, at 271-72 (citations omitted). A clodpoll is defined as "[a] stupid person, a blockhead." *Clodpoll*, DICTIONARY.COM, http://dictionary.reference.com/browse/clodpoll (last visited Mar. 1, 2012). Interestingly, the dictionaries I consulted all place the origin of the word between 1595 and 1605. *Id.*; *see also Clodpoll,* OXFORD ENGLISH DICTIONARY.
[239] GREGORY, *supra* note 227, at 346 ("It is mistaken to think that they might have shelved their competing commitments to Christian truth for the sake of peaceful coexistence.").
[240] There were individuals who strenuously worked for alternatives to the death penalty, for example, John Foxe opposed execution for heretics. See *supra* note 136 and accompanying text.
[241] Koterski, *supra* note 79, at xvii-xvix.

should also aid in securing their observance by other lawyers."[242] In Minnesota, professional misconduct includes engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation."[243]

Seeking and giving counsel to one another professionally is critical. The preamble to the Model Rules states that beyond the rules themselves, "a lawyer is also guided . . . by the approbation of professional peers."[244] "Approbation" is not a word I use every day (or really much at all); it simply means commendation, praise, or approval. [245] Attorney discipline has not always been popular in the profession, and in practice, a fairly recent development in the United States.[246]

Before rising to the level of discipline, a better practice is of course seeking out the support and counsel of colleagues when difficulties arise. Doing so while protecting client confidences can be a challenge, but seeking the wise counsel and support of trusted colleagues is essential.[247]

More sought and received encouragement and counsel from friends and colleagues. When he and Bishop John Fisher both occupied cells in the Tower of London, their servants were able to exchange messages between the two. While circumspect in their communications, those exchanges no doubt gave each of them heart in the midst of great tribulation.[248] When Cranmer found himself in the same situation decades later, he found him-

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[242] ABA MODEL RULES pmbl. [13] (2010), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.

[243] MINN. RULES OF PROF'L CONDUCT R. 8.4 (2012). *See generally* ABA MODEL RULES R. 8.4 (2010), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html

[244] ABA MODEL RULES pmbl. [7] (2010), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html. A lawyer "who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authorities." MINN. RULES OF PROF'L CONDUCT R. 8.3 (2012). *See generally* ABA MODEL RULES OF PROF'L CONDUCT R. 8.3, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/_rules_of_professional_conduct/rule_8_3_reporting_professional_misconduct.html.

[245] *Approbation*, MERRIAM-WEBSTER (2010), http://www.merriam-webster.com/dictionary/approbation (last visited Mar. 5, 2012).

[246] *See, e.g.*, WERNZ, *supra* note 7, at 22-23.

[247] Most Rules of Professional Conduct allow for limited disclosure of client confidences through implied consent to carry out the representation, or in order to seek legal counsel to insure compliance with the rule overall. *See, e.g.,* MINN. RULES OF PROF'L CONDUCT R. 1.6(b)(3) & (7) (2012). *See generally* ABA MODEL RULES R. 1.6(a) and 1.6(b)(4) (2010), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html.

[248] ACKROYD, *supra* note 11, at 386-88.

self imprisoned along with his colleagues Ridley and Latimer. Terwoodt provided encouragement to co-religionists in the midst of their ordeal.

While it is difficult to know many details of the life of the Dutch Anabaptist church in London, it is not a stretch to connect them to the tradition of Anabaptist spirituality. One key theme was:

> The giving and receiving of counsel from church members and celebrating the Lord's supper only in the context of a reconciled community. Their strict view of the rule of Christ (Matt. 18) often led to stern, even harsh, church discipline (banning, shunning). While such practices now seem problematic, they contrasted with how other sixteenth-century Christians practiced discipline (imprisonment, torture, execution, war).[249]

Of course, what one person sees as mutual support and stern discipline could be viewed as conspiracy and coercion:

> [More] epitomized, in modern terms, the apparatus of a state using its powers to crush those attempting to subvert it. His opponents were genuinely following their consciences, while More considered them the harbinger of the devil's reign on earth.[250]

Both More and Cranmer went to lengths to persuade those they perceived as rule breakers to reform. When push came to shove, they reached for the matches. The Anabaptists, while rejecting the bloody violence of capital punishment, nonetheless did make use of the Ban, or shunning. The difficulty clearly comes in determining when to go beyond counsel and move to discipline. Making an example of someone can backfire – leading to the creation of martyrs and undermining the main purpose.

Perhaps I stretch the lessons a bit far when I hold up these up as examples, but disciplinary actions against members of the bar is sometimes necessary. Disbarment does occur, but must occur for good reason. The actions by More and Cranmer to support the executions of religious dissidents did go too far, and the opposition to such actions by others in their day belies the argument that they were products of their age.

C. *Truth to Power*

These martyr stories most clearly exemplify the virtue of courage in the face of state power – speaking truth to power regardless of consequences. While Cranmer does not present an example of unbending fidelity to principle (under pressure, he did recant and did nearly everything he could to save his life), when no possible out was available, he reverted to conscience to the consternation of his tormentors. More and Cranmer's falls are of course all the more ironic, as they had wielded the power of the state against their own opponents.

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[249] Arthur Paul Boers, *Anabaptist Spirituality*, *in* DICTIONARY OF CHRISTIAN SPIRITUALITY 260 (Glen Scorgie ed., 2011). My thanks to Bill Carlson for pointing out this resource.
[250] ACKROYD, *supra* note 11, at 302.

"As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession."[251] To achieve these goals, and to advance the public good, attorneys at times must face the possibility of sanction. The civil rights movement in the United States, the fight against apartheid in South Africa, and other efforts at social reform come immediately to mind. The willingness of the Anabaptist martyrs, in their refusal of the oath and hence their challenge to social order of the day, provides an example that transcends their era. Their obstinacy with respect to the oath, while others in their movement took a less confrontational approach, has met with mixed judgment by historians. Many had to pass through great suffering, even catastrophe, to arrive at a new, more open order. While catastrophic for early communities, what at one point seemed unimaginable (not taking an oath at all) has by now come to seem passé – oaths and affirmations are virtually synonymous. According to Black's Law Dictionary from 2004:

> Oath: A solemn declaration, accompanied by a swearing to God or a revered person or thing, that one's statement is true or that one will be bound to a promise; A formal declaration made solemn without a swearing to God or a revered person or thing; AFFIRMATION
>
> Affirmation: A pledge equivalent to an oath but without reference to a supreme being or to 'swearing'; a solemn declaration made under penalty of perjury, but without an oath.[252]

An incident in Minnesota in 1984 provides an example of how the value of speaking truth to colleagues (and holding them responsible) came into conflict with speaking truth to power. A protest against Honeywell's arms division was planned in the spring of 1984. Two public defenders went to monitor the demonstration, anticipating that arrests might be made, but were themselves arrested. While they were promptly released and no charges filed, the Office of Lawyers Professional Responsibility instigated an investigation against them. That investigation was terminated after the Director of that office met with the Chief Justice of the Supreme Court, the chair of the Board, and the court's liaison officer. The resolution seemed prudential – while the OLPR Director thought an investigation was initially warranted into arrests of lawyers to judge if they had violated their duties, their willingness to put their duties to justice on the frontlines was vindicated.[253]

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[251] ABA MODEL RULES pmbl. [6] (2010), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.
[252] BLACK'S LAW DICTIONARY 64, 1101 (8th ed. 2004).
[253] WERNZ, *supra* note 7, at 34-35.

V. Conclusion

While martyrdom seems inconceivable to the modern mind, the exploration of courage and human failings in the Reformation era can nonetheless provide us with motivation and inspiration in how to live our professional lives. The steadfastness and courage of Thomas More, in the face of state power, has rightly been served up as an example to be emulated. Such admiration should not erase consideration of his shortcomings. And the obvious shortcomings of Thomas Cranmer should also not obviate his courage under duress. The unwillingness of the Anabaptist martyrs to alter their conscience on the issue of the oath provided an example of speaking truth to power, no matter what the cost.

These historical figures, if put together in the same room, would at least agree that they were all seeking after ultimate truth, pursuing it as honestly as possible, and earnestly working for the betterment of themselves and those around them. On how to achieve that goal of oaths, they would disagree. But we can learn both from their agreement and profound disputes.

Criminal Punishment and the Pursuit of Justice

Mike C. Materni *

ABSTRACT

Since the beginning of recorded history societies have punished offenders while at the same time trying to justify the practice on moral and rational grounds and to clarify the relationship between punishment and justice. Traditionally, deontological justifications, utilitarian justifications, or a mix of the two have been advanced to justify the imposition of punishment upon wrongdoers. In this article, I advance a new conceptual spin on the mixed theorist approach to criminal punishment – one that can hopefully resonate not just among legal philosophers, but also among ordinary citizens, i.e. the people who are most affected by the criminal law. Distancing myself from previous scholarship, which has used utilitarian arguments to point out the shortcomings of retributivism and vice-versa, on the one hand I attack the philosophical foundations of retributivism (currently the predominant rationale for punishment) on deontological grounds; on the other hand I attack the consequentialist rationales on consequentialist grounds. Concluding that neither approach – as they all fail under their own standards – is sufficient per se to justify criminal punishment in a liberal democracy, I argue that a mixed theory approach, which is usually presented as a matter of preference, is instead a matter of necessity if we want a criminal justice system that, while still not perfect, can be defended on both rational and moral grounds. In this sense, retributive considerations are meant to serve as the normative check on a system that aims at rationality and efficiency, and it is thus strongly utilitarian in character. I conclude by arguing that something more than punishment is required if we want to implement a system that really pursues justice, and I suggest that a path worth exploring in that regard is the one laid down by restorative justice. If nothing else, hopefully my blistering attack on retributivism will serve the purpose of rekindling a debate that seems to have accepted the dominance of retributivist positions.

CONTENTS

I. INTRODUCTION

Why do we punish? How does punishment relate to justice? Does punishment *achieve* justice? For centuries, these questions have occupied the minds of moral philosophers, political theorists, and legal scholars. Today, as the American criminal justice system – with a prison population of just over 2.2 million[1] – has become the most punitive in the world,[2] these questions are ever-pressing.

During oral argument in *Miller v. Alabama* Justice Antonin Scalia seemed to have the answer to those questions when he exclaimed, "Well, I thought that modern penology has abandoned that rehabilitation thing, and they -- they no longer call prisons reformatories or -- or whatever, and punishment is the -- is the criterion now. Deserved punishment for crime."[3] Justice Scalia's answer endorses the retributive function of criminal law: just punishment for moral desert. The answer also reflects the fact that

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[1] Lauren E. Glaze & Erika Parks, *Correctional Populations in the United States, 2011,* Bureau of Justice Statistics, Nov. 2012, at 3, available at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&i*Id*=4537, (last visited Dec.20, 2012).

[2] The United States, with 753 per 100,000 people incarcerated at last calculation has by far the highest incarceration rate in the world. The United States is followed by Russia, with 629 per 100,000 people incarcerated, and Rwanda, with an incarceration rate of 593 per 100,000 people. *See* John Schmitt, Kris Warner, Sarika Gupta, *The High Budgetary Cost of Incarceration,* Center for Economic and Policy Research, 5 (June 2012) available at http://www.cepr.net/documents/publications/incarceration-2010-06.pdf. *See also generally* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011).

[3] Miller v. Alabama, The Oyez Project at IIT Chicago-Kent College of Law (*http://www.oyez.org/cases/2010-2019/2011/2011_10_9646)* (last visited 3 Mar.2013).

"punishment ... is now acknowledged to be an inherently retributive practice." [4]

But is this really what criminal law is – or should be – about? Of course, not everyone agrees with Justice Scalia; on the other side of the spectrum are those who, drawing upon Cesare Beccaria and Jeremy Bentham, offer utilitarian justifications for criminal punishment – deterrence, rehabilitation, incapacitation. But, once again, the question pops up: Is this a sound approach? My proposed answer to both questions is no; the answer itself, of course, begs the question: Why not? My response to this (third) question stems from a general viewpoint, which I want to lay out up front now, as it is the key to the arguments I am going to offer throughout this paper. Before I do that, however, there is another, maybe even more important question that needs to be answered: Why should we care about what the rationale(s) justifying criminal punishment should be? I can think of at least two reasons, both having practical implications (the first more directly and intuitively so than the second). The first reason is sentencing; although I am not going to engage with sentencing in this paper, I think it is paramount that those who do – and especially those at the legislative and judiciary levels who make actual, concrete decisions about sentencing practices – have a clear idea of what concepts are involved in criminal punishment, and how and why the practice of inflicting pain and taking liberty away is justified, and therefore what its characteristics and limitations in a liberal democracy ought to be. The second reason is that for the criminal law to maintain its moral force we need – I believe – to be able to justify criminal punishment on moral grounds while at the same time having a criminal justice system that resonates with the very people to protect and serve whom it was created. Failing to do so would undermine the very justifiability of imposing criminal punishment in a liberal democracy. And while it is true that these issues have been debated for centuries, because of the fact that nowadays retributivism has arguably taken the lead as *the* justification of punishment among academics and – maybe more importantly – policymakers,[5] I believe that a re-examination of the foundations of criminal punishment is in order.

Back to the premise of the arguments that I will develop below: One of the central tenets of a seminar that Alan Dershowitz and I teach at the Harvard College is that "absolutist" philosophies are wrong or, at the very least, untenable. As one of this year's students ironically put it: "Saying always is always wrong." What Alan and I pitch to our students is the idea

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[4] Hugo Adam Bedau & Erin Kelly, *Punishment*, *The Stanford Encyclopedia of Philosophy (Spring 2010)*, http://plato.stanford.edu/archives/spr2010/entries/punishment/ (last visited Dec. 8, 2012).

[5] *See generally* MARK D. WHITE, RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY (2011); *see also* Whitley Kaufman, *Retributivism: Essays on Theory and Policy Book Review*, in Law & Politics Book Review, available at http://www.lpbr.net/2012/01/retributivism-essays-on-theory-and.html (last visited Dec. 15, 2012); *see also generally* MICHAEL TONRY (ED.), RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE? (2011).

that we wouldn't want to live in a purely Kantian world, just as we wouldn't want to live in a purely Benthamite world. Rather, these two philosophies (or approaches, world-views, or what have you) should serve as checks and balances upon one another. In this paper, I will try to show that a "checks and balances" approach is also best suited to provide the most compelling (*rectius*, the least troublesome) justification for criminal punishment, contrary to what purely retributivists and purely utilitarians posit.

