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GROVE CITY COLLEGE

JOURNAL OF LAW & PUBLIC POLICY

ARTICLES

NOTES

GROVE CITY
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Notes

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The editors strongly prefer articles under 15,000 words in length, the equivalent of 50 *Journal* pages, including text and footnotes. The *Journal* will not publish articles exceeding 20,000 words, the equivalent of 60 *Journal* pages, except in extraordinary circumstances.

To facilitate our anonymous review process, please confine your name, affiliation, biographical information, and acknowledgements to a separate cover page. Please include the manuscript's title on the first text page.

Please use footnotes rather than endnotes. All citations and formatting should conform to the 18th edition of *The Bluebook*.

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GROVE CITY
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JOURNAL OF LAW & PUBLIC POLICY

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GROVE CITY COLLEGE

Grove City College was founded in 1876 in Grove City, Pennsylvania. The College is dedicated to providing high quality liberal arts and professional education in a Christian environment at an affordable cost. Nationally accredited and globally acclaimed, Grove City College educates students through the advancement of free enterprise, civil and religious liberty, representative government, arts and letters, and science and technology. True to its founding, the College strives to develop young leaders in areas of intellect, morality, spirituality, and society through intellectual inquiry, extensive study of the humanities, and the ethical absolutes of the Ten Commandments and Christ's moral teachings. The College advocates independence in higher education and actively demonstrates that conviction by exemplifying the American ideals of individual liberty and responsibility.

Since its conception, Grove City College has consistently been ranked among the best colleges and universities in the nation. Recent accolades include: The Princeton Review's "America's Best Value Colleges," Young America's Foundation "Top Conservative College," and U.S. News & World Report's "America's Best Colleges."

GROVE CITY COLLEGE JOURNAL OF LAW & PUBLIC POLICY

The *Grove City College Journal of Law & Public Policy* was organized in the fall of 2009 and is devoted to the academic discussion of law and public policy and the pursuit of scholarly research. Organized by co-founders James Van Eerden '12, Kevin Hoffman '11, and Steven Irwin '12, the *Journal* was originally sponsored by the Grove City College Law Society. The unique, close-knit nature of the College's community allows the *Journal* to feature the work of undergraduates, faculty, and alumni, together in one publication.

Nearly entirely student-managed, the *Journal* serves as an educational tool for undergraduate students to gain invaluable experience that will be helpful in graduate school and their future careers. The participation of alumni and faculty editors and the inclusion of alumni and faculty submissions add credence to the publication and allow for natural mentoring to take place. The *Journal* continues to impact educational communities around the country and can now be found in the law libraries of Akron University, Regent University, Duquesne University, the University of Pittsburgh, and Pennsylvania State University. The *Journal* has been featured by the Heritage Foundation and continues to be supported by a myriad of law schools, law firms, and think tanks around the nation.

EDITOR'S PREFACE

Throughout the course of history, when pen has scratched on paper, the resulting transfer of thoughts to words has been powerful. As Ayn Rand said, "Words are a lens to focus one's mind." The Founders of our great nation took this focus in mind when they hastily signed their names to a document that forthright challenged the fiercest nation in the world. Many of those same focused hands would craft the Constitution - a framework that has guided the formation of our great Republic.

Though today's writing is conducted with a keyboard, its produced ideas are just as powerful. It is my greatest pleasure to bring forth this edition of the *Grove City College Journal of Law & Public Policy.* Within these pages are many thoughts and ideas of gifted authors and attorneys who have surveyed and debated the focused words of the Constitution and how it is applied to everyday life, changed for the better or worse, and related to political dialog.

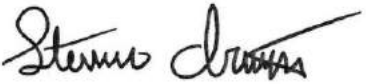
Over the last two years, I have been blessed to work with many gifted individuals on all levels of the Journal organization. The outstanding credentials of the Journal's Editorial Board includes experienced attorneys who have presented before the Supreme Court and in the most prestigious court rooms in the nation, to dynamic professors who have devoted their lives to educate the next generation of litigators, esquires, negotiators, and counselors.

My greatest joy, however, has come from engaging with the students who dedicate precious time and resources to this project. As an undergraduate law review that aims to prepare its staff and authors for the next step in their legal tutelage, the publication has experienced outstanding success. A perusal of previous mastheads reveals the names of students that now sit in the lecture halls of law schools at Harvard, Virginia, Ohio State, Akron, Regent, and many more. One of my favorite stories is that of a former author, who, during an interview for a prestigious legal internship, was asked about the Journal because of its developing reputation; her particular involvement with the publication was not even mentioned. It is our many thanks in return for your work as alumni and friends for spreading the Journal.

From the conception of the Journal, our advisors have encouraged us to prioritize the continuation of the organization. Though this can be quantified through several successful initiatives and progressions, this qualitative element is difficult to harness in words. However, as I move towards graduation and my next steps in life,

I am again reminded of how great writing begins with thoughts. As Lao Tse noted, "Watch your thoughts; they become words. Watch your words; they become actions. Watch your actions; they become habit. Watch your habits; they become character. Watch your character, it becomes your destiny." It is my hope that the focused thoughts espoused in these pages will influence the character and destiny of many for years to come.