This paper aims to make two major points. The first point is that neither retributivism nor the utilitarian rationales (whether individually or combined) can stand on their own. However, unlike the vast majority of previous scholarship (including mixed theorists), which has traditionally taken sides and either argued against retributivism on grounds of utilitarian reasons, or argued against utilitarian reasons with deontological arguments,[6] I will make my point by attacking retributivism on deontological grounds, which is to say, at its moral and philosophical foundations; and I will attack utilitarian justifications on consequentialist grounds, both with regard to their effectiveness (= their utility) and to their logical consequences. The critical analysis of both a fully backward-looking retributivist view and a fully forward-looking utilitarian view will allow me make the case for a "checks and balances" approach to criminal punishment. The "checks and balances" approach that I advance differs from most traditional 'mixed theorist' approaches in that, whereas the mixed theorist approach is usually presented as a matter of *preference*, I will claim that the "checks and balances" take on mixed theories is a matter of *necessity*: since some sort of criminal punishment *is necessary*, and since each rationale is so deeply flawed as to be unable to stand on its own, then the only way we can present an acceptable justification for imposing criminal punishment is by pulling the rationales together and having them serve as "checks and balances" upon one another. The second point is that, the necessity of criminal punishment notwithstanding, *something more* than punishment as traditionally interpreted and implemented is required if we want to pursue *justice*. For reasons that I will elaborate, I will suggest that the most promising path toward justice is the one indicated by the promoters of restorative justice. Given the air of moral entitlement – a kind of righteousness, if you will – that seems to animate most retributivist scholarship, and in light of the fact that nowadays retributivism seems to be the dominant theory of punishment,[7] retributivism is going to be first on my list.

II. LOOKING BACKWARD: RETRIBUTION

If one scrolls through the literature on retributivism, it will be almost impossible not to notice an aura of moral entitlement which, in my opinion, is the product of the equation, accepted and advanced by most retributivist scholars, that justice = giving offenders what they deserve. Before we

[6] *See*, *e.g.*, John Bronsteen, *Retribution's Role*, 84 IND. L.J. 1129, 1131 –33 (2009).
[7] *See supra* note 5 and accompanying text.

get into that, however, I think it will be useful to offer a little background: What is retributivism, and how did it get to achieve the dominance that it nowadays seems to hold in the field of criminal justice[8] – and, some might wonder, why should we care?

The answer to why we should care I leave to David Dolinko:

> Under retributivism's spell, proponents of making penalties harsher or of expanding capital punishment feel free to scoff at any suggestion that their favored policies might have more drawbacks than benefits, or might even serve no useful purpose whatsoever. For those are "mere" utilitarian sentiments, unworthy of consideration by the devotees of justice, and a policy need have no "useful" consequences at all so long as it can be perceived as "doing justice" or "giving people what they deserve."[9]

I think that such an approach to criminal legislation, and criminal law in general, is, to say the least, misguided and dangerous. Rather than focusing on the practical consequences of this approach, however, for the moment I aim to strike at its premises. To do so, we need to answer the other two questions – what is retributivism and how did it become the dominant theory of punishment?

To answer to these questions, a brief historical overview of the origins of the modern philosophy of criminal punishment in the Western world will be useful. In the (roughly) 150 years leading to the drafting of the Model Penal Code (1962) retributivist ideas were largely absent from the mainstream criminal law discourse and played little if any role in the structuring of the criminal justice system;[10] "in our time, in contrast, retributive ideas seem an inherent part of thinking about crime and punishment."[11] Despite its "absence" from "mainstream criminal law discourse," however, retributivism has a long-dating pedigree in the criminal law. Indeed the history of criminal punishment – the history of the criminal law – is pervaded with retribution. Back in the day, retribution tended to be exacted through cruel and violent forms of punishment. Just think, for example, of Damiens' *supplice*, graphically described by Michel Foucault:[12]

> On 2 March 1757 Damiens the regicide was condemned 'to make the *amende honorable* before the main door of the Church of Paris,' where

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[8] *See, e.g.*, David Dolinko, *Three Mistakes of Retributivism*, 39 U.C.L.A. L. REV. 1623 (1992): "Retributivism ... has enjoyed in recent years so vigorous a revival that it can fairly be regarded today as the leading philosophical justification of the institution of criminal punishment;" *see* also note 5, *supra*.

[9] Dolinko, *supra* note 8, at 1624.

[10] Michael Tonry, *Can Twenty-first Century Punishment Policies Be Justified in Principle?* in TONRY, SUPRA note 5, at 8; *see* also Matt Matravers, *Is Twenty-first Century Punishment Post-desert?*, *id.* at 31.

[11] Tonry, *supra* note 5, at 7.

[12] The description of the episode hereinafter, including quotations, is found in MICHEL FOUCAULT, DISCIPLINE AND PUNISH. THE BIRTH OF PRISON 3 – 5 (Alan Sheridan trans., Pantheon Books, 1977) (1975) (citations omitted).

> he was to be 'taken and conveyed in a cart, wearing nothing but a shirt, holding a torch of burning wax weighing two pounds;' then, 'in the said cart, to the Place de Grève, where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed said parricide, burnt with sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes, and his ashes thrown to the winds.'

"Finally – Foucault continues – he was quartered." This operation was "very long:" the horses, in fact, were not "accustomed to drawing;" instead of the usual four, six horses were needed. Still, the six horses were not enough to quarter Damiens; hence the executioner was forced to "cut off the wretch's thighs, to sever the sinews and hack at the joints." Throughout the torment, although Damiens "was a great swearer, no blasphemy escaped his lips." The newspaper report on the *Gazette d'Amsterdam* recounts how the spectators were all "edified by the solicitude of the parish priest of St. Paul's who despite his great age did not spare himself in offering consolation to the patient." The description of the torment goes on: the executioner, grabbing some steel pinchers that "had been especially made for the occasion," started pulling the flesh off of Damiens' body, "first at the calf of the right leg, then at the thigh, and from there at the two fleshy parts of the right arm; then at the breasts." The executioner's task was so hard that he had to go through multiple attempts at each spot before he was able to rip the flesh off of Damien's body. After the ripping of the flesh, the executioner "dipped an iron spoon in the pot containing the boiling potion, which he poured liberally over each wound." While Damiens was crying out to God to forgive him, cords were tied to the horses and to his arms and legs – "the cords had been tied so tightly by the men who pulled the ends that they caused him indescribable pain" –; the horses started to pull. After some time of unsuccessful pulling, one of the horses fell to the ground, exhausted. Eventually, the executioner "drew out a knife from his pocket and cut the body at the thighs instead of severing the legs at the joints;" the horses gave a tug and carried away Damiens' body parts. When this was done, Damiens' pieces were gathered together and set on fire; "The last piece to be found in the embers was still burning at half-past ten in the evening."

Damiens' case was not the exception; in the eighteenth century, the administration of criminal law in continental Europe was barbaric. Gallows, torture, branding, mutilation, and the wheel were commonplace in the administration of "justice;" the death penalty was implemented even for the most trivial of crimes, such as, for example, stealing a handkerchief.[13] A dramatic change was initiated in 1764 when Cesare Beccaria, in

[13] *See generally* JOHN HOSTETTLER, CESARE BECCARIA: THE GENIUS OF 'ON CRIMES AND PUNISHMENTS' (2010).

what John Hostettler calls a "watershed" and "cri de coeur,"[14] effectively laid down the foundations of a liberal, humane criminal law built, among other principles, on the principle of the *extrema ratio*.[15] Analyzing the foundations of the power to inflict criminal punishment, in Chapter II of *On Crimes and Punishments* Beccaria writes:

> As the great Montesquieu says, every punishment that does not derive from absolute necessity is tyrannical. The proposition can be stated more generally in the following manner: every act of authority of one man over another that does not derive from absolute necessity is tyrannical. This is the foundation, therefore, upon which the sovereign's right to punish crimes is based: the necessity to defend the depository of the public welfare from individual usurpations; and the more just the punishments, the more sacred and inviolable the security and the greater the liberty the sovereign preserves for his subjects.[16]

For Beccaria the legitimacy of a sovereign derives from the harsh conditions in which men lived before civil society was formed – the Hobbesian state of nature: "Laws – Beccaria observes – are the terms by which independent and isolated men united to form a society, once they tired of living in a perpetual state of war where the enjoyment of liberty was rendered useless by the uncertainty of its preservation."[17] According to Beccaria, men "sacrificed a portion of this liberty so that they could enjoy the remainder in security and peace."[18] "The sum of all these portions of liberty"[19] is the foundation of the "sovereignty of a nation,"[20] where the sovereign is "the legitimate keeper and administrator of these portions."[21] It was not, therefore, by divine right or natural law that some men were invested with the power to govern other men; nor did men give up part of their freedom voluntarily:

> No man ever freely surrendered a portion of his own liberty for the sake of the public good; such a chimera appears only in fiction. If it were possible, we would each prefer that the pacts binding others did not bind us; every man sees himself as the centre of all the world's affairs.[22]

Rather, Beccaria explains, men *had to* give up part of their freedom in order to escape the state of nature – a state where, as Hobbes put it, *homo homini lupus* – and thus be able to enjoy in a relative tranquility the re-

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[14] *Id*. at *ix*; *xiv*.
[15] The description of Beccaria's philosophy hereinafter does not imply a complete adherence on my part; rather, it serves to illustrate the evolution of the philosophy of punishment in the Western world.
[16] CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 11 (Aaron Thomas ed., Aaron Thomas & Jeremy Parzen trans., Univ. of Toronto Press, 2008) (1764).
[17] *Id*. at 10.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*. at 11.

mainder of their freedom. The consequence of this "forced surrender" of freedom is, for Beccaria, compelling:

> It was … necessity that compelled men to give up part of their personal liberty; and so it is that each is willing to place in the public depository *only the least possible portion* … . The aggregate of these smallest possible portions constitutes the right to punish; everything that exceeds this is abuse, not justice; it is a matter of fact, not of right.[23]

The result of Beccaria's efforts is the forerunner of the well-known utilitarian conception: men are born free and therefore they will give up "only the least possible portion" of their liberty; deprivation of this liberty through punishment cannot be justified with transcendent ends, but only by the utility to society – the common good,[24] identified by Beccaria as "the greatest happiness *shared among* the greatest number."[25] The common good, combined with the respect for the citizen's originary freedom, demands that penalties be mild but certain, so that they can serve a deterrent effect without brutalizing society.[26] While "the prime objective of punishment in Beccaria's day was retribution or revenge,"[27] the *rejection* of retributivism and of the *lex talionis* which retributivism often implies is clear in Beccaria's work. Beccaria writes:

> The purpose of punishment … is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same. Therefore, punishments and the method of inflicting them must be chosen such that, in keeping with proportionality, they will make the most efficacious and lasting impression on the minds of men *with the least torment to the body of the condemned*.[28]

Not retribution then – "it is evident that the purpose of punishment is neither to torment and afflict a sentient being, nor to undo a crime already

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[23] *Id*. at 12 (emphasis added).
[24] FEDERICO STELLA, LA GIUSTIZIA E LE INGIUSTIZIE, 181 (2006).
[25] HOSTETTLER, *supra* note, 13 at 28 (emphasis added). Richard Bellamy, referenced in Hostettler, observes that this, and not "the greatest happiness of the greatest number," was Beccaria's actual view. *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS xviii – xix (Richard Bellamy ed., Richard Davies, Virginia Cox and Richard Bellamy trans., Cambridge Univ. Press, 1995). Indeed, as A.P. d'Entrèves has shown, Bentham was consciously indebted to Beccaria for the development of his famous utilitarianism, to the point that Bentham, referring to Beccaria, exclaims: "Oh my master, first evangelist of Reason, you who have raised your Italy so far above England and I would add above France... You who have made so many useful excursions into the path of utility, what is there left for us to do? – Never to turn aside from that path." *See* A.P. d'Entrèves, INTRODUCTION TO ALESSANDRO MANZONI'S *THE COLUMN OF INFAMY:* PREFACED BY CESARE BECCARIA'S *ON CRIMES AND PUNISHMENTS* xi (trans. Kenelm Foster & Jane Grigson, Oxford Univ. Press, 1964), quoted in Hostettler, *supra* note 13, at 28.
[26] STELLA, *supra* note 24, at 181.
[27] HOSTETTLER, *supra* note 13, at 29.
[28] BECCARIA, *supra* note 25, at 26 (emphasis added).

committed"[29] – but deterrence, and the common good, are – for Beccaria – what justifies punishment.[30] Beccaria's work was of great inspiration for sovereigns around Europe; for example, Frederick the Great abolished torture; Maria Theresa of Hapsburg outlawed witchburning and torture; and Leopold II, Duke of Tuscany, abolished the death penalty altogether in 1786 – the first state in the Western world to do so.[31]

As one can expect, Beccaria's efforts toward an enlightened and humane criminal law did not go unchallenged: for example, "the Inquisition forbade the use of Beccaria's book under penalty of death and it was placed on the Index in 1766;"[32] Beccaria was portrayed by Church apologists as a "man of a narrow mind, a madman, a stupid imposter, full of poisonous bitterness and calumnious mordacity."[33] Neither the Inquisition nor its henchmen, however, managed to stop the impact of Beccaria's revolutionary ideas; unfortunately, another intellectual giant – and otherwise one of the greatest contributors that mankind has ever had to its cause – took up the flag of retributivism: and so it was that Beccaria's efforts were overshadowed by Immanuel Kant's "vindictive folly."[34] The damaging effects of Kant's theory of punishment are still suffered today at the hands of contemporary retributivists who, enthusiastically, refer to Kant's – and Hegel's – theories as the foundations of their arguments.

A. *KANT AND HEGEL*

In a now famous excerpt – possibly Kant's *most famous* excerpt in penal literature – Kant, qualifying the right to impose criminal punishment as "*the right of the sovereign as the supreme power to inflict pain upon a subject* on account of a crime committed by him,"[35] lays down the philo-

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[29] *Id*.

[30] For similar reflections on Beccaria's work *see* also Matthew A. Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 AM. J. JURIS. 97 (1994) at 114 *et seq*. Unlike Pauley, however, I would think twice before dubbing Beccaria an "*amateur*" who "listened to what some people told him about the tortures and cruelties of the penal systems of Europe of his day" (*Id*. at 114). Beccaria in fact – contrary to Pauley's assertion that he "was not a professional lawyer" (*Id*.) – earned his law degree from the University of Pavia in 1758; his *On Crimes and Punishments*, rightly considered the foundational work of penology, is a *systematic* proposal to revolution and reform criminal law and procedure – the first of its kind.

[31] *See*, *e.g.*, Aaron Thomas, *Preface to* Beccaria, *supra* note 16, at xxix; STELLA, LA GIUSTIZIA E LE INGIUSTIZIE, *supra* note 24, at 181 – 182; HOSTETTLER, *supra* note 13, at *ix*.

[32] HOSTETTLER, *supra* note 13, at 21.

[33] *Id*.

[34] This expression, which effectively conveys an almost visual significance to the criticism of Kant and Hegel hereinafter, is found in STELLA, LA GIUSTIZIA E LE INGIUSTIZIE, *supra* note 24, at 180.

[35] IMMANUEL KANT, THE PHILOSOPHY OF LAW. AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 194 (trans. W. Hastie, The Lawbook Exchange, 2002) (1797) (emphasis added).

sophical foundations of retributivism asserting that punishment "must in all cases be imposed only because the individual on whom it is inflicted *has committed a Crime*."[36] This is because, Kant claims, "the penal law is a categorical imperative;"[37] hence "woe" to those – such as Beccaria – who "cree[p] through the serpent-windings of utilitarianism" and thus stand in the way of justice.[38] According to Kant, in fact, "justice would cease to be justice if it were *bartered away* for any consideration whatever."[39]

After advancing this absolute notion of "justice" – which, *per se*, doesn't say a lot more other than that justice needs to be absolute, untouched, unspoiled – Kant proceeds to enlighten us with what he sees as the *measure* of justice: nothing less than the infamous *lex talionis* which, "properly understood," "is the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty."[40] If at this point anyone is wondering what that "properly understood" means, here's Kant's chilling answer: "whoever has committed Murder must *die*."[41] This, in Kant's construction, is required by justice: "there is no Equality between the crime of Murder and the retaliation of it but what is judicially accomplished by the execution of the Criminal."[42] To make sure that there really aren't any doubts left, the passage concludes with the famous hypothetical of a society living on an island which at some point decides to disperse throughout the world, never to come together as a people ever again: in such a case, Kant urges, unless the whole people were to partake in a public violation of justice "the last murderer lying in the prison ought to be executed before the resolution was carried out."[43] According to Kant, then, just punishment is retribution; retribution is justified because the criminal law is a moral imperative the violation of which *demands* retribution.

The first thought that comes to mind when reading this passage of Kant's is: why? Kant, in fact, throws in our faces an absolute truth – just punishment *is* retribution – that is not demonstrated as true, but rather, it is *assumed* to be true. Kant does not demonstrate that the justification of punishment is retribution; rather, he *affirms* that it is so.[44] Kant also fails to explain why a punishment that is not limited to retributivism, or even that, with complete disregard for retributivism, simply aims to the rehabili-

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[36] *Id*. at 195. We will see, *infra*, that this is still nowadays the base-claim of retributivism.
[37] *Id*.
[38] *Id*. *See* also DAVID YOUNG, BECCARIA: ON CRIMES AND PUNISHMENTS xv (1986).
[39] KANT, *supra* note 35, at 196 (emphasis added).
[40] *Id*.
[41] *Id*. at 198.
[42] *Id*.
[43] *Id*.
[44] For this observation *see* Ulrich Klug, *Skeptische Rechts-Philosophie und humanes Strafrecht*, Springer, Berlin, 1981, vol. II, p. 6, in LUCIANO EUSEBI (*a cura di*), LA FUNZIONE DELLA PENA: IL COMMIATO DA KANT E DA HEGEL 3 (Giuffrè, 1989).

tation of the criminal should be an infringement of justice.[45] Moreover, Kant tells us that "the penal law is a categorical imperative," but he doesn't tell us *why*. Again, we are asked to make a leap of faith and just trust him. Indeed, the "categorical imperative" rule as applied to penal law is, without further justification, an "empty formula."[46] On the premise that from an empty principle nothing can be derived in terms of content, Klug observes how the Kantian categorical imperative, being *per se* an empty formula, could be applied, for instance, by "a community of gangsters."[47] And unfortunately, history is full of examples where the Kantian formula has been "filled" with the wrong "content:" thus, in Nazi Germany the Kantian "thou shall" became a dreadful "thou shall kill." After all, that was the categorical imperative of the new system, and thus accepted and obeyed because "true."[48] But if the "thou shall" is, *per se*, an empty formula from which nothing in terms of content can be inferred, then most definitely it cannot serve to justify the equation that punishment = retribution.[49] Finally, it is by no means clear why, under an ethical point of view, evil needs to be compensated by evil, and not by good:[50] it can very well be argued that retribution in and of itself, without any further purposes, will not lead to anything good; rather, it will hurt human dignity.[51]

Ideas similar to those of Kant's, albeit within a somewhat more complex theoretical framework, are echoed by Georg Wilhelm Friedrich Hegel in *Elements of the Philosophy of Right*.[52] Hegel agrees with Kant that punishment equals retribution. Hegel, however, goes a little further than Kant, and bothers to provide us with a metaphysical justification for retribution: retribution, Hegel says, is the "infringement of the infringement."[53] Hegel's reasoning is the following: a crime is an infringement of rights; this infringement is erased by the infringement, caused by the infliction of punishment, of the rights of the criminal, and in particular of his right to freedom.[54] This theory of punishment is effectively summarized by the well-known expression that, "wrong being the negation of right, punishment is the negation of that negation."[55]

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[45] *Id*.
[46] *Id*. at 7.
[47] *Id*.
[48] For this observation see Federico Stella, *Perché Non Basta Affidarsi allo Spirito Critico*, CORRIERE DELLA SERA, 31 (June 22, 2004).
[49] Klug, *supra* note 44, at 7. While it would be interesting to explore what instruments could be used to guide the interpreter in choosing the right content for the "thou shall," it is a task that would go far beyond the objectives of this paper.
[50] *See*, *e.g.*, STELLA, LA GIUSTIZIA E LE INGIUSTIZIE, *supra* note 24, at 182.
[51] Klug, *supra* note 44, at 8.
[52] GEORG WILHELM FRIEDRICH HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press, 1991) (1821).
[53] *Id*. at 101.
[54] *See* Klug, *supra* note 44, at 5.
[55] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 42 (1881). Klug, *supra* note 44, at 5, notes how the expression "negation of the negation" does not appear in *Elements of the*

Albeit starting from the same premise that punishment is retribution, Hegel reaches a different conclusion than Kant on the quantification of punishment. Hegel, in fact, rejects the "eye for an eye" approach, opting instead for a punishment that equals the crime in terms of value.[56] Moreover, according to Hegel, the criminal has a *right* to be punished; through punishment, in fact, the criminal is honored as a rational being.[57]

Is this a sound approach – one on which to found the justification for criminal punishment? I think not. Hegel's elaboration of punishment is, ultimately, a result of his complex idealistic vision of reality. But his thesis – antithesis – synthesis model, if indeed it makes any sense to begin with,[58] seems at odds with the conclusions that he draws: why should violence be undone by violence? It could be argued that violence is increased by violence, or that violence is undone by non-violence.[59] And "what exactly is the infringement of the infringement?"[60] As Klug observes, a healing, or reconstruction, of the infringement, would be significant; a "negation of the negation" is simply a meaningless figure of speech.[61]

Finally, Hegel's contention that "insofar as the punishment … is seen as embodying *the criminal's own right*, the criminal is *honoured* as a rational being,"[62] is a mere "metaphysical reverie"[63] formed in the mind of a philosopher, and with no connection whatsoever to the real world, where criminal punishment "degrad[es] prisoners and … plung[es] them further into crime."[64] Conversely, it is precisely the respect for human dignity that requires society not to react to a crime in a purely retributivist way, but to try instead to rehabilitate the criminal. Only by doing so society really "honors" the criminal as a "rational being"[65] – or, in Kant's words, treats him not only as a means, but also as an end.[66]

Philosophy of Right, but rather, it is found in the Addings to Hegel's lectures collected by one of his students, Eduard Gans.

[56] Klug, *supra* note 44, at 6.

[57] *Id*. For a somewhat more expanded – and far more deferential – exposition of Hegel's theories of crime and punishment *see* also Pauley, *supra* note 30, at 141 *et seq*.

[58] *See* KARL POPPER, 2 THE OPEN SOCIETY AND ITS ENEMIES 27 – 89 (1966).

[59] Klug, *supra* note 44 at 7.

[60] *Id*.

[61] *Id*. at 8.

[62] HEGEL, *supra* note 52, at 100.

[63] Klug, *supra* note 44, at 9.

[64] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 470 (1897).

[65] Klug, *supra* note, at 9.

[66] I want to stress, at this point, that Kant is also wrong on the *lex talionis*. Although the *lex talionis* can be first found in the Code of Hammurabi, two other sources are more relevant with respect to the Western world: the Bible and the Law of the Twelve Tables. As for the Bible, it must be noted that, while the principle of "eye for an eye" is indeed present in the Old Testament, it is rejected in the New Testament: "You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, do not resist an evildoer. If anyone strikes you on the right cheek, turn to him the other also." (Matthew 5:38–39). Hence, the *lex talionis* was explicitly discarded. Besides, as Cliff Fishman has noted, when the Bible sets forth the *lex talionis* in Exodus 21:23-25 the context is that of

Indeed, while reading these passages from Hegel's work, one is reminded of Arthur Schopenhauer who – quoting Shakespeare – suggested that Hegel's philosophy was "such stuff as madmen tongue, and brain not," and that Hegel himself was nothing more than a "flat-headed, insipid, nauseating, illiterate charlatan, who reached the pinnacle of audacity in scribbling together and dishing up the craziest mystifying nonsense."[67]

As Ulrich Klug invites us to do in his poignant and heartfelt essay *Skeptische Rechts-Philosophie und humanes Strafrecht*,[68] we should take leave from the theories of punishment of Kant and Hegel.[69] At the end of the day, once we've pierced through the philosophical superstructure of Kant's and Hegel's theories of punishment what we are left with is an idea of "just punishment" that strikingly resembles vengeance – public vengeance at the hand of the state.

This "inconvenient truth" was most harshly denounced by Friedrich Wilhelm Nietzsche who, after noticing that "old Kant['s]" moral imperative "smells of cruelty," goes on to shed light on what he sees as the essence of criminal punishment:

> To put the question once again: in what way may suffering be a compensation for "debts?" In that the act of *making* another suffer produced the highest kind of pleasure; in that the loss (to which must be added the vexation caused by the loss) brought, by way of exchange, to the damaged party a most remarkable counter-pleasure – the *making* another suffer, – a true *festival*, as it were … . Revenge leads, in its turn, to the same problem, "How can the act of making another suffer be a satisfaction?" The feeling of delicacy, and still more the tartuffism of tame, domesticated animals (rather say – of modern men, rather say – of *us*) abhors, it seems to me, the energetic representation of the extent to which *cruelty* constituted

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civil damages, and not of criminal punishment. *See* Clifford S. Fishman, *Old Testament Justice*, 51 CATH. U. L. REV. 405 (2002) at 414 (Fishman's argument is quite convincing; however, it does not square with other passages of the Bible, such as that which establishes the death penalty for murder: "Whoever sheds the blood of man, [b]y man shall his blood be shed." *See* Genesis 9:5-6). With respect to the Twelve Tables, which were laid down as the law of Rome in 451 – 450 B.C., the "eye for an eye principle" is instead of great significance; it is, indeed, an enormous step forward for civilization. The reason is because, before the Twelve Tables, there was no limit to retribution in private justice; thus, the principle of "an eye for an eye" was meant to be the limit – to reverse a common metaphor, a ceiling, not a floor. In seeking justice, the individual who suffered the harm could go as far as inflicting the same kind of harm to the wrongdoer, but *no more*. Thus, for example, Law IX of Table VII, which deals with crimes, provides that "*Si membrum rupsit, ni cum eo pacit, talio esto*" ("When anyone breaks a member of another, and is unwilling to come to make a settlement with him, he shall be punished by the law of retaliation"). Thus, the injured party could break the injurer's member, but he could not *kill* the injurer. It did not mean, like most retributivists – first of all, Kant – seem to assume, that the *correct* punishment is *only* one that *equals* the wrong suffered.

[67] ARTHUR SCHOPENHAUER, ON THE WILL IN NATURE: A LITERAL TRANSLATION 7 (4th ed., 1887), as quoted in POPPER, *supra* note 58, at 32.

[68] *See supra* note 44.

[69] Klug, *supra* note 44, at 9.

> the great festive joy of early mankind and, in fact, is admixed as a necessary ingredient of nearly all their joys; and, on the other hand, the representation of the *naïveté*, the innocence with which this desire of cruelty manifests itself; of the deliberate manner in which "disinterested malignity" (or, in the words of Spinoza, *sympathia malevolens*) is pointed as a *normal* attribute of man; *i.e.* as something to which his conscience with hearty will says *Yes!* ... No festival without cruelty: thus the oldest and longest history of man teaches us – and in punishment, also, there is so much that is *festival*! ... The criminal is, first of all, a *breaker* – a breaker of a contract and of a word given .... . The criminal is a debtor, who not only fails to pay back the advantages and advances received, but even aggresses his creditor ... . The anger of the damaged creditor – community – plunges him back into the wild, out-law condition, against which so far protection had been granted him. Community repudiates him, and now all sorts of hostilities may wreak themselves upon him. "Punishment," in this stage of civilization, is simply the image, the *mimus* of normal conduct, as manifested against a hated, disarmed and cast-down enemy, who has forfeited not only all privileges and all protections, but even every claim to mercy; it is, therefore, the martial law and triumphal celebration of the *vae victis!* with all its unrelentingness and cruelty.[70]

According to Nietzsche, retribution – vengeance – is the "cruel festival" of punishment. What is most interesting is that even if we were to discard Nietzsche's analysis on grounds of it being too extreme, we couldn't ignore the fact that similar conclusions on criminal punishment and its relationship to vengeance were reached by Oliver Wendell Holmes, Jr.

In *The Common Law*, Holmes writes:

> There remains to be mentioned the affirmative argument in favor of the theory of retribution, to the effect that the fitness of punishment following wrong-doing is axiomatic, and is instinctively recognized by unperverted minds. I think that it will be seen, on self-inspection, that this feeling of fitness is absolute and unconditional only in the case of our neighbors. It does not seem to me that anyone who has satisfied himself that an act of his was wrong, and that he will never do it again, would feel the least need or propriety, as between himself and an earthly punishing power alone, of his being made to suffer for what he had done, although, when third persons were introduced, he might, as a philosopher, admit the necessity of hurting him to frighten others. But when our neighbors do wrong, we sometimes feel the fitness of making them smart for it, whether they have repented or not. The feeling of fitness seems to me to be *only vengeance in disguise*, and … vengeance is an element … of punishment.[71]

With an act of intellectual courage typical of his character, Holmes openly admits what most retributivists to this day refuse to admit – namely, that an essential (albeit not unique) element of criminal punishment is

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[70] FRIEDRICH WILHELM NIETZSCHE, A Genealogy of Morals, in THE WORKS OF FRIEDRICH NIETZSCHE, vol. X, 75 – 86 (Alexander Tille ed., William H. Hausemann trans., Macmillan1897).