Steven A. Irwin '12



Editor-in-Chief

*Many individuals have made this publication possible, and I wish to thank several of them personally. President Jewell has supported the *Journal* from conception and continues to remain as a consultant and encourager-in-chief. Our faculty advisor, Dr. Sparks has assisted us through many hurdles throughout the editing process and is always available when we need his wisdom and tact. The monetary support from alumni and friends of the College continues to fund this publication, and each gift received is a blessing and encouragement. Mr. Jeff Prokovich in Advancement and Mr. Larry Hardesty of Student Life & Learning continue to provide funding and moral support, as well as organizational development. Much thanks is owed to our Editorial Board, faculty and alumni alike, who take the time to edit, mentor, and advise. Personally, I have been blessed to grow into this leadership role and I graciously thank those individuals who have provided endless encouragement, critiques, and helpful hands along the way. Additionally, thank you to my parents for instilling a love for reading and writing at a young age, as well as for passing along the confidence of Truth and love for organizational management. Among the student staff, a huge thanks to Dorothy Williams, Jared Smith, and Julia Haines. Dorothy, you are the third managing editor that I have had the pleasure of working with and your abilities and skills have astounded me. Jared, you have become a close confidant and I will always appreciate your opinions and strong skills where mine falter. Finally, Julia, thank you for executing an enormous amount of tasks delegated to you outside of your responsibilities – you and several others represent the continuation of the *Journal*, and I know that it will be passed down into very capable hands. Every student who contributed to this organization deserves a large thank-you, and I am proud to celebrate the publication of another successful edition with you. Most of all, I thank the Author of Truth for His blessings bestowed upon each of us.

FOREWORD

Dear Reader: This issue of the *Grove City College Journal of Law & Public Policy* contains five timely and carefully considered articles.

First, Brad Tupi explores the traditional importance of religion as a basis for American law and argues that, by diminishing the role of religion in the law, our Supreme Court has unleashed a torrent of sexual immorality on an unwilling populace. In particular the author analyzes the reasoning in Perry v. Schwarzenegger and focuses on the way Judge Walker found moral consideration to be impermissible. The author then discusses the Christian influences in the founding, the original meaning of the Establishment Clause and its use throughout America judicial history before analyzing the reinterpretation of the First Amendment as a "wall of separation between church and state." This change in judicial philosophy opened the door for a number of decisions removing religion and morality from public life and opening the door to decisions such as Lawrence v. Texas and Perry v. Schwarzenegger which disregarded the moral convictions of the majority of Americans.

Next, in a change of pace, Randy Cole makes a case for diplomats and academics using public relations and rhetorical scholarship to inform their understanding of the formation and implementation of foreign public diplomacy policy – that is, the branch of the U.S. diplomacy that communicates directly with foreign publics, not their governments. The article approaches foreign public diplomacy as the practice of public relations. Cole draws on the scholarship in the field. He reviews the advocacy of national interests via a discussion of Machiavelli, Grotius and medieval international law and its role in promoting mutual understanding to aid in the implementation of foreign policy. The article promotes a holistic approach. Based in rhetorical scholarship, he argues that public diplomacy scholarship may be situated in rhetoric and communications just as readily as international relations and law.

Chris Wetzel surveys the Second Amendment by looking at United States v. Miller (1939) and District of Columbia v. Heller (2008), with special attention given to the historical language of Miller that would eventually be applied to the Heller ruling. The case notes of Miller are outlined, as are the positions taken by Justice McReynolds. In its discussion of Heller, the article gives ample treatment to Justice Stevens' dissent, but rebuts with Justice Scalia's majority opinion that upheld the Second Amendment, based upon an historical interpretation of the Second Amendment and Miller.

Jared Smith surveys, from an historical perspective, the "wild ride" of the Exclusionary rule, from the Fourth Amendment through Weeks v. United States (1914), the Warren Court's interpretation in Mapp v. Ohio (1961) to the present. The author takes an interesting look at current Chief Justice Roberts' interactions with it, first as an associate counsel to President Reagan, and then as Chief Justice of the Court in Herring v. US and Hudson v. Michigan. The article is open-ended, hinting that the "Good Faith Exception" and the "Knock and Announce Rule" have moved to a conservative rollback of the Exclusionary rule.

Dr. John Sparks reviews key decisions by the Fuller Court during the Progressive Era. That court adhered to certain core values foremost among them – individual liberty and the idea of limited government. Though modern commentators have indicted the Court for reining in Progressive legislation, Sparks argues that its decisions on matters of taxation, labor working conditions and interstate commerce were consistent with those of the Founders.

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CALIFORNIA'S SAME-SEX MARRIAGE DECISION:
HOW DID WE GET HERE?

*Bradley S. Tupi**

ABSTRACT: *This paper explores the traditional importance of religion as a basis for American law and argues that, by diminishing the role of religion in the law, our Supreme Court has unleashed a torrent of sexual immorality on an unwilling populace. In particular, the author analyzes the reasoning in* Perry v. Schwarzenegger *and focuses on the way Judge Walker ruled moral considerations as impermissible. The author then discusses the Christian influences in the founding, the original meaning of the Establishment Clause and its use throughout American judicial history before analyzing the reinterpretation of the First Amendment as a "wall of separation between church and state." This change in judicial philosophy opened the door for a number of decisions removing religion and morality from public life and paved the way for decisions such as* Lawrence v. Texas *and* Perry v. Schwarzenegger *which disregarded the beliefs of the majority of Americans.*

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* Brad Tupi is an attorney practicing in Pittsburgh, Pennsylvania. Mr. Tupi was born and raised in Pittsburgh, then obtained his B.A. in 1975 and his J.D. in 1978 from Columbia University. He practiced in New York with the Law Department of the City of New York and as an in-house attorney with CIBA-Geigy Corporation (now Novartis). He returned to Pittsburgh in 1987, where his law practice has included commercial and personal injury defense litigation, environmental law, and pro bono work in the area of religious freedom and the First Amendment. Mr. Tupi is an Allied Attorney with the Alliance Defense Fund and a member of the Federalist Society and the Christian Legal Society. He and his wife, Ann Marie Clyne, have two grown children, Nick and Steph.