[71] HOLMES, THE COMMON LAW, *supra* note 55, at 45 (emphasis added).

vengeance: in Holmes' own words, "it has never ceased to be one object of punishment to *satisfy the desire for vengeance*."[72] According to Holmes, this fact is "made clear" if only one "consider[s] those instances in which ... compensation for a wrong is out of the question."[73] In those cases, where no restoration or compensation is possible, Holmes argues, punishment "is inflicted *for the very purpose of causing pain*."[74] Insofar as this punishment "takes the place of compensation," Holmes concludes, "one of its objects is to *gratify the desire for vengeance*. The prisoner pays with his body."[75]

I believe that the arguments set forth by Nietzsche and Holmes should provide a strong incentive to heed Klug's exhortation and "take our final leave from Kant's and Hegel's theories of punishment and their irrational, lyrical-philosophical excesses."[76] The seeds of Kant's and Hegel's philosophy and their equation of justice with retribution, however, still pervade contemporary retributivist scholarship. It is to this scholarship, then, that I now turn my attention.

B. MODERN-DAY RETRIBUTIVISM

While Kant and Hegel may justly be considered the "fathers" of retributivism in the sense that they were the first to provide the practice with a systematic philosophical justification, they were far from being the last.[77] Interestingly enough, in most of the modern literature on retributivism the equation justice = retribution in consequence of one's deserts survives unchallenged.[78] What I find even more interesting is that little has been done to *demonstrate* Kant's – and Hegel's – assertion that justice *demands* retribution. Thus, for example, Jeffrie Murphy claims that "[T]he retributivist seeks, not primarily for the socially useful punishment, but for the *just* pun-

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[72] *Id*. at 40 – 41 (emphasis added).
[73] *Id*.
[74] *Id*. (emphasis added).
[75] *Id*. (emphasis added).
[76] Klug, *supra* note 44, at 9.
[77] *See generally* Dolinko, *supra* note 8.
[78] Matt Matravers seems to disagree with this statement, as he observes: "In short, with the notable exception of Michael Moore, the mainstream revival in retributivism since the 1970s has not been a revival in the desert thesis. The slogan "the punishment must fit the crime" is part of contemporary retributivism, but its association with traditional notions of desert is inappropriate. ... The traditional desert thesis is defensible only by invoking some pretty robust metaphysical commitments (such as can be found in Kant, Hegel, and Moore), and such commitments are not only out of fashion philosophically, but are widely regarded by liberals as an inappropriate basis on which to ground public policy in pluralistic societies." Matravers, *supra* note 10, at 36. While Matravers is right in theory when he observes that only "robust metaphysical commitments" can justify the desert thesis, he seems to overlook that the "desert thesis," rather than a 'thesis,' has, in practice, assumed the status of an 'axiom.' As I will show through the literature hereinafter, in fact, most scholars rely on the 'desert thesis' simply by claiming that justice = giving people their (just) deserts; from this axiom, they then go on to develop their theories.

ishment, the punishment that the criminal (given his wrongdoing) deserves or merits, the punishment that the society has a right to inflict and the criminal a right to demand."[79] The same point is made by Igor Primoratz, who claims that there is "nothing methodologically unsound" in advancing "the central tenet" of retributivism: "punishment is morally justified insofar as it is just, that justice is *the* moral consideration with regard to punishment."[80] According to Primoratz, punishment is just "when it is deserved," which is after the commission of an offense.[81] Advancing arguments that echo those of Kant's and that will be echoed by Michael Moore, Primoratz claims that "the offense committed is the sole ground of the state's right and duty to punish"[82] and that "[j]ustice is ... not being done when the guilty go unpunished"[83] because "justice ... is to treat offenders according to their deserts, to give them what they deserve."[84] As usual, this equivalence between justice and retribution is not *demonstrated*; rather, it is *asserted*. Primoratz, in fact, claims – along with Hegel – that "[i]t is justified to requite evil with evil, for it is only just; and it is just because when doing so, we treat another person in the way he has deserved."[85] Circular reasoning at its finest.

This chant – "justice is giving people what they deserve" – is sung over and over in the literature: John Kleinig writes that "[i]t is the fact that a person has committed a moral offence which, in the first instance, constitutes the justification for his being punished. It is what is due to him, what is his desert"[86] and that "to treat a man justly is ... to give him what is due to him, where what is due to him is determined either by considerations of need or of desert;"[87] Paul Robinson and John Darley claim that "[e]nhancing the criminal law's moral credibility requires, more than anything, that the criminal law make clear to the public that its overriding concern is doing justice."[88] If anyone were wondering what exactly "doing justice" could ever mean, Robinson has a ready answer: "doing justice [is] punishing offenders for the crimes they commit."[89]

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[79] Jeffrie G. Murphy, *Retributivism and the State's Interest in Punishment,* in NOMOS XXVII: CRIMINAL JUSTICE 156, 158-59 (J. Pennock & J. Chapman eds. 1985), cited in Dolinko, *supra* note 8, at 1630.
[80] IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT, 147 (1989).
[81] *Id*. at 148.
[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] *Id*. at 70.
[86] JOHN KLEINIG, PUNISHMENT AND DESERT, 66 (1973). Kleinig goes on to observe how "appeals" to reasons other than this would deny the wrongdoer the right to be considered a "moral subject." For a critique of this specific argument see *infra*, note 94.
[87] *Id*. at 80.
[88] Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997) at 477 –78.
[89] Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001) at 1429.

The chorus of retributivists who chant together that justice is deserved punishment for crime is joined by Michael Moore, whose organic, intelligent and well-thought defense of retributivism very few can, in my opinion, compete with.[90]

Moore recognizes that "the battleground of theory known as the philosophy of punishment is littered with the corpses of supposed general principles from which the retributive principle is supposed to follow."[91] According to Moore, however, there is only one way to correctly define and qualify retributivism: retributivism is a "theory of justice" according to which "punishment of the guilty" is an "intrinsic good:" "wrongdoers suffer and justice thus be done."[92] Echoing Hegel, Moore claims that the imposition of punishment is also required if we want to "[respect] the autonomy of the criminals."[93] This, according to Moore, is "the grain of truth in the otherwise misleading slogan that 'criminals have a *right* to retributive punishment'."[94]

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[90] Although Michael Moore has published extensively on retributivism, in this paper I will only take into account his latest published effort, *Placing Blame* (2nd ed. 2010), on the reasonable assumption that whatever views Moore has expressed before, they have either been discarded, or they are reflected in his most recent work.

[91] MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 170 (2010). Moore offers some illustrations: "Giving an offender the punishment he deserves solely because he deserves it has been said to follow from a principle that: debts to society must be repaid (coupled with the further idea that crime creates a debt and punishment is a form of repayment); wrongs must be annulled (coupled with the further idea that punishment annuls them); God's anger must be placated (coupled with the further thoughts that God is a retributivist and that human punishment placates her); wrongdoing must be denounced (coupled with the further belief that punishment is the appropriate form of denunciation despite there being other, less draconian forms); etc." *Id*. (citations omitted).

[92] MOORE, *supra* note 91, at 88 and 118, respectively. It is interesting to note that Moore is just as inflexible as Kant (and also how much of Moore's position is reminiscent of Kant's): "Retributivism is a very straightforward theory of punishment: We are justified in punishing because and only because offenders deserve it. Moral responsibility ('desert') in such a view is not only necessary for justified punishment, it is also sufficient. Such sufficiency of justification gives society more than merely a *right* to punish culpable offenders. It does this, making it not unfair to punish them, but retributivism justifies more than this. For a retributivist, the moral responsibility of an offender also gives society the *duty* to punish. Retributivism, in other words, is truly a theory of justice such that, if it is true, we have an obligation to set up institutions so that retribution is achieved." MOORE, *supra* note 91, at 91 (citations omitted).

[93] MOORE, *supra* note 91, at 151.

[94] *Id*. David Dolinko offers a powerful and engaging critique of the argument that retributivism respects the criminal as a rational being. Responding to the respect/rationality argument, Dolinko concludes that "exposing the weakness of the retributivist's own theory ... I am ... attracted to the other possible response to the accusation: tu quoque. That is, retributivism itself can be accused of using convicted offenders, and thus stripped of its cloak of Kantian respectability. This can be done in two ways – by appealing to the inevitability of mistaken convictions, or by attacking the very notion that we can know what the offender truly deserves. ... Indeed, I think one could argue that it is the deterrence theorists, with their utilitarian outlook, who truly "respect" the criminal by acknowledging

To bring his point home, Moore offers the following thought experiment: he asks the reader to "imagine an offender"[95] who commits an atrocious wrong "in a very culpable way"[96] – Moore chooses the old Russian general who launches his dogs after a young boy and has them tear him apart in front of his mother's eyes, from Fyodor Dostoevsky's *The Brothers Karamazov* – and to assume that *no other purpose* but retribution could be served by punishing the offender. Moore then invites the reader to consider two possible scenarios, the first where the reader himself is the Russian general; the second where someone else, other than the reader, is the general. He then asks the reader whether the offender in either scenario should be punished "even though no other social good will thereby be achieved."[97] Moore concludes: "The retributivist's 'yes' runs deep for most people."[98] If Moore is right – and we will soon see whether he is –, then the conclusion is straightforward:

> Dostoevsky's nobleman should suffer for his gratuitous and unjustified perpetration of a terrible wrong to both his young serf and that youth's mother. As even the gentle Alyosha murmurs in Dostoevsky's novel, in answer to the question of what you do with the nobleman: you shoot him. You inflict such punishment even though no other good will be achieved thereby, but simply because the nobleman deserves it. The only general principle that makes sense of the mass of particular judgments like that of Alyosha is the retributive principle that culpable wrongdoers must be punished. This, by my lights, is enough to justify retributivism.[99]

If we want at this point to recap the essence of the retributivist position, we can say that it consists of a deontological argument that someone who chooses evil must suffer the consequences of that choice; this, the retributivist claims, is not vengeance: it is *justice*. Justice, the argument goes, requires that someone who intentionally (or knowingly, recklessly, negligently: just as long as his conduct is morally blameworthy) causes harm be punished for such harm. The problem with the proponents of this argument is that they – much like Kant and Hegel –, far from *demonstrating* that retributivism *is justice*, simply *affirm that it is so*.

Recall Moore's thought experiment about the Russian general from *The Brothers Karamazov*:[100] Moore asks if you and the offender should be punished even if no other social good will be achieved through the punishment and claims that "The retributivist's 'yes' runs deep for most peo-

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that inflicting pain on him is, in itself, *bad,* and not to be done unless it can be outweighed by its good consequences." For the full argument see Dolinko, *supra* note 8, at 1642 – 1652.

[95] MOORE, *supra* note 91, at 163.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.* at 188.

[100] *See supra* notes 95 – 99 and accompanying text.

ple."[101] Well, granted. I'm not saying it doesn't; I'm not saying it shouldn't; I'm not saying I wouldn't: all I am saying is that this is an instinct, a deep, almost atavistic drive toward vengeance. It is not just me, of course, who is saying that; "Social and experimental psychologists instruct that human beings are hardwired to react punitively to crime" and "evolutionary psychologists explain that natural selection has favored human beings with that hard wiring."[102] At this point, however, it seems to me that F.H. Bradley's quip that "metaphysics is the finding of bad reasons for what we believe upon instinct,"[103] referred to by Moore twice in *Placing Blame* to criticize his opponents' arguments,[104] can just as easily be turned against him. His whole argument in defense of retributivism can, in fact, be seen as the finding of "bad reasons" for what he and, admittedly, most of us believe upon instinct. To be fair, Moore's reasons are far from bad; to the contrary, he makes a quite compelling case that our retributive urges are *justified* (which, as any lawyer knows, does not necessarily mean they are *just*), and that our feeling them makes us neither bad nor immoral persons.[105] But Moore's argument seems to go no further than that. Indeed if we tried to stretch it further – as Moore does – we would simply fall prey to the naturalistic fallacy of *post hoc ergo propter hoc*. As we have seen, Moore claims that "punishing the guilty achieves something good – namely, justice,"[106] and he therefore concludes that "there is such a thing as retributive justice, a kind of justice that is achieved by the punishment of the guilty because and only because they are guilty [and] we have good reason to set up institutions that achieve such justice."[107] If this is the case, though, it

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[101] MOORE, *supra* note 91, at 163.

[102] TONRY, *supra* note 5, at 8 and references therein (citations omitted). Some studies even claim that "Individuals with clear senses of right and wrong and a willingness to act on them ... are better community members, fostering cohesion, increasing the odds of community survival, and perpetuating the gene pool that predisposed people to be retributive." *Id*. (citations omitted).

[103] F.H. BRADLEY, APPEARANCE AND REALITY xiv (2d ed. 1897), quoted in Sanford Kadish, *Foreword: Criminal Law and the Luck of the Draw,* 84 J. CRIM. L. & CRIMINOLOGY 679, 690, 691 (1994).

[104] MOORE, *supra* note 91, at 99, 60.

[105] *See* MOORE, *supra* note 91, at 104 – 188.

[106] *Id*. at 111.

[107] *Id*. at 149. In this essay, for purposes of argument, I accept at face value Moore's – and retributivists' in general – assumption that we all start at the same level on the moral ledger when we are judged for our "just deserts." As a matter of fact, though, I don't think we do, and this is another great weakness of retributivism. As Carol Steiker observes, one cannot avoid considering "the uncontroversial empirical fact that in our contemporary society, those most likely to commit the worst crimes (capital murders) are, as a group, also most likely to have had their volitional capacities affected or impaired by societal conditions for which we collectively bear some responsibility. Thus, it cannot fairly be said that this group is deserving of our worst punishment, or, more affirmatively, it must be acknowledged that there is a retributive gap between the culpability of such offenders and the punishment inflicted upon them." Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology and the Death Penalty*, 58 STAN. L. REV. 571

follows – as I had anticipated – that the whole construction necessarily rests on the coincidence of justice with retribution: which Moore & co. affirm *plurime*, but not even once try to demonstrate (except by saying that it is just because we feel it, and we feel it because it is just: not much of an argument after all). This is the point upon which their elaboration rests; but, I claim, it is also the point because of which said elaboration fails.

While the argument might seem compelling at first sight, in truth it just begs the question; its weakness is exposed right away as soon as one asks: *What is justice*? The strength of the argument, in fact, rests on the assumption that there exists a clear definition of justice, and that retribution fits within that definition. Unfortunately, the assumption is exactly what it is – an assumption; and it is anything but settled. Now, I am aware that the question of "what is justice" is – to use a euphemism – a tough one, and I am not presuming here to say the final word on a century-long debate. Indeed, all I am aiming to do here is to raise doubts (and thus, hopefully, revive the debate) on the validity of the retributivist idea of justice – an enterprise which, I believe, can be successful without needing to *impose* my own definition of what "justice" should be. While I do not want to be entangled in the metaphysical trap of defining the ideal of perfect justice, I will of course – as indeed I must – provide some indication as to what I believe would bring us closer to justice. The fact of the matter is that most writers who occupied themselves with the task of coming up with a positive definition of "what is justice" ended up producing very abstract, elusive theorizations that very little – if anything – have to do with reality;[108] I believe, however, that a better way may be found in what expe-

(2005) at 767 – 768. *See* also Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice* 30, *in* FORGIVENESS, MERCY AND CLEMENCY (Austin Sarat & Nasser Hussain eds., 2007) (noticing that "Retributivism is limited and skewed by its inability to make nuanced judgments about freedom of action and choice in a world of great inequality; this limitation is reflected in the on-off switch of culpability that characterizes much of substantive criminal law.").