I. Introduction.

For the better part of two centuries, American courts deemed Christianity a part of the common law, and our governmental institutions explicitly endorsed religious belief. Only in the post-World War II era has our jurisprudence separated church and state so as to require legislative acts to have primarily secular purposes. At the same time that the Supreme Court was reducing the role of religion in American public life, it was creating new Constitutional protections for activities traditionally condemned as immoral, and even criminally proscribed, such as contraception, pornography, abortion and sodomy. Indeed, the Supreme Court now views moral objections as trivial if not irrational when analyzing the Constitutional validity of a law. Only in such a jurisprudential environment could *Perry v. Schwarzenegger*[1] have come about.

Perry v. Schwarzenegger, of course, is the 2010 case that struck down California's Proposition 8 same-sex marriage ban as unconstitutional under the Fourteenth Amendment's Due Process and Equal Protection Clauses. In so doing, *Perry* invalidated the legislative will of over seven million California voters who, like

1 704 F.Supp.2d 921 (N.D. Cal. 2010.)

voters in every other same-sex marriage referendum to date[2], voted to uphold marriage as between one man and one woman. *Perry* is the first (and so far only) case finding a right to same-sex marriage under the U.S. Constitution.

This paper explores the traditional importance of religion as a basis for American law and argues that by diminishing the role of religion in the law, our Supreme Court has unleashed a torrent of sexual immorality on an unwilling populace.

II. The Perry Case.

A. Procedural History.

California's same-sex marriage decision had its roots in a referendum ten years before called Proposition 22. In November 2000, California voters, using the state's initiative process, adopted the California Defense of Marriage Act. Proposition 22 stated, "Only marriage between a man and a woman is valid or

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2 Citizens in the following 30 states have voted to ban same-sex marriage: Alabama, 2006 (81% voted in favor); Alaska, 1998 (68%); Arizona, 2008 (56%); Arkansas, 2004 (75%); California, 2008 (52%); Colorado, 2006 (56%); Florida, 2008 (62%); Georgia, 2004 (76%); Hawaii, 1998 (69%); Idaho, 2006 (63%); Kansas, 2005 (70%); Kentucky, 2004 (75%); Louisiana, 2004 (78%); Michigan, 2004 (59%); Mississippi, 2004 (86%); Missouri, 2004 (72%); Montana, 2004 (67%); Nebraska, 2000 (70%); Nevada, 2000 and 2002 (69.6% and 67.1%); North Dakota, 2004 (73%); Ohio, 2004 (62%); Oklahoma, 2004 (76%); Oregon, 2004 (57%); South Carolina, 2006 (78%); South Dakota, 2006 (52%);Tennessee, 2006 (81%); Texas, 2005 (76%); Utah, 2004 (66%); Virginia, 2006 (57%); and Wisconsin, 2006 (59%). *See* http://en.wikipedia.org/wiki/List_of_U.S._state_constitutional_amendments_banning_same-sex_unions_by_type.

recognized in California."[3] In defiance of Proposition 22, the Mayor of San Francisco instructed county officials to issue marriage licenses to same-sex couples beginning in February 2004.[4] The California Supreme Court enjoined this practice and nullified the marriage licenses that had been issued.[5]

The City of San Francisco and various other parties filed suit challenging the California Defense of Marriage Act. In May 2008, the California Supreme Court held Proposition 22 unconstitutional because it failed to afford equal protection under the California Constitution. California's highest court directed all California counties to issue marriage licenses to same-sex couples.[6]

In November 2008, California voters passed Proposition 8, which reinstated the definition of marriage as between one man and one woman in California's constitution.[7] Several gay and lesbian couples filed suit in the Northern District of California to challenge the constitutionality of Proposition 8 under the Due Process and Equal Protection clauses of the Fourteenth Amendment.[8] Plaintiffs named as defendants then-Governor Schwarzenegger, Attorney General Edmund G. Brown, Jr., and other California officials.[9] Various organizations and individuals who had organized the Proposition 8 referendum effort ("the Proponents")

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3 704 F.Supp.2d at 927.

4 *Id.* at 928.

5 *Id.*, *Lockyer v. City & County of San Francisco*, 95 P.3d 459 (Cal. 2004).

6 *Id.*, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

7 704 F.Supp.2d at 927.

8 704 F.Supp.2d at 927, 929.

9 *Id.* at 928.

intervened in the case.[10] Because Governor Schwarzenegger and Attorney General Brown declined to defend Proposition 8 -- to the contrary, for the most part they sided with Plaintiffs -- the Proponents presented the case in support of Proposition 8.[11]

The case was tried to Chief Judge Vaughn R. Walker without a jury January 11-27, 2010.[12] According to Judge Walker, the evidence at trial was lopsided. The Proposition 8 Proponents offered only "a rather limited factual presentation."[13] The Proponents presented only two witnesses. One was an expert on marriage named David Blankenhorn, whose testimony Judge Walker ultimately disregarded.[14] The other, Kenneth Miller, was offered as a political expert to testify that gay men and lesbians are not without political power.[15] Judge Walker assigned little weight to Prof. Miller's opinions.[16]

Other expert witnesses identified by the Proponents refused to testify at trial out of concern for their personal safety.[17] Supporters of Proposition 8 were subjected to "harassment, intimidation, vandalism, racial scapegoating, blacklisting, loss of employment, economic hardships, angry protests, violence,

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10 *Id.* at 928, 930.

11 Although obligated to defend the state's duly enacted laws, Attorney General Brown conceded that Proposition 8 was unconstitutional. The other government defendants "refused to take a position on the merits of plaintiffs' claims and declined to defend Proposition 8." *Id.* at 928.

12 *Id.* at 929.

13 *Id.* at 931.

14 *Id.* at 931, 934, 945-50.

15 *Id.* at 950.

16 *Id.* at 952.

17 *Id.* at 944.

at least one death threat, and gross expressions of anti-religious bigotry."[18] Because Judge Walker insisted, over the Proponents' objection, on having the trial videotaped, these experts declined to testify for fear that subsequent disclosure of the video record might subject them to violent reprisals.

Plaintiffs, represented at trial by illustrious attorneys including former United States Solicitor General Theodore Olson, presented eight lay witnesses and nine expert witnesses.[19] The trial court found all of Plaintiffs' witnesses reliable and persuasive.[20] On August 4, 2010, Judge Walker issued an opinion finding that Proposition 8 violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. As of this writing, the decision is on appeal before the U.S. Court of Appeals for the Ninth Circuit.[21]

B. The Trial Court Finds Prop 8 Unconstitutional.

Judge Walker agreed with Plaintiffs that Proposition 8 was unconstitutional for two reasons. First, under the Due Pro-

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18 Thomas Messner, "The Price of Prop 8," Oct. 22, 2009, available at http://www.heritage.org/research/reports/2009/10/the-price-of-prop-8 (last viewed Nov. 4, 2011.)

19 704 F.Supp.2d at 932.

20 *Id.* at 938-45.

21 *Perry v. Brown*, No. 10-16696 (9th. Cir. filed Aug. 5, 2010). As a preliminary matter, the Ninth Circuit referred to the California Supreme Court the question of whether the Proponents had standing to appeal. On Nov. 17, 2011, the California high court confirmed that the Proponents do have standing. *Perry v. Brown*, No. S189476 (Sup. Ct. Cal. Nov. 17, 2011).

cess Clause, the court found that Proposition 8 denied homosexuals the fundamental right to marry the person of their choice. Second, under the Equal Protection Clause, the court found that the voters of California had no rational basis to discriminate against homosexuals in the definition of marriage.

1. Due Process Analysis.

Judge Walker correctly noted that "when legislation burdens the exercise of a right deemed to be fundamental, the government must show that the intrusion withstands strict scrutiny,"[22] and that "to determine whether a right is fundamental under the Due Process Clause, the court inquires into whether the right is rooted 'in our Nation's history, legal traditions, and practices.'"[23] Of course, while marriage is indeed deeply rooted in our Nation's history, legal traditions and practices, same-sex marriage is not. To the contrary, until recently homosexual relations were criminal.[24]

In his concept of marriage, Judge Walker focused on two parties giving free consent and forming a household. He concluded that the State's interest in marriage is its interest in stable households, which contribute to a stable society.[25] He omitted the

22 704 F.Supp.2d at 991, citing *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978.)

23 704 F.Supp.2d at 992, quoting *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

24 In both of the U.S. Supreme Court sodomy cases, the Court discussed the long history of criminalization of homosexuality. See *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986), and *Lawrence v. Texas*, 539 U.S. 558, 596-98 (2003) (Scalia, J., dissenting).

25 704 F.Supp.2d at 992.

fact that marriage has traditionally been focused upon the procreative act. While fertility is not necessary for a valid marriage, the procreative act has always been the *sine qua non* of a valid marriage. Indeed, coitus has been legally required for the consummation of marriage.[26]

Judge Walker concluded that the right to marry the person of one's choice was a fundamental right "rooted 'in our Nation's history, legal traditions, and practices.'"[27] Having found as a matter of fact that "same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions,"[28] the court drew the legal conclusion that "same-sex and opposite-sex unions are, for all purposes relevant to California law, exactly the same."[29] Therefore, according to Judge Walker, allowing Plaintiffs to marry would not be recognizing a new right, but would simply "recognize their relationships for what they are: marriages."[30]

Predictably, Judge Walker drew an analogy to American laws that had once forbidden interracial marriage.[31] Such laws, of course, were struck down by the U.S. Supreme Court in *Loving v.*

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26 Sherif Girgis, Robert P. George & Ryan T. Anderson, "What Is Marriage?" 34 HARV. J.L. & PUB. POL. 245 (2011), available at http://www.harvard-jlpp.com/wp-content/uploads/2011/08/GeorgeFinal.pdf (hereinafter cited as GEORGE).

27 704 F.Supp.2d at 992, quoting *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

28 704 F.Supp.2d at 967, Finding of Fact ("FF") 48.

29 *Id.* at 1001.

30 *Id.* at 993.

31 *Id.* at 958.