[108] An emblematic example of this attitude is John Rawls' *A Theory of Justice*. Rawls defines "justice" as the idea that is proper of fundamental institutions; justice is defined as the "fairness" of society. "Justice," Rawls claims, "is the first virtue of social institutions;" "principles of social justice" are those that "provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation." (JOHN RAWLS, A THEORY OF JUSTICE 3 – 4 (1999)). Throughout his work, Rawls maintains the idea of "justice" as "fairness" and elevates the idea of the social contract to the "highest level of abstraction." (*Id*.) The end result is that the man who participates to the social contract in what Rawls calls the "originary position" is, himself, an abstraction of a man – a hypothetical man. But what help can a hypothetical man offer in the search of a definition of what is "justice"? The answer is that the hypothetical man can offer no help. Unfortunately, Rawls has fallen in the trap of elaborating a model that has little if any correspondence with *reality*. But, as Émile Durkheim – one of the fathers of sociology – asks: "By what privilege is the philosopher to be permitted to speculate about society, without entering into commerce with the detail of social facts?" (ÉMILE DURKHEIM, SOCIOLOGY AND THE SOCIAL SCIENCES (1903) as

rience has to tell us about justice. While, in fact, it is extremely hard to come up with a positive definition – or conceptualization – of "justice," it is far easier to recognize what is *injustice* – and it is easier because each and every one of us has, at one point or another, *experienced* injustice.[109] As Alan Dershowitz puts it: "There is far more consensus about what constitutes gross injustice than about what constitutes perfect justice."[110] In other words – paraphrasing Justice Potter Stewart's famous quip – we know injustice when we see it.[111]

Maybe, then, this approach "from bottom-up,"[112] which Dershowitz uses to offer "a secular theory of the origin of rights,"[113] can serve as our heuristic criterion to try to come up with a conceptualization of justice that more closely resembles our actual experience – that most closely resembles *reality*. In fact, it is precisely the experience of injustice – of the wrongs suffered; of the losses incurred; of the suffering endured – that may allow us to frame, in a sort of *a contrario* construction, an idea of "justice" that is *anchored to reality*. In this perspective, we could say that justice is the reparation of the wrongs suffered; the restitution of the losses incurred; the compensation for the suffering endured.[114]

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quoted in ALAN M. DERSHOWITZ, RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS 132 (2004)). In what Alan Dershowitz defines as a "blistering attack on the ivory tower philosopher," (*Id*.) Durkheim demands that "moral issues be posed and addressed in the light of systematic study of experience." (DURKHEIM, SOCIOLOGY AND SOCIAL SCIENCES as quoted in DERSHOWITZ, RIGHTS FROM WRONGS, at 133). And Durkheim is right; the price of operating otherwise is to offer speculation that is detached from reality and that, therefore, can be of no use to those who have to operate *within* reality.

[109] *See* STELLA, *supra* note 24, at 13; *see* also BARRINGTON MOORE JR., INJUSTICE: THE SOCIAL BASES OF OBEDIENCE AND REVOLT (1978).

[110] DERSHOWITZ, *supra* note 108, at 82.

[111] As it is well known (at least among lawyers), in his concurring opinion in the Supreme Court case *Jacobellis v. Ohio* Justice Potter Stewart wrote: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ["hard-core pornography"]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it." *See* Jacobellis v. Ohio, 378 U.S. 184 (1964) (Stewart, J., concurring).

[112] DERSHOWITZ, *supra* note 108.

[113] *Id*.

[114] *See generally* STELLA, LA GIUSTIZIA *supra* note 24. This approach to how to conceptualize "justice" is somewhat confirmed in ALAN M. DERSHOWITZ, THE GENESIS OF JUSTICE. TEN STORIES OF BIBLICAL INJUSTICE THAT LED TO THE TEN COMMANDMENTS AND MODERN LAW (2000) (arguing that an idea of "justice" can be derived from the several examples of injustice that are found in the Book of Genesis), and DERSHOWITZ, RIGHTS FROM WRONGS, *supra* note 108 (arguing that looking for a transcendent – whether religious or mystical or simply metaphysical – justification for fundamental human rights would be a pointless effort; rather, the sacredness of certain rights derives from the wrongs experienced in the past and from the horrors that derived from such wrongs, thus making the protection of those rights of vital importance to avoid that the horrors of the past be repeated).

Despite this is – I believe – as close and pragmatic a definition of justice as we can ever hope for,[115] as well as a conceptualization on which most people will be able to find common ground, it is also a conceptualization that gives us little reason to be happy. If, in fact, justice is the reparation of the wrongs suffered; the restitution of the losses incurred; the compensation for the suffering endured, then the inescapable conclusion is that, many times, justice simply *cannot be done*. How is it possible to do justice to a woman who has been raped? How is it possible to do justice to a mother whose son has been killed? The answer to these rhetorical questions contains the bitter truth that *it is not possible*.

Fyodor Dostoevsky, the great connoisseur of the human soul, paints a perfect picture of the situation in *The Brothers Karamazov*. In what I find to be one of the most touching pieces of literature of all times, during a confrontation with his younger brother – and novice – Alyosha, Ivan Karamazov cries out:

> Oh, Alyosha, I am not blaspheming! I understand, of course, what an upheaval of the universe it will be when everything in heaven and earth blends in one hymn of praise and everything that lives and has lived cries aloud: 'Thou art just, O Lord, for Thy ways are revealed.' When the mother embraces the fiend who threw her child to the dogs, and all three cry aloud with tears, 'Thou art just, O Lord!' then, of course, the crown of knowledge will be reached and all will be made clear. But what pulls me up here is that I can't accept that harmony. And while I am on earth, I make haste to take my own measures. You see, Alyosha, perhaps it really may happen that if I live to that moment, or rise again to see it, I, too, perhaps, may cry aloud with the rest, looking at the mother embracing the child's torturer, 'Thou art just, O Lord!' but I don't want to cry aloud then. While there is still time, I hasten to protect myself, and so I renounce the higher harmony altogether. It's not worth the tears of that one tortured child who beat itself on the breast with its little fist and prayed in its stinking outhouse, with its unexpiated tears to 'dear, kind God'! It's not worth it, because those tears are unatoned for. They must be atoned for, or there can be no harmony. But how? How are you going to atone for them? Is it possible? By their being avenged? But what do I care for avenging them? What do I care for a hell for oppressors? What good can hell do, since those children have already been tortured?[116]

What, then, of "those instances in which, for one reason or another, compensation for a wrong is out of the question?"[117] What about "the tears of that one tortured child who beat itself on the breast with its little fist and prayed in its stinking outhouse, with its unexpiated tears to 'dear, kind God'!"? Those tears will remain "unatoned for".

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[115] Or, if not "ever," at least for the time being. I honestly wish it were possible to come up with a better, happier and more hopeful definition; and maybe, one day, we will. Nowadays, however, I truly believe that we are far more likely to find a greater consensus on what is wrong rather than on what is ideal.

[116] FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV 257 (Macmillan, 1922).

[117] HOLMES, THE COMMON LAW, *supra* note 55, at 40.

In those instances, where it is impossible to repair the wrongs, to give restitution for the losses and to give compensation for the suffering – and this, alas, seems to be the case for most of the instances that require the intervention of the criminal law – all that is left is to inflict a punishment "upon the wrong-doer, of a sort which does not restore the injured party to his former situation ... *for the very purpose of causing pain*. And so far as this punishment takes the place of compensation ... one of its objects is to *gratify the desire for vengeance*."[118] Even by trying to fit retribution within the idea of "justice," the conclusion is that, with respect to the core of criminal law, retribution – criminal punishment for the evil done, without transcendent ends – does not, and indeed, *cannot*! Achieve justice. In all those instances where there can be no undoing of the harm done, the conclusion is, once again, that retribution in its essence is closer to vengeance than it will ever be to justice.[119] We are right back where we were after dealing with Kant and Hegel; retributive punishment is, as Sir James Fitzjames Stephen wrote, the "gratif[ication of] the public desire for vengeance."[120] What's more, a consciousness of the close bond that ties retribution to vengeance is clear in the writings of at least some retributivists. To be sure, there are arguments that support a distinction between retribution and revenge. Samuel Pillsbury, for example, while acknowledging the in-

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[118] *Id*.

[119] In the excerpt from Dostoevsky quoted above, Ivan, after asking "what good can hell do [for the oppressors] since t[he] children have already been tortured," goes on to say that "too high a price is asked for harmony; it's beyond our means to pay so much to enter on it. And so I hasten to give back my entrance ticket, and if I am an honest man I am bound to give it back as soon as possible. And that I am doing. It's not God that I don't accept, Alyosha, only I most respectfully return him the ticket." (DOSTOEVSKY, *supra* note 116, at 258). While I am not ready to follow Ivan's decision to just "give up" and "return the ticket" to God (which by the way, as Michele Taruffo observes in the introduction to FEDERICO STELLA, LA GIUSTIZIA E LE INGIUSTIZIE, *supra* note 24 presupposes that there is a somewhere else to go to – but there is not, in reality, such a place) I agree with the bottom message – that justice, in front of the great evils that befall humanity (including those instances of evil that criminal law is called upon to repress and punish), cannot be attained. The moral choice, though, as Federico Stella indicates at the end of LA GIUSTIZIA E LE INGIUSTIZIE, is not to "return the ticket," but rather to "chase" justice by working to build a society that is less unjust. The first step toward the building of a society that is less unjust is, in my opinion, recognizing that evil – with what Hannah Arendt defined its "banality" – is the supreme source of all injustices that afflict mankind. And while this is not the place to engage in a meditation on "evil," I think we should still pause for a second to reflect on the fact that that "radical evil" is in all of us – as Kant himself was well aware: "*In the misfortunes of our best friends there is something that does not altogether displease us,"* he observes in RELIGION WITHIN THE LIMITS OF REASON ALONE (Theodore M. Greene trans., Digireads.com Publishing, 2011) (1793), of which book one is indeed dedicated to "the radical evil in human nature" (which renders his "vindictive folly" even the more puzzling). Acknowledging the presence of evil inside us – what Jung calls the "darkness" that "fills us" – is the first, necessary step to defeat it.

[120] JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, Vol. 2, 83 (Macmillan, 1883), quoted in Hostettler, *supra* note 13, at 70.

separability of anger and retribution,[121] claims that retribution "involves a judgment of wrong to the society according to publicly agreed principles of morality"[122] and it "seeks another's suffering, not to satisfy a personal need, but for a principle of good-enforcing respect for persons;"[123] revenge, on the other hand, "arises from a judgment of harm to self-made according to personal principles ... . The revenge-seeker ... seeks personal gain in the form of restored dignity or power from another's suffering."[124]

Another notable writer who argued for a distinction between retribution and revenge is Robert Nozick. Nozick individuates five criteria to distinguish vengeance from retribution: first, while retribution is imposed for a wrong, revenge can be carried out also for any other sort of injury; second, retribution has intrinsic limits of proportionality, whereas revenge knows no such limits; third, revenge is "personal," whereas retribution is carried out impersonally and therefore – one assumes – impartially. Moreover, revenge involves "pleasure in the suffering of another," whereas retribution involves "pleasure at justice being done." Finally, retribution, unlike revenge (which is focused on the harm suffered by the revenge-seeker), is committed to a level of generality, i.e. to "general principles" mandating equal punishment for similar cases.[125] The line between retribution and revenge, however, is not as clear-cut as Nozick makes it out to be. For starters, Nozick himself has to admit that "there can be mixed cases" and that "people can be moved by mixed motives."[126] As for the argument that revenge (and not retribution) requires a "personal tie"[127] between the avenger and the subject of the revenge, it seems to me that it all rests on the incorrect assumption that if A kills or rapes or maims B, it is only a matter between A and B. A plausible argument, however, can be made – and indeed it is an argument that is at the foundations of criminal law as a *public* institution – that A wronging B wrongs not only B, but the community as a whole. In John Donne's words, "No man is an island, entire of itself. ... Any one's death diminishes me, for I am involved in mankind."[128] A crime, then, always harms at least two categories of subjects: the victim of the crime itself, and the community at large.

Another apparently strong argument that is common to Pillsbury,[129] Nozick[130] and Hegel[131] rests on the public-private distinction. As Primoratz

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[121] Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment,* 74 CORNELL L. REV. 655, 657, 671 –72 (1989).
[122] *Id*. at 690.
[123] *Id*.
[124] *Id*.
[125] *See* ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 366 –68 (1981).
[126] *Id*. at 368.
[127] *Id*. at 367.
[128] John Donne, *Meditation XVII in* DEVOTIONS UPON EMERGENT OCCASIONS (1624).
[129] *See supra* notes 121 –24 and accompanying text.
[130] *See supra* note 125 and accompanying text.
[131] Hegel, *supra* note 52, at 100 – 03.

puts it, "retributivism has two forms: revenge and punishment."[132] Primoratz explains that revenge has two defects: first, it tends not to be objective and therefore not proportionate; second, it is private, and not institutionalized.[133] Once the State comes into play and institutionalizes punishment, retribution is "freed from both limitations that plague revenge."[134] The public-private distinction, however, seems to me to be mostly about *form*; it is the *collective* exaction of revenge versus the *individual* exaction of revenge. True, *public vengeance* will most likely be (more) constrained by proportionality, but other than that, given its formal nature, the distinction between revenge and justice based on the private or public nature of the execution is *a distinction without a difference*. This seems clear to Jeffrie Murphy, who acknowledges that "the desire to hurt another ... is ... sometimes ... motivated by feelings that are at least partly *retributive* in nature."[135] Later in the chapter, when Murphy sets forth three reasons why in his opinion "persons may sometimes fail to act out their retributive hatreds," two out of the three reasons involve "getting even" – an expression that recalls vengeance if there ever was one.[136] Murphy's conclusion is unequivocal: "retributive hatred" is a "desire for revenge;"[137] giving people their just deserts means "in short, to 'get even' through revenge."[138] Defining revenge as "any injury inflicted on a wrongdoer that satisfies the retributive hatred felt by that wrongdoer's victim,"[139] Murphy finally admits that "it will ultimately be impossible to draw a sharp distinction between the desire for retributive justice and the desire for revenge."[140] Once again, retributivists failed in their efforts to separate justice from revenge; indeed at least one of them openly admits that the two are *de facto* inseparable. So, while retribution exacted within the constraints of the legal system is clearly – and by far – preferable to individual, private and unbound revenge (the one which characterizes blood feuds, honor killings, and the like) it is still, in its substance, closer to revenge than it is to justice. And insofar as the argument for a difference between the two rests on formalist grounds, I would say that accepting that argument would mean yielding to the temptation of putting one's "last trust in a sure nothing, rather than in an uncertain something:"[141] it is probably easier to accept an empty distinc-

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[132] Primoratz, *supra* note 80, at 70.
[133] *Id*. at 70 – 71.
[134] *Id*. at 71.
[135] JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 89 (1988). The chapter from which the quote is taken is written by Murphy.
[136] *See id*., at 104 –05.
[137] Jeffrie G. Murphy, *Getting Even: The Role of the Victim, in* CRIME, CULPABILITY, AND REMEDY 209 (E. Paul, F. Miller, Jr., & J. Paul eds., 1990).
[138] *Id*.
[139] *Id*. at 218.
[140] *Id*. at 224. Murphy qualifies the conclusion as a "consequence of [his] view," but I think the conclusion has a broad, general value.
[141] FRIEDRICH WILHELM NIETZSCHE, BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE 14 – 15 (Helen Zimmern trans., MacMillan 1907) (1886).

tion than to recognize that one of the concepts to which we are most attached – that of retribution and its relationship to justice – may not be exactly as we thought it was.