Virginia.[32] There are at least two flaws with the court's analogy. One is that race is not central to what marriage is, but sexual intercourse is.[33] The other is that race is an inherited, immutable characteristic, whereas homosexuality is not.[34] But to Judge Walker, the ban on same-sex marriage was merely an anachronism, "an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time has passed."[35]

Judge Walker concluded that the right to marry involves "the right to choose a spouse and, with mutual consent, join together and form a household."[36] He left out procreative sexual intercourse as central to the idea of marriage. In Judge Walker's mind, marriage is nothing more than State recognition of "committed relationships."[37] But as Professor Robert P. George has persuasively argued, marriage has always been more than this. A friendship is a committed relationship, but it is not a marriage.[38]

Judge Walker found that Plaintiffs were not seeking a new kind of marriage but recognition of their same-sex relationships as within the bounds of the fundamental right to marry.[39] Once

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32 388 U.S. 1 (1967).

33 GEORGE at 249.

34 *See e.g.*, Stanton L. Jones & Mark A. Yarhouse, "A Longitudinal Study of Attempted Religiously-Mediated Sexual Orientation Change," J. SEX & MARITAL THERAPY, 37:404-27 (2011).

35 704 F.Supp.2d at 993.

36 *Id.*

37 704 F.Supp.2d at 993.

38 GEORGE at 253: "Marriage is distinguished from every other form of friendship inasmuch as it is comprehensive. It involves a sharing of lives and resources, and a union of minds and wills. . . [I]t also includes organic bodily union."

39 704 F.Supp.2d at 993.

he concluded that Plaintiffs had been denied a fundamental right, the people voting in the Proposition 8 referendum were powerless to overturn that right. In other words, fundamental rights are subject to strict scrutiny and cannot be overturned by the will of a majority.[40]

Of course, Judge Walker did not frame the issue before the court as whether homosexuality was a fundamental right, or whether homosexual marriage was a fundamental right. Instead, he defined the right at stake as the right to marry the person of one's choosing and form a stable household. His definition of marriage is debatable. Marriage does not hinge upon an unbridled right to choose one's partner. The law forbids one to choose one's sister or one's pet as a spouse. Likewise, marriages arranged by a couple's parents may lack choice, but are still marriages. The fundamental characteristic of marriage is not unfettered choice but bearing and raising children. By focusing on choice of partner and ignoring marriage's procreative roots, Judge Walker redefined marriage in a way that allowed him to declare it a fundamental right.

2. *Equal Protection Analysis.*

Under the Equal Protection Clause, the court held that the voters of California had no rational basis to discriminate against homosexuals in the definition of marriage. Restricting mar-

40 704 F.Supp.2d at 994-95: "fundamental rights may not be submitted to [a] vote; they depend on the outcome of no elections," quoting *West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943.)*

riage to one man and one woman was based upon nothing more than "unfounded stereotypes and prejudices specific to sexual orientation."[41] "Proposition 8 targets gays and lesbians in a manner specific to their sexual orientation" and "eliminates a right only a gay man or a lesbian would exercise. . . ."[42] Under the Equal Protection Clause, "California's obligation is to treat its citizens equally, not to 'mandate [its] own moral code. . . .' '[M]oral disapproval, without any other asserted state interest,' has never been a rational basis for legislation."[43]

Judge Walker concluded, "The evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples," and he held that such views are irrational.[44]

C. Judge Walker Rules Moral Objections Out of Bounds.

To a man on the street, the most important objection to same-sex marriage would probably be based on traditional morality. Near the beginning of his opinion, in only three sentences, Judge Walker quickly dispatched any and all moral arguments. "A state's interest in an enactment must of course be secular in nature. The state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular purpose. See *Lawrence v. Texas*, 538 U.S. 558, 571, 123 S.Ct. 2472,

41 704 F.Supp.2d at 996.
42 *Id.*
43 *Id.* at 1002 (citations omitted).
44 *Id.* at 1001.

156 L.Ed.2d 508 (2003); see also *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 15, 67 S.Ct. 504, 91 L.Ed. 711(1947)."[45] *Everson* is infamous for the statement that "the First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[46] Thus in *Perry* did the mere invocation of the proverbial "wall of separation between church and state" dismiss one of the principal arguments against same-sex marriage.

As will be shown below, religious morality was a cornerstone of American jurisprudence until *Everson* and its progeny. In the post-*Everson* legal culture, religious belief is not only an improper basis for law-making; it is a pernicious one. Judge Walker cited with disdain evidence in the trial record about the religious motivations of opponents of same-sex marriage. "The testimony of several witnesses disclosed that a primary purpose of Proposition 8 was to ensure that California confer a policy preference for opposite-sex couples over same-sex couples based on a belief that same-sex pairings are immoral and should not be encouraged in California."[47] Judge Walker said, "The moral disapprobation of a group or class of citizens" will not suffice to support a legislative enactment, even a constitutional amendment by referendum, "no matter how large the majority that shares that view."[48]

As evidence that California voters impermissibly relied

45 704 F.Supp.2d at 930-31.
46 330 U.S. at 18.
47 704 F.Supp.2d at 936.
48 *Id.* at 938.

upon religious motivations in adopting Proposition 8, Judge Walker cited "data showing 84 percent of those who attend church weekly voted yes on Proposition 8, 54 percent of those who attend church occasionally voted no on Proposition 8 and 83 percent of those who never attend church voted no on Proposition 8."[49] Apparently in Judge Walker's mind, it was not only constitutionally impermissible for a state legislature to adopt a statute based upon religious convictions, but also for church-going referendum voters to apply their moral beliefs at the polls.