I realize that – the foregoing arguments notwithstanding – I will not be able to persuade everyone that retribution equals revenge; especially I may not succeed in convincing someone who holds *deep-seated intuitions* to the contrary. Moreover, I will most certainly not manage to move someone who believes vengeance in and of itself to be a good thing – but, with regard to this latter point, I am not even trying, as it would be, I believe, a futile effort. Besides, I am not claiming here that public vengeance is never justified; even less so am I claiming that *we as people* are not justified in feeling revengeful impulses. Michael Moore has made quite the persuasive case to the contrary (although, as I have shown, that's *all* he proves);[142] and maybe Nietzsche was right when he quipped, "A little revenge is more human than no revenge."[143] Moreover, given the fact that our retributivist instincts run so deep and may even play a part in our evolution,[144] we may not – probably, even, should not – completely ban retribution from the realm of criminal punishment, if we want the criminal law and the criminal justice system to be respected and supported by the very society it was created to protect and serve.[145] But this shouldn't mean that revenge should be the *guide* of our actions, nor the *principle* that *shapes* our system of criminal justice. As Dolinko puts it, "punishing criminals is a dirty business but the lesser of two evils and thus a sad necessity, not a noble and uplifting enterprise that attests to the richness and depth of our moral character."[146] Therefore, even if I have only succeeded in raising some "reasonable doubts" about the equation justice = retribution, I shall be satisfied. After all, none of the arguments set forth by the retributivist camp is able to address satisfactorily – if at all – Sanford Kadish's basic questions on retributivism: what makes punishing offenders "a good thing to do in and of itself?"[147] After observing that "punishment consists of intentionally afflicting a person with suffering and deprivation or similar evils,"[148] Kadish presses on:

> Why is it good to create more suffering in the world simply because the criminal has done so? How does the unlikely proposition that it is right to

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[142] *See supra* notes 101 – 105 and accompanying text.

[143] FRIEDRICH WILHELM NIETZSCHE, *Thus Spoke Zarathustra*, *in* THE PORTABLE NIETZSCHE 180 (Walter Kaufmann ed., NEW York: Viking, 1954) (1883 – 1885). As Kadish candidly admits: "I freely confess that, like most people, I have a feeling in my bones that it is right to punish wrongdoers even where no good comes of it. Yet I can find no persuasive justification for my feelings; that they are widely shared tells me that it is human, not that it is right." Kadish, *supra* note 103, at 699.

[144] *See supra* notes 100 –07 and accompanying text.

[145] I owe this point to Cliff Fishman.

[146] Dolinko, *supra* note 8, at 1656.

[147] Kadish, *supra* note 103, at 699 (1994).

[148] *Id*.

> hurt a person apart from any good coming of it connect with other moral ideas in our culture that are worth preserving? Is it not a strange candidate for a good worthy of our devotion? Doesn't it resemble too closely for comfort the despised practice of taking pleasure in another's pain?[149]

Even a reader who were to completely reject my proposed conceptualization of justice and hence one of the pillars of my critique of retributivism would have to acknowledge that the failure to offer a plausible answer to any of the aforementioned questions renders retributivism "prima facie morally suspect."[150] But if something is *prima facie* morally suspect, then *a fortiori* – indeed, I daresay, by definition – it is unlikely to equal justice, however justice be defined. If people mean it when they say, "I want *justice*, not *revenge*," then retribution cannot offer them what they are looking for.

III. LOOKING FORWARD: DETERRENCE, REHABILITATION, INCAPACITATION

If, for the moment, we leave the backward-looking rationale for criminal punishment to one side, we can turn our attention to the forward-looking ones: deterrence, rehabilitation, and incapacitation. Are they going to provide us with a stronger, more compelling justification for the infliction of criminal punishment?

The deterrence rationale goes back to at least around 2400 years ago.[151] Establishing what can be called the "classical" theory of deterrence,[152] Plato writes:

> [N]o one punishes the evil-doer under the notion, or for the reason, that he has done wrong, – only the unreasonable fury of a beast acts in that manner. But he who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he has regard to the future, and is desirous that the man who is punished, and he who sees him punished, may be deterred from doing wrong again. He punishes for the sake of prevention.[153]

Plato's theory remains virtually unchanged for the next 2000 years.[154] Thus Beccaria in 1764 writes:

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[149] *Id*.
[150] *Id*.
[151] *See* Giancarlo De Vero, *Prevenzione Generale e Condanna dell'Innocente*, 990 RIV. IT. DIR. PROC. PEN. 1003 –04, (2005).
[152] As opposed to the "modern" theory of deterrence, see *infra*.
[153] PLATO, PROTAGORAS 43 (Benjamin Jowett trans., Serenity Publishers, 2009). For a more complete view of Plato's complex theories of punishment, which include, besides deterrence, also elements of rehabilitation, incapacitation and retribution, *see* Pauley, *supra* note 30, at 101-06.
[154] *See* De Vero, *supra* note 151, at 1003-04.

> It is evident that the purpose of punishment is neither to torment and afflict a sentient being, nor to undo a crime already committed ... . The purpose of punishment ... is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same.[155]

A somewhat different approach was advanced in 1799, with the publication of Anselm Von Feuerbach's *Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts*.[156] Feuerbach, the father of the "modern" conception of deterrence, introduces a distinction – which is not present in the "classical" conception – between the *threat* of punishment (= the penal law) and the *execution* of punishment.[157] Only the threat of punishment, by means of the proclamation of penal laws, is set forth *ne peccetur*; the infliction of criminal punishment is *quia peccatum est*. According to Feuerbach, criminal law can only have a function of *general* deterrence; this function is accomplished by establishing a law that provides a punishment for a crime. It is the establishment of the law *per se* that serves the purpose of deterrence.[158]

The novelty of Feuerbach's approach is that, anchoring the deterrence effect *to the legal provision* (as opposed to the infliction of punishment), it takes the foundations of their arguments away from those who refer to general deterrence as the justification for exemplary punishments.[159] What the "classical" and the "modern" theories have in common, however, is that the effectiveness of general deterrence – or rather, its *scope* – has never been *proven*. Once again, this is something of which Oliver Wendell Holmes was aware well over a century ago:

> [W]hat have we better than a *blind guess* to show that the criminal law in its present form does more good than harm? ... . Does punishment deter? Do we deal with criminals on proper principles?[160]

A satisfactory answer to Holmes' question has yet to be given; as Stephen Schulhofer has observed, "whether punishment deters certain kinds of crimes at all, whether more severe penalties produce greater deterrence,

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[155] Beccaria, *supra* note 25.

[156] PAUL JOHAN ANSELM RITTER VON FEUERBACH, REVISION DER GRUNDSÄTZE UND GRUNDBEGRIFFE DES POSITIVEN PEINLICHEN RECHTS (Erfurt, 1799).

[157] Feuerbach, *supra* note 155; for the reflections hereinafter *see generally* De Vero, *supra* note 151.

[158] *Id*. Hegel rejected and vehemently attacked Feuerbach's position: "Feuerbach – Hegel writes – in his theory of punishment considers punishment as a menace ... But is it right to make threats? A threat assumes that a man is not free, and will compel him by vividly representing a possible evil. Right and justice, however, must have their seat in freedom and in the will, and not in the restriction implied in the menace." HEGEL, *supra* note 52, at 96. For a summary of Hegel's attack and a defense of Feuerbach's position *see* also De Vero, *supra* note 151, at 1012 – 1015, and the texts thereby referenced.

[159] STELLA, *supra* note 24, at 187.

[160] Holmes, The Path of the Law, *supra* note 64, at 470 (emphasis added).

even these basic questions cannot be answered with confidence."[161] To be sure, some studies have shown that there is *at least some* general deterrent effect that follows from incarceration, although it is by no means a straight line;[162] for specific deterrence, at least one study claims that incarceration is responsible for a 10-25% reduction in crime rates,[163] although this small reduction comes at a very high cost for taxpayers[164] and although "the impact of incarceration on crime is inconsistent from one study to the next."[165]

The next rationale for punishment in our analysis is rehabilitation. The main idea of rehabilitation is to "recuperate" the criminal, so that he can be sent back into the community no more as a threat, but rather as a productive member of society.

According to Michael Moore, rehabilitation "is perhaps the most complex of the theories of punishment, because it involves two quite different ideals of rehabilitation."[166] Moore operates a distinction between rehabilitation that aims to make sure that the criminal no longer poses a threat to society, thus making the community "better off as a whole," and rehabilitation that focuses on the criminal and aims at allowing him to return to society and live a "flourishing and successful" life.[167] The latter kind is, according to Moore, "paternalistic in character" and "has no proper part to play in any theory of punishment."[168] Moore goes on to explain why such a theory should play no role in the justification for punishment:

> First, such a paternalistic reform theory allocates scarce societal resources away from other, more deserving groups ... . Second, in any political theory according high value to liberty, paternalistic justifications are them-

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[161] Stephen Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974) at 1517. As for the specific deterrent effect, it is reasonable to assume that *at least some* offenders will not offend again, wishing not to go back to prison. For many convicted offenders – maybe even for most – however, prison ends up being a "school of specialization in crime," and the prison door turns out to be a revolving door. Thus, current prison practice casts serious doubts on the personal deterrence effect of criminal punishment.

[162] *See*, *e.g.*, Donald Ritchie, *Does Imprisonment Deter? A Review of the Evidence*, in Sentencing Matters, April 2011, available at http://www.abc.net.au/mediawatch/transcripts/1128_sac.pdf.

[163] Alfred Blumstein & James Wilson, *The Impact of Incarceration on Crime: Two National Experts Weigh In*, The PEW Center on the States, (April 5 2008), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/the%20impact%20of%20incarceration%20on%20crime.pdf (last visited Jan. 8, 2013).

[164] Don Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime*, Vera Institute of Justice, Jan. 2007, at 2, available at http://www.vera.org/download?file=407/veraincarc_vFW2.pdf (last visited Jan. 8, 2013).

[165] *Id*. at 3.

[166] MICHAEL S. MOORE, LAW AND PSYCHIATRY 234 (1984), excerpt quoted from Kadish et al., *supra* note 103, at 98. *See* also Moore, Placing Blame, *supra* note 91, at 84 – 87.

[167] *Id*.

[168] *Id*.

> selves to be regarded with suspicion ... . Third, such recasting of punishment in terms of "treatment" for the good of the criminal makes possible a kind of moral blindness that is dangerous in itself.[169]

While I agree with Moore on the two ideals of rehabilitation, I cannot share his conclusion that the second kind is "paternalistic" and thus cannot play any "proper part in any theory of punishment."[170] On the contrary, the two ideals represent two vital sides of the same coin. On the one hand, in fact, we do want punishment to foster the good of society by rendering offenders "harmless" so that, when (if?) they re-enter society, society will be safe.[171] On the other hand, mere utility for society cannot be the only reason to attempt rehabilitation; an argument can be made that *morally*, rehabilitation is *required* to be undertaken *in the best interest of the offender* to be at least given a chance to become a positive, productive member of the community. Contrary to what Moore claims, this is not a "paternalistic" attitude; rather, it is the application of Kant's own golden maxim that "one man ought never to be dealt with merely as a means subservient to the purpose of another."[172] Like I argued *supra*, it is *precisely* by offering the criminal a *chance* to rehabilitate himself, that he is treated not only as a means, but also as an end; or, in Hegel's words, that he is recognized as a "rational being." [173]

This said, the concept of rehabilitation does have two structural problems: first, it cannot be forced upon the subject that needs to be rehabilitated (at least not, I believe, in a liberal democracy). It is a process that must be undertaken voluntarily; once the criminal accepts and wants to be rehabilitated, enormous success can be obtained[174] – but first, the criminal *must want* to rehabilitate himself. Second – and equally importantly – for rehabilitation to work, *it must be taken seriously*. It is precisely this second point which is systematically lacking, and which gives rise to the false notion that rehabilitation 'just doesn't work.' But the truth of the matter is that, pursuant to current prison conditions, rehabilitation simply is not an option: as a Human Rights Watch report on prisons contends, "prisons do

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[169] *Id*.

[170] For a critique of this argument see also Dolinko, *supra* note 8, at 1642 –52.

[171] A goal, this one, that doesn't seem to be served particularly well by the current prison system: see, *e.g.*, NILS CHRISTIE, CRIME CONTROL AS INDUSTRY. TOWARDS GULAGS, WESTERN STYLE (2000); LORNA A. RHODES, TOTAL CONFINEMENT: MADNESS AND REASON IN THE MAXIMUM SECURITY PRISON (2004); Joan Ryan, *Prisoner's Isolation Leads to Desperation. Safer Cells Means More Dangerous Streets*, S.F. CHRONICLE, Jan. 27, 2004, at A 13.

[172] Kant, *supra* at 195. *See also supra* note 66 and accompanying text.

[173] *See supra* note 57 and accompanying text. For similar arguments, *see also* Dolinko, *supra* note 8.