Judge Walker made a Finding of Fact that "religious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians." In support, he cited evidence that "religions teach that homosexual relations are a sin and that contributes to gay bashing. . . ," that "[t]here is a religious component to the bigotry and prejudice against gay and lesbian individuals. . . ," that the "Catholic Church views homosexuality as 'sinful. . . ,'" and that "[r]eligion is the chief obstacle for gay and lesbian political progress. . . ."[50] Instead of seeing Biblical morality as a valid reason to oppose a redefinition of marriage, Judge Walker saw it as a sign of hatred and intolerance.

Judge Walker considered faith-based arguments by the Proposition 8 campaign as superstitious or unsophisticated. Proposition 8 leader Hak-Shing William Tam was an official with the "American Return to God Prayer Movement," which encouraged voters to support Proposition 8 because, among other things,

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49 *Id.* at 952.

50 *Id.* at 985, FF 77.

same-sex marriage would cause states "one-by-one to fall into Satan's hands."[51] Judge Walker thought any references to God or Satan denoted bizarre, outmoded beliefs that held no persuasive value when compared with the scholarly opinions of the secular academics called by Plaintiffs.

Judge Walker cited religious beliefs against homosexuality only to castigate such beliefs. He declined to address Biblical morality head-on or to explore the merits of long-standing religious objections to homosexual conduct. Under his view of the law, he was not required to confront religious objections on their merits; indeed, he was precluded from doing so by the so-called "wall of separation between church and state." Freed from any need to debate the religious teachings against homosexual conduct, Judge Walker treated such teachings with derision, as further evidence of prejudice. In Judge Walker's analysis, the fact that "Sacred Scripture condemns homosexual acts as 'a serious depravity'" did not mean that Scripture should be accorded weight in the debate over same-sex marriage, only that Scripture's condemnation further evidenced the narrow-minded bigotry of people of faith.[52]

According to Judge Walker, the majority of California citizens simply may not amend their State constitution to enact their "profound and deep convictions accepted as ethical and moral principles."[53] "California's obligation is to treat its citizens

51 *Id.* at 937.

52 *Id.* at 985, FF 77(i).

53 704 F.Supp.2d at 1002, citing *Lawrence v. Texas*, 539 U.S. at 571.

equally, not to "mandate [its] own moral code."[54] The fact that between 1998 and 2008, thirty states took affirmative action to define marriage as between one man and one woman did not cause Judge Walker to reconsider his conclusions. To the contrary, this was additional proof that "stereotypes and misinformation" have caused gays and lesbians to suffer legal disadvantage.[55] "'[M]oral disapproval, without any other asserted state interest,' has never been a rational basis for legislation."[56]

"Moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians. The evidence shows conclusively that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples."[57] Judge Walker overlooked that moral objections are based upon reason. He dismissed moral objections as mere superstitions and prejudices. Because Supreme Court precedents had ruled out morality as a proper foundation for legal enactments, Judge Walker was easily able to rationalize a radical change in one of society's most fundamental units, the family. He saw no cause for alarm that school children might be taught about homosexuality and gay marriage, or that such children might be receiving a message "that is absolutely contrary to the values that their family is attempting to teach them at home."[58] To Judge Walker, such concerns were simply further evidence of bigotry and ignorance.

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54 *Id.*

55 *Id.* at 988, FF 78(k).

56 704 F.Supp.2d at 1002, citing *Lawrence v. Texas*, 539 U.S. at 582 (O'Connor, J. concurring.)

57 *Id.* at 1003.

58 704 F.Supp.2d at 988-90, FF 79(i)-(j) and (q).

As recently as 1986, moral objections to homosexuality were sufficient to support anti-sodomy legislation:

> Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. *The law, however, is constantly based on notions of morality,* and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.[59]

The *Bowers* Court's acknowledgement that morality is a valid -- indeed, routine -- basis for lawmaking was consistent with American legal traditions that prevailed from the Founding into the middle of the 20th Century. As of 1986, *Bowers*' endorsement of morality was somewhat unusual, against a backdrop of Supreme Court cases that had tended to diminish the role of religious morality in our jurisprudence.[60] As will be shown below, our Nation was founded as a Christian republic.[61] By 1986, only vestiges of solicitude for morality remained in our constitutional law. By the time of *Lawrence v. Texas* in 2003, the prevailing

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59 *Bowers v. Hardwick*, 478 U.S. 186, 196 (emphasis added.)

60 *See* Part IV.F, *below*.

61 *See* Part IV.A through IV.D, *below*.

worldview of the Supreme Court had resumed its path away from Judeo-Christian foundations of the Nation toward increasing protection for sexual freedom outside of marriage.

III. Traditionally, Homosexuality Was Considered Morally Wrong, Indeed, Criminal.

The *Perry* decision contradicts the lessons of centuries of Western Civilization, lessons with origins in biblical principles that found their way into the fabric of American government. One of the reasons *Perry* is so troubling is because the opinion seems almost to revel in the overthrow of so many ancient, tried-and-true teachings about sexuality and the family.