[174] On the issue of rehabilitation, its challenges and its successes see, for all, KIRAN BEDI, IT'S ALWAYS POSSIBLE: ONE WOMAN'S TRANSFORMATION OF INDIA'S PRISON SYSTEM (2006), where the author recounts her efforts to reform the prison of Tihar – one of Asia's largest prisons, counting over 10,000 inmates – and of the enormous successes attained through rehabilitative programs, including an abatement of recidivism.

more than deprive their inmates of freedom. The great majority ... are confined in conditions of filth and corruption, without adequate food or medical care, with little or nothing to do, and in circumstances in which violence – from other inmates, their keepers or both – is a constant threat."[175] In the words of Arne Nilsen, governor of Norway's Bastoy prison, in a "conventional prison where prisoners are given no responsibility, locked up, fed and treated like animals [they] eventually end up behaving like animals."[176] This seems indeed to be pursuant to the position advocated, among others, by former Massachusetts Governor William Weld, who "told a meeting of attorneys general that prison should be like 'Dante's inner circles of Hell'."[177]

Now compare this depiction with, for example, the model of Norway, whose prison system, according to Halden prison governor Are Hoidal, promotes a "focus on human rights and respect."[178] Norway's prison system aims to treat inmates as human beings who are of course being punished – they committed a wrong and thus their liberty is taken away from them – but whose dignity as human beings remains unspoiled.[179] During their sentence, inmates are taught a profession – crafting, cooking, plumbing, and so on and so forth – and, in the case of Bastoy prison, inmates spend their time working in various capacities so as to maintain the green and self-sustaining status of the institution ("The prison is self-sustaining and as green as possible in terms of recycling, solar panels and using horses instead of cars," says Nilsen).[180] Of course this approach will encounter a staunch opposition – infused with retributivism – from those who repel the idea of an offender having done something monstrous and being sent to a place that resembles a vacation resort more than a prison. To those who advance such an objection, however, my answer is twofold: first, as an anonymous contributor to *The Economist* has observed, it is true that such an approach might "offend our sense of justice."[181] This is, however, due

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[175] THE HUMAN RIGHTS WATCH GLOBAL REPORT ON PRISONS XV, New York: Human Rights Watch, 1993, available at http://dmitrijus.home.mruni.eu/wp-content/uploads/2009/12/Human-Rights-Watch-Global-Report-on-Prisons.pdf (last visited Jan. 9, 2013).

[176] Piers Hernu, *Norway's Controversial 'Cushy Prison' Experiment – Could It Catch On in the UK?*, DAILY MAIL, July 25, 2011, available at http://www.dailymail.co.uk/home/moslive/article-1384308/Norways-controversial-cushy-prison-experiment--catch-UK.html (last visited Jan. 9, 2013).

[177] PHYLLIS KORNFELD, CELLBLOCK VISIONS: PRISON ART IN AMERICA 23 (1997).

[178] William Lee Adams, *Norway Builds the World's Most Humane Prison*, TIME MAGAZINE, May 10, 2010, available at http://www.time.com/time/magazine/article/0,9171,1986002,00.html (last visited Jan. 9, 2013).

[179] *See* Hernu, *supra* note 176; Adams, *supra* note 178.

[180] *Id*.

[181] W.W., *Norwegian v. American Justice: Plush and Unusual Punishment*, THE ECONOMIST, July 28, 2011, available at

to our own "instinct for retribution:" "The idea of balancing some cosmic scale, of restoring the moral order to equilibrium, is deeply appealing. But there is no cosmic scale to balance. The moral order is not some sort of pervasive ethereal substance that threatens to undo us if a monstrous offence is not met with equally ferocious punishment."[182] If we approach the subject rationally – the anonymous contributor continues – we will see that the "main imperative" is to guarantee society's safety and to punish wrongdoing to the extent necessary to deter the commission of similar crimes in the future.[183] And with respect to this latter point – and this is the second part of my answer – a comparison of the recidivism rates of the United States, Europe, Scandinavia in general and Norway in particular pretty much speaks for itself; while the recidivism rate in the United States and Europe is between 50% and 75%, the recidivism rate in Denmark, Sweden and Finland is only 30%.[184] The recidivism rate in Norway is 20%, with Bastoy prison having a recidivism rate as low as 16% – the lowest in Europe.[185] This is indeed compelling evidence that rehabilitation can succeed and do well – if taken seriously. And while of course there are strong differences between Norway and the United States – just think, for example, that Norway's prison roll "lists a mere 3,300, or 69 per 100,000 people, compared with 2.3 million in the U.S., or 753 per 100,000"[186] – that may make the Norwegian model unfeasible in the U.S., the fact that such model exists and, even more, that it seems to work should be a cause for deep reflection on and reconsideration of the policies and principles – pure retributivism above all – that inform American criminal justice.

On the last rationale – incapacitation – I don't think there is much to be said. Pure and simple, incapacitation "works directly to build walls between the allegedly dangerous and the endangered populations."[187] This can happen essentially[188] in either of two ways: the allegedly dangerous individual can be locked up preemptively (such is the case, for example, of civil confinement for the mentally ill and dangerous) or he can be locked up after a crime has been committed and for as long as the dangerousness persists. A recent example of this latter scenario is that of Anders Breivik who, after killing 77 people and being denied a defense of insanity, was

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http://www.economist.com/blogs/democracyinamerica/2011/07/norwegian-v-american-justice.

[182] *Id*.

[183] *Id*.

[184] Hernu, *supra* note 176.

[185] *Id*.

[186] Adams, *supra* note 178.

[187] Alan M. Dershowitz, *Background Paper*, in FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 73 (1976).

[188] For reasons of space, and in order not to stray too far away from the core topic of this paper, I am offering a somewhat simplistic description of preventive confinement. For a detailed, in depth analysis of the concept and forms of preventive confinement *see* Alan M. Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277 (1973).

sentenced by an Oslo court to a prison term of 21 years – the maximum penalty under Norwegian law – to which judges will be able to add a succession of 5-year extensions for as long as Breivik will be considered dangerous.[189]

What the rationales described above have in common is that – as I have already pointed out – they are all forward-looking; punishment is imposed so that those who are punished (as well as the general population) will be deterred *from committing future crimes*; so that they will be rehabilitated and thus *will not commit crimes in the future* (upon release); so that they will be *prevented from offending again*. The question to be asked now, then, is: what is wrong with adopting a purely forward-looking approach?

The answer is that what the approaches outlined above also have in common is their utilitarian character; their ultimate goal is what is best for society (in the case of rehabilitation by means of what, I believe, also happens to be best for the offender). Without any elements of desert – without any looking backward – the imposition of punishment is reduced to a "simplistic Benthamite calculus."[190] But what are the consequences of a purely Benthamite calculus applied to the criminal law?

To respond to this question, one need not go very far, nor be very imaginative; the answer can be found, to begin with, in the writings of Cesare Lombroso. Lombroso – the founder of the Positive School of criminology – pushed Beccaria's deterrence theories beyond their limit and argued that rather than repressing crime, the focus should be on trying to prevent it.[191] According to Lombroso, the way to crime prevention was twofold; on the one hand, the broad, general causes of certain crimes had to be studied and addressed; on the other hand, a narrow focus on the individual criminal (or class of criminals) was required.[192] Observing with Cicero that *a natura hominis discenda est natura iuris*,[193] Lombroso concludes that some criminals "ought never to be liberated."[194] For Lombroso, "the preventive imprisonment of the ... criminal [is analogous] to the confinement of the insane;"[195] both are justified by "society's right to defend itself."[196] "Crime and insanity" Lombroso writes – "are both misfortunes; let us treat them,

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[189] Mark Lewis and Sarah Lyall, *Norway Mass Killer Gets the Maximum: 21 Years*, N.Y. TIMES, Aug. 24, 2012, available at http://www.nytimes.com/2012/08/25/world/europe/anders-behring-breivik-murder-trial.html?pagewanted=all&_r=1& (last visited 12/7/2012).

[190] Dershowitz, Background Paper, *supra* note 187, at 73.

[191] CESARE LOMBROSO, CRIME, ITS CAUSES, AND REMEDIES 245 (Henry P. Horton trans., Little-Brown & Co., 1911)

[192] *See* Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Crime*, 123 U. PA. L. REV. 297 (1974 – 1975) at 308 –09.

[193] Lombroso, *supra* note 191, at 386.

[194] *Id*. at 423. *See also* Dershowitz, Indeterminate Confinement, *supra* note 192, at 309.

[195] *Id.* at 309.

[196] *Id*. and references therein.

then, without rancor, but defend ourselves from their blows."[197] Utility to society is key to the Lombrosian theory: "formerly, punishment, which was made to correspond to the crime and like it had an atavistic origin, did not attempt to conceal the fact that it was either an equivalent or an act of vengeance;"[198] those, however, were "the theories of ... Kant ... and Hegel, [nothing more than] the ancient ideas of vengeance and the *lex talionis* disguised in modern dress."[199] According to Lombroso, there is only one acceptable (and absolute) rationale to justify criminal punishment: "[i]t is just because the principle of punishment is based upon the necessity of defense that it is really not open to objection."[200]

One can very well see how anchoring the justification of criminal punishment to the defense of society (a defense, moreover, which shows the colors of necessity, and, as the saying goes, necessity knows no law) can open the door to limitless preventive punishment exacted in the name of protecting society. Such was the case, for instance, of the internment of Japanese-Americans during World War II – "the most dramatic example of pure preventive confinement [in United States history]."[201] And while this may very well be the most extreme example to date, if we adopt a purely forward-looking approach (featuring any of the three rationales outlined in this section or any combination thereof) whose only consideration is the utility to society, we might be tempted not only to advance the preventive confinement and detention of those subjects considered to be socially dangerous or likely to (or having the potential to) commit (future) crimes, but also to confine the socially undesirable, to dilute standards of proof, to increase prison sentences, to force rehabilitation upon inmates, to – why not? – punish bad thoughts and bad character; after all, we would only have to invoke the necessity of defending society. This is precisely what happened in the Soviet Union, where criminal law was tasked with "the protection of the Soviet order, socialist property, the character and rights of citizens and the entire social law and order"[202] and where the purpose of punishment was "to reform and re- educate the convicted offender in the spirit of honest attitude towards work [and] verbatim adherence to laws and respect of the rules of the socialist way of life."[203] But is this the appropriate role of the criminal law in a liberal democracy? I believe that it is not. I believe that in a liberal democracy, a bedrock principle must be that the criminal law should be used only as the *extrema ratio*. By this, I mean that the criminal sanction should be invoked only as an option of the last

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[197] Lombroso, *supra* note 94, at 421, quoted in Dershowitz, Indeterminate Confinement, *supra* note 192, at 310.
[198] Lombroso, *supra* note 94, at 381 (citations omitted).
[199] *Id*. at 383.
[200] *Id*. at 381.
[201] Dershowitz, Preventive Confinement, *supra* note 192, at 1285.
[202] Jaan Sootak, *Theories of Punishment and Reform of Criminal Law*, 68 JURIDICA INTERNATIONAL 72 (2000).
[203] *Id*.

resort – when certain interests cannot be effectively protected except through resorting to the criminal sanction, *only then* should we turn to the criminal law.[204] I believe this should be so even if we reject Cesare Beccaria's construction of the social contract, his idea that men only agreed to give up the smallest possible portion of their liberty, and his illuminist utilitarianism altogether.[205] There are, in fact, compelling reasons that demand that criminal punishment be used only as a last resort. Criminal law must be the option of the last resort because "[t]he accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."[206] A criminal proceeding impairs – and an eventual conviction definitely takes away – "the right to make basic decisions about the future; to participate in community affairs; to take advantage of employment opportunities; to cultivate family, business, and social relationships; and to travel from place to place."[207] The criminal law's devastating effects are not limited to the life of the accused; "fine and imprisonment ... fall ... heavily on a criminal's wife and children."[208] Even before the verdict, the mere existence of a criminal proceeding against someone taints his or her good name.[209] This is even more so in a media- and internet-invaded society, where often the outcomes of judicial proceedings are "anticipated" by the verdict of public opinion – a situation portrayed in an effective (if somewhat caricatural) way by a cartoon on The New Yorker where a judge, talking to the defendant, says: "Since you have already been convicted by the media, I imagine we can wrap this up pretty quickly."[210]

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[204] Something akin to what Stephen Schulhofer calls the principle of frugality. *See* Schulhofer, *supra* note 161, at 1565, and references therein.
[205] *See supra* notes 16 – 30 and accompanying text.
[206] *In re Winship*, 397 U.S. 358; 90 S. Ct. 1068 (1970) (Brennan, J., writing for the Court).
[207] Albright v. Oliver, 510 U.S. 266 (1994) (Stevens, J., dissenting).
[208] Holmes, The Path of the Law, *supra* note 64, at 470.
[209] A long time ago Shakespeare taught us the importance of a person's good name: "Good name in man and woman, dear my lord,/Is the immediate jewel of their souls:/Who steals my purse steals trash; 'tis something, nothing;/'Twas mine, 'tis his, and has been slave to thousands:/But he that filches from me my good name/Robs me of that which not enriches him/And makes me poor indeed." WILLIAM SHAKESPEARE, *Othello*, III, 3 – 160. While it is probably true that – as Alan Dershowitz noted during a conversation – most people who quote this famous statement from the *Othello* fail to stress the irony of it – after all, these verses are pronounced by the villain Iago, whose conduct is in exact antithesis with the message carried by his words. I also believe that a message isn't less true just because the speaker does not believe in what he is saying or, as is indeed the case here, believes in what he is saying, but fails to act accordingly. In other words, the fact that Iago is the villain doesn't make his words less valuable in their truth, which transcends the contingency of why they were said. After all, Iago's ultimate evil plan was the ruin of Othello – a ruin that comprised taking away his good name and reputation.
[210] Mischa Richter, *The New Yorker Collection*, 08/05/1991, available at www.cartoonbank.com.

Moreover, criminal punishment is a knife that cuts both ways; much like Oliver Wendell Holmes, we still don't know whether it "does more good than harm." Indeed, most times, prison doors end up being, in fact, revolving doors.[211] What Oliver Goldsmith observed in 1752 is still true today: prisons "enclose wretches for the commission of one crime and return them, if returned alive, fitted for the perpetration of one thousand."[212] It is exactly the degrading of prisoners and the plunging them further into crime denounced by Justice Holmes.[213] In short, protection through the criminal law comes at a very high price.

These are not just words on paper. Anyone who practices – or has practiced – criminal law knows that. True, as Alan Dershowitz always says, we live in a country where most criminal defendants are, in fact, guilty; and thank God for that! Would anyone really want to live in a country, Dershowitz asks, where most of the defendants tried by the state are, in fact, innocent? The answer is – and it should be – no![214] But *not all* criminal defendants are guilty. For example, I once worked on the appeal for a heart-surgeon who had been convicted of performing unnecessary heart operations on patients in order to inflate the total volume of surgeries carried out at his hospital and hence obtain, by fraud, a higher level of compensation (his contractual agreement with the hospital provided for a bonus every x number of surgeries past a threshold level per year). The conviction was obtained on the basis of flimsy medical evidence, which ineptly characterized the surgeries as "unnecessary" (and which the previous counsel failed to challenge during trial), and a witness testimony. On appeal, my colleagues and I were able to contest the validity of the medical evidence, thereby dismantling the prosecution's theory, and to prove that the witness was unreliable; hence the conviction was reversed. What we couldn't do, however, was to give back to the surgeon the four years that elapsed between the start of the proceedings and the overturning of the conviction. During those four years, his license to practice medicine, as well as his teaching privileges, were revoked; he was left jobless and branded a criminal in the eyes of the community. A society that values individual liberty, self-determination, and freedom – and American society is, by all means, a society that values those principles – cannot ignore the devastating consequences of criminal law; thus it *needs* to embrace the bedrock principle of criminal law as the *extrema ratio*. Under-criminalization, ra-

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[211] *See generally* Bedi, *supra* note 170.

[212] OLIVER GOLDSMITH, THE VICAR OF WAKEFIELD 173 (The Folio Society, 1971), quoted in Hostettler, *supra* note 13, at 61.

[213] *See supra* note 63 and accompanying text. On the general issue of the conditions of prison inmates, besides the works referenced *supra* notes 175 & 177, *see* also ZIGMUT BAUMAN, WASTED LIVES. MODERNITY AND ITS OUTCASTS (2004); LOÏC WACQUANT, LES PRISONS DE LA MISÈRE (1999); ALAN ELSNER, GATES OF INJUSTICE: THE CRISIS IN AMERICAN PRISONS (2004).

[214] *See*, *e.g.*, ALAN M. DERSHOWITZ, TAKING THE STAND: AN AUTOBIOGRAPHY (Random House, *forthcoming*, 2013).

ther than over-criminalization, should be the preferred way. The logical consequences of a purely forward-looking approach, however, point toward the latter. What then?

IV. CONCLUSIONS (PART I): CHECKS AND BALANCES

In the pages above I have offered a critical analysis of the justifications traditionally advanced in support of criminal punishment. If I have been effective, I will also have advanced convincing arguments as to why relying on a purely backward-looking or forward-looking approach would be a bad idea. And this brings us where we started: the backward-looking approach and the forward-looking approach should serve as checks and balances upon one another. While we have seen that retributivism is at least morally suspect and thus inadequate by itself to provide a moral justification for criminal punishment,[215] in fact, we have also seen that a purely forward-looking approach taken to its logical conclusions would violate the bedrock principle of the *extrema ratio*. Moreover, punishment detached from any backward-looking consideration whatsoever would not – could not! – resonate with the very people that the criminal law is crafted to protect and serve.[216] For the law in general – and the criminal law in particular – to maintain its moral force, it cannot stray too afar from what the sentiments of "we, the people!" are. As Robinson and Darley have argued, "when the just desert principle is violated, we ought to understand now as instances of injustice imposed on us all, since each such instance erodes the criminal law's moral credibility and, thus, its power to protect us all."[217] Thus, the notion of moral desert – which, as we have seen, lies at the core of retributivism – should serve as the *normative check* upon a purely utilitarian, forward-looking approach: no punishment without desert. I don't mean to suggest, of course, that pre-emptive measures are never justified. Especially in contemporary society, pre-emption is very alluring; to borrow some jargon from the law of torts, we may be tempted to "tax risk" so that hopefully we won't have to "tax harm."[218] This, however, is a very tricky enterprise that can easily lead down the very slippery slope indicated above. Thus, *as a general rule or principle* – to which exceptions may be carefully carved[219] – moral desert ought to be the *minimum*, the *sine qua non* for the infliction of criminal punishment, although by no means should it be the only element to be considered (and here is where the retributivist

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[215] *See* notes 147 – 150, *supra* and accompanying text.
[216] *See* note 145, *supra* and accompanying text.
[217] Robinson & Darley, *The Utility of Desert*, *supra* note 88, at 499.
[218] For a comprehensive work on preemption *see* ALAN M. DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS (2006).
[219] *Id*.

and I part ways). As H.L.A. Hart masterfully put it, moral desert should serve as the "licence to punish the offender."[220]

In a checks and balances perspective, once moral desert has been found, utilitarian considerations should determine the duration, quality and intensity of punishment, both in theory (legislatures writing sentencing laws) and in practice (judges imposing sentences and correctional officers and facilities carrying them out). This proposed take on a mixed theory of punishment differs from the traditional one in that the mixed theory approach is not seen here as a matter of preference or choice, but rather of *necessity*. We have seen, *supra*, that retribution cannot stand on its own for both deontological and consequentialist reasons; we have also seen that the utilitarian rationales on their own verge on the top of a dangerous slippery slope. At the same time, we cannot reasonably claim to be able to do away with the infliction of criminal punishment altogether. What we *need*, however, is a criminal justice system that is *effective* and *rational*: thus, we *need* to induce deterrence; we *need* to promote rehabilitation; and we *need* to practice incapacitation. But we also *need* a criminal justice system which punishes people *for having done "something bad"* – hence we *need* backward-looking considerations of retribution and desert upon which to anchor the infliction of punishment. Only then can we have a criminal justice system that, while still not perfect, is at least justifiable on both rational and moral grounds.

Still, part of the original question remains to be answered: would this system achieve justice?

V. CONCLUSIONS (PART II): SOMETHING MORE

In light of my conclusions on the real nature of retribution,[221] and of the tentative and uncertain character of the utilitarian justifications,[222] I believe that while the checks and balances approach proposed above qualifies as the best way to approach and justify criminal punishment in a liberal democracy, *something more* is required if we want to move from simply punishing offenders and protecting society to *pursuing justice*. In my opinion, a proposal worthy of our attention of what this something more may be pursuant to the conceptualization of justice "from bottom up" proposed above[223] is that offered by the restorative justice movement.

The restorative justice movement posits that mercy, as opposed to (vengeful) punishment, might bring us closer to justice.[224] Appealing as this

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[220] H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 236 – 37 (1968), excerpt quoted from Kadish et al., *supra* note 103, at 91.

[221] *See supra* Part II.

[222] *See supra* Part III.

[223] *See supra* notes 109 – 119 and accompanying text.

[224] *See, e.g.*, Steiker, *Tempering or Tampering?*, *supra* note 107, at 29 – 30. It should be kept in mind that one need not – indeed should not – look at mercy as a panacea for all the evils that afflict the criminal justice system. Steiker herself, while "plant[ing her] tent in

idea may be to some, I believe that completely abandoning the idea of punishment would stray too far both from the sentiments of the people (which include the instinct to punish offenders for their deserts) and from the necessity of protecting society from offenders. However, leaving mercy aside, the restorative justice approach merits to be taken into serious consideration for a particular feature it presents: restorative justice *cares about the victim* – a figure that, along with its needs, is utterly absent in the more traditional approaches to (and literature on) criminal punishment.[225] In our traditional system of criminal justice, after a crime occurs, the victim is pretty much left to herself, almost forgotten about, until and if such time comes when the "victim card" is played to impose punishment at all costs, or to obtain a longer prison sentence, or to prevent a convicted offender from being released on parole, and so on and so forth. In all these instances, the victim's interests are *alleged* at best; but no one (and especially not retributivists, for whom retributive punishment is justified in and of itself) really cares about what the victim actually feels – and needs. Conversely, the restorative justice approach is an approach to justice that *has the victim at its center*. Restorative justice "focuses on the unique needs of the individuals affected by specific incidents of crime and invites them to participate in a personalized and private experience where they have the opportunity to consider what is necessary to help them heal."[226] By *empowering* the victim and giving the victim *an active role* (which is also a voluntary one- no victim is ever *forced* to participate in the restorative justice process) and *a say on what the offender should do to make up for the crime committed and for all the consequences of said crime* the victim resumes the

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the anti-skeptic, pro-mercy camp," acknowledges that mercy has some "dark sides" that need to be dealt with "before the case for the cultivation of mercy within our current institutions can prevail." *Id*. at 30 – 31. For practical concerns on the empirical problems in making people embrace restorative justice see also Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implication for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007) at 12 *et seq*. For further readings on restorative justice see, *e.g.*, Arthur V. N. Wint, *Are Restorative Justice Processes Too Lenient toward Offenders?*, in JOHN FULLER AND ERIC HICKEY (EDS.), CONTROVERSIAL ISSUES IN CRIMINOLOGY 167 (1999), and Duane Ruth-Heffelbower, *Rejoinder to Mr. Wint*, *id.* at 174; Mark Walters & Carolyn Hoyle, *Healing Harms and Engendering Tolerance: The Promise of Restorative Justice for Hate Crime*, in NEIL CHAKRABORTI (ED.), HATE CRIME. CONCEPT, POLICY, FUTURE DIRECTIONS 228 (2010); Barbara Hudson, Restorative Justice: The Challenge of Sexual and Racial Violence, 25 J.L. & SOC'Y 237 (1998).

[225] While the problem of the "absence" of the victim in most of the discourse on criminal punishment has been in the back of my mind for a while, it was after a conversation with Richard Parker discussing a draft of the present article that I decided the issue needed to be explicitly, if briefly, addressed.

[226] Lorenn Walker & Leslie Hayashi, *Pono Kaulike: Reducing Violence with Restorative Justice and Solution-Focused Approaches*, 73 FEDERAL PROBATION. A JOURNAL OF CORRECTIVE PHILOSOPHY AND PRACTICE (June 2009) available at http://www.uscourts.gov/FederalCourts/ProbationPretrialServices/FederalProbationJournal/FederalProbationJournal.aspx?doc=/uscourts/FederalCourts/PPS/Fedprob/2009-06/index.html (last visited Aug. 2012).

central role that it should have in the administration of justice and that was stripped away from her with the rise of European monarchies and the concurrent transformation of crimes from offenses against a person to offenses against the Crown (and now, the state).[227] Without giving up accountability for offenders, restorative justice has been shown to have more positive effects on victims than the traditional court-based and adversarial administration of criminal justice: "Research on crime victims' feelings shows significant anger and anxiety reductions, along with increased understanding, after participation in restorative interventions compared to traditional court hearings;"[228] the evidence also indicates that "when participating in restorative justice sessions, victims obtain short-term benefits for their mental health by reduced post-traumatic stress symptoms (PTSS);"[229] victims also report to be more satisfied than with the traditional system and they see a decrease in their desire for violent revenge against offenders.[230] Mind me, the restorative justice process is not an easy one – neither for the victim or the victim's relatives, who, in a sense, have to re-live the traumatic experience (and, in fact, it is always the victim's choice, and no one else's, to participate in a restorative justice process), nor for offenders, who are *forced to face what they did*, and not allowed to take the easy way out or to shift blame on the system, or society, or what have you.[231] However, it is through restorative justice that victims can experience at least some form of reparation of the wrongs suffered, restitution for the losses incurred, compensation for the suffering endured – that they can experience some form of justice.[232] And while it must be acknowledged that there are several different approaches to restorative justice, and that there is evidence not only of success, but also of (at least some) failure,[233] "[w]hat all definitions of restorative justice share is a common moral vision: that justice requires more than the infliction of a "just dessert" of pain on an offender."[234] As it

[227] *See* for all Nils Christie, *Conflicts as Property*, 17(1) BRIT. J. CRIMINOLOGY, 1-15 (1977).
[228] Walker & Hayashi, *supra* note 226.
[229] Lawrence W. Sherman & Heather Strang, *Restorative Justice: The Evidence*, 9 (The Smith Institute, 2007) (available at http://www.sas.upenn.edu/jerrylee/RJ_full_report.pdf).
[230] *Id*. Interestingly enough, the report shows that, contrary to common intuitions, restorative justice seems to work best with violent crimes, and less with petty crimes and property crimes (with the exception of burglary). The report also shows that other benefits include a greater abatement of recidivism for adults, as compared to prison, and at least an equal abatement as that achieved by prison for juvenile offenders.
[231] *See*, *e.g.*, Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?*, N.Y.TIMES, Jan. 4, 2013, available at http://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html?_r=0 (last visited Jan. 9, 2013), recounting in all the details the painstaking restorative justice process that the parents of a murdered teenager went through, by their own choice, including the positive effect it has had on them and the necessary assumption of responsibility on the part of the offender.
[232] *See supra* note 114 and accompanying text.
[233] *See* Sherman & Strang, *supra* note 229; *see also supra* Sections 6 and 11.
[234] *Id*. at 32.

turns out, such an approach is not incompatible with the idea of punishing deserts. For example, R.A. Duff, acknowledging "the manifest destructiveness and inhumanity of so much of what now passes for punishment in our existing institutions of criminal justice" and "the rather crude brutalism of some retributivist thought, with its emphasis on making offenders suffer – on imposing a kind of pain that is purely backward-looking and that lacks any redemptive or constructive character,"[235] argues in favor of a retributivism understood as accountability – "call[ing] a wrongdoer to account for the wrong he has done"[236] – in a perspective that is "not merely retributive, since it also looks to the future: to the offender's (self-) reform, and to the restoration of the bonds of citizenship that the crime damaged."[237] This kind of retributivism, Duff concludes, would not be opposed to ideas of "restoration and reparation."[238] On the same note, even John Kleinig – who earlier in his career had advanced a hardcore retributivism based on just deserts[239] – concludes that "we may argue ... that although wrongdoing deserves punishment, what we ought ultimately to seek is a restoration of fractured relationships."[240] Sometimes, Kleinig admits, desert may "allow for other considerations to prevail." In those cases "we may wish to restore broken relations as well as – perhaps even more than – penalizing their breach."[241]

This approach allows us to go beyond one of the major faults of retributivism which, equating retribution with justice,[242] invites us to believe that, once an offender has been given their just deserts, justice *has been done* and that, therefore, our job is done. Such an approach to justice, I am convinced, would be a mistake; after all, even the Bible "commands 'Justice, justice you shall *pursue,*' suggesting an active and never-ending quest that assumes the perfectibility of even God's nature."[243] Irrespective of what one's religious beliefs are, the message has universal didactical value; if not even God's nature is perfect, how can we, inherently imperfect human beings,[244] think that we have actually *achieved* justice? I believe that the quest of justice is never-ending, and that by *pursuing* justice we further the cause of humanity. That is why even a checks and balances approach to criminal punishment is not enough; that is why we should do something more if we are aiming for justice. Explicitly recognizing the cross purposes

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[235] R.A. Duff, *Responsibility, Restoration, and Retribution*, in Tonry, *supra* note 5, at 69.
[236] *Id*. at 74.
[237] *Id*. at 80.
[238] *Id*.
[239] *See supra* notes 86 – 87 and accompanying text.
[240] John Kleinig, *What Does Wrongdoing Deserve?* in Tonry, *supra* note 5, at 57.
[241] *Id*.
[242] *See supra* Part II.
[243] Dershowitz, Rights from Wrongs, *supra* note 107, at 31.
[244] As Isaiah Berlin notes in the incipit of The Crooked Timber of Humanity, quoting Kant: "Out of timber so crooked as that from which man is made nothing entirely straight can be built." *See* ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY. CHAPTERS IN THE HISTORY OF IDEAS (1992).

that inform the imposition of criminal punishment and consciously adopting the approach that I am here advocating may constitute the first step toward building what Cesare Beccaria fought for two and a half centuries ago – a more rational, more humane and more just system of criminal law.

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