A. Major Religions Taught (And Still Teach) That Homosexuality Was Sinful.

1. New Testament.

To Christian sensibilities, Judge Walker's decision is shocking because it flies in the face of several explicit Biblical condemnations of homosexual conduct. In his First Letter to the Corinthians, St. Paul said: "Do you not realize that people who do evil will never inherit the kingdom of God? Make no mistake -- the sexually immoral, idolaters, adulterers, the self-indulgent, sodomites, thieves, misers, drunkards, slanderers and swindlers, none

of these will inherit the kingdom of God."[62] Likewise, in his Letter to the Romans, St. Paul wrote that men, thinking themselves wise, had in fact been stupid to exchange God's truth for a lie:

> That is why God abandoned them to degrading passions: why their women have exchanged natural intercourse for unnatural practices; and the men, in a similar fashion, too, giving up normal relations with women, are consumed with passion for each other, men doing shameful things with men and receiving in themselves due reward for their perversion.[63]

In his First Letter to Timothy, St. Paul compares sodomy to murder and other serious crimes:

> We know that the law is good, provided that one uses it as law, with the understanding that law is meant not for a righteous person but for the lawless and unruly, the godless and sinful, the unholy and profane, those who kill their fathers or mothers, murderers, the unchaste sodomites, kidnappers, liars, perjurers, and whatever else is opposed to sound teaching. . . .[64]

These New Testament passages do not distinguish between homosexual acts in the context of a committed relationship and otherwise.

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62 1 Corinthians 6:9-10.

63 Romans 1:22-28.

64 1 Timothy 1:8-10.

2. Old Testament.

The word "sodomy," of course, derives from the Biblical town of Sodom, which a wrathful God destroyed in the book of Genesis. Two angels of God were guests in the home of a holy man named Lot.

> They had not gone to bed when the house was surrounded by the townspeople, the men of Sodom both young and old, all the people without exception. Calling out to Lot they said, "Where are the men who came to you tonight? Send them out to us so that we can have intercourse with them." Lot came out to them at the door and, having shut the door behind him, said, "Please, brothers, do not be wicked. Look, I have two daughters who are virgins. I am ready to send them out to you, for you to treat as you please, but do nothing to these men since they are now under the protection of my roof."[65]

To Lot, it was better to see his virgin daughters raped by the mob than his two male guests sodomized. God protected the angels from harm and destroyed Sodom and Gomorrah with fire.[66]

The other Old Testament passage prohibiting homosexuality is the straightforward command in Leviticus: "You will not have intercourse with a man as you would with a woman. This is a hateful thing."[67] Some Bibles translate "hateful thing" with the

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65 Genesis 19:1-9.
66 Genesis 19:24.
67 Leviticus 18:22.

word "abomination."

The Judeo-Christian faith unmistakably condemns homosexuality.

3. Roman Catholic Catechism.

The Catechism of the Catholic Church, noting that Scripture "presents homosexual acts as acts of grave depravity," declares homosexual acts to be "intrinsically disordered" and "contrary to the natural law." The Church calls homosexual persons to chastity.[68] At the same time, the Church teaches that "Men and women who have deep-seated homosexual tendencies. . . must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided."[69] The Church is compassionate toward homosexuals while condemning homosexual behavior.

4. Other Major Faiths.

Among Orthodox Jews, sexual relations between men is forbidden by the Torah.[70] Based on the writings of the Qur'an and various Hadith narrations, homosexuality is not only a sin but a

68 CATECHISM OF THE CATHOLIC CHURCH, Second Ed., ¶¶ 2357-59 (1997).

69 *Id.*, ¶ 2358.

70 *See, e.g.*, "Homosexuality and Orthodox Judaism," http://www.religionfacts.com/homosexuality/judaism.htm (last viewed Nov. 4, 2011).

crime under Islamic law.[71] In 1997, the Dalai Lama (the leader of Tibetan Buddhism) stated that because the purpose of sex is procreation, homosexual acts are unnatural. "From a Buddhist point of view, [gay sex] is generally considered sexual misconduct."[72]

On November 20, 2009, American Orthodox, Catholic, and Evangelical Christians issued the Manhattan Declaration, which states in part:

> Because we honor justice and the common good, we will not . . . bend to any rule purporting to force us to bless immoral sexual partnerships, treat them as marriage or the equivalent, or refrain from proclaiming the truth, as we know it, about morality and immorality and marriage and the family. We will fully and ungrudgingly render to Caesar what is Caesar's. But under no circumstances will we render to Caesar what is God's.[73]

Perry, if affirmed, not only will condone practices that many Americans consider sinful, but it will also require people of faith to surrender their conscientious objections to homosexual conduct

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71 *See, e.g.*, "Islam and Homosexuality," http://wikiislam.net/wiki/Islam_and_Homosexuality (last viewed Nov. 4, 2011).

72 *See, e.g.*, "Homosexuality in Vajrayana/Tibetan Buddhism," http://www.religionfacts.com/homosexuality/buddhism.htm (last viewed Nov. 4, 2011).

73 MANHATTAN DECLARATION, http://manhattandeclaration.org/home/aspx, cited in WAYNE GRUDEM, POLITICS ACCORDING TO THE BIBLE, Zondervan, Grand Rapids, MI, 2010, at 227 hereinafter cited as GRUDEM).

or face legal jeopardy.[74]

B. As Recently As 1973, Psychiatry Diagnosed Homosexuality As a Disorder.

Objections to homosexuality are not only based on religion; they have scientific support, as well. Judge Walker cited with approval the testimony of one of Plaintiffs' experts to the effect that "homosexuality is not considered a mental disorder. The American Psychiatric Association, the American Psychological Association and other major professional mental health associations have all gone on record affirming that homosexuality is a normal expression of sexuality and that it is not in any way a form of pathology."[75] But Judge Walker did not mention that the mental health profession believed otherwise as recently as 1973.

The DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM), published by the American Psychiatric Association, classifies various psychiatric disorders. Homosexuality was a listed diagnosis until 1973. In 1970, the American Psychiatric Association held its convention in San Francisco. Gay rights activists invaded the meeting and shouted down speakers. This disruptive

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74 *See, e.g., Elane Photography v. Willock*, No. CV 2008-06632 (County of Bernalillo (NM) 2d Jud. Dist. Ct. Dec. 1, 2009), available at http://oldsite.alliancedefensefund.org/userdocs/ElanePhotoOrder.pdf, where a Christian photographer who respectfully declined to photograph a lesbian commitment ceremony was found liable for discrimination under the New Mexico Human Rights Act, NMSA 1978, § 28-2-7(F) (2004).

75 704 F.Supp.2d at 967, FF 47(e).

behavior continued at the next several APA conventions. Finally, at the 1973 convention, the APA surrendered to the "intense political pressure" and voted to remove homosexuality from the DSM.[76] The APA's decision was in response to protests, not any new scientific insight into the causes of or treatments for homosexuality. The APA decision, according to gay activists themselves, "never was a medical decision."[77]

By suggesting that leading psychiatry and psychology organizations do not consider homosexuality to constitute a pathology, the *Perry* court was using pseudo-science to support its conclusion. While it is true that same-sex attraction is no longer listed as a mental disorder in the DSM, this cannot, given the historical facts, be equated with a scientific conclusion that homosexuality is a normal expression of sexuality. The fact that the American Psychiatric Association no longer considers homosexuality a treatable disorder was not the product of reasoned scientific deliberation, but political intimidation.

C. There Are Public Health Reasons for Preferring Traditional Marriage.

Judge Walker framed much of his Equal Protection analysis in terms of equality, but with respect to medical outcomes,

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76 THE ADVOCATE, December 28, 1993 at 40; Andrew Sullivan, LOVE UNDETECTABLE, 1998 at 107; Mark Thompsan, Ed., THE LONG ROAD TO FREEDOM, 1994 at 97; Kay Tobin and Randy Wicker, THE GAY CRUSADERS, 1972 at 98, 130-31.

77 Eric Marcus, MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS, at 224.

heterosexual and homosexual relationships are not equal. To the contrary, male homosexuals have a substantially decreased life expectancy, a higher incidence of infectious hepatitis, AIDS, rectal cancer, bowel and other infectious diseases, and a higher incidence of suicide.[78]

Homosexual men and women are 14 times more likely to attempt suicide than heterosexuals[79] and 3½ times more likely to do so successfully.[80] These statistics have not improved as homosexuality has gained greater public acceptance. Male and female homosexuals have higher rates of maladjustment, depression, child abuse (both sexual and violent), domestic violence, substance abuse, anxiety, and psychiatric treatment than heterosexuals.[81] Only 2% of homosexual men live past age sixty-five.[82]

Male homosexuals are uniquely susceptible to anal cancer, which is rare among male heterosexuals. Male homosexuals have

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78 Jeffrey Satinover, HOMOSEXUALITY AND THE POLITICS OF TRUTH, Grand Rapids: Baker, 1996, 51, cited in GRUDEM at 226.

79 C. Bagley and P. Tremblay, "Suicidal Behaviors in Homosexual and Bisexual Males," CRISIS 18 (1997): 24-34.

80 R. A. Garofalo et al., "The Associations Between Health Risk Behaviors and Sexual Orientation Among a School-Based Sample of Adolescents," PEDIATRICS 101 (1998): 895-902.

81 R. Herrell et al., ARCHIVES OF GENERAL PSYCHIATRY 56 (1999): 867-74; D. M. Fergusson, J. Horwood, A. L. Beautrais, "Is Sexual Orientation Related to Mental Health Problems and Suicidality in Young People?" ARCHIVES OF GENERAL PSYCHIATRY 56 (1999): 876-80; M. J. Bailey, "Homosexuality and Mental Illness," ARCHIVES OF GENERAL PSYCHIATRY 56 (1999): 883-4.

82 *Id.*

high incidence of various sexually transmitted diseases,[83] partly due to high rates of promiscuity. According to a San Francisco study, 43% of male homosexuals had had more than 500 sexual partners,[84] 79% of whom were strangers.[85]

Lesbian promiscuity is less than that of male homosexuals but greater than that of heterosexual women: 42% had more than ten sexual partners.[86] Like male homosexuals, lesbians have high rates of drug abuse, psychiatric disorder, and suicide.[87]

If, as Judge Walker asserted, gay relationships are equal to heterosexual relationships, then why do so many homosexuals of both sexes pursue so many sexual encounters with strangers? This tends to refute Judge Walker's insistence that gay couples participate in the same kinds of committed relationships as heterosexual couples, and so their homosexual relationships should be recognized as marriages.[88]

Monogamy and sexual fidelity are important components of traditional marriage. One study showed that "90 percent of heterosexual women and more than 75 percent of heterosexual men have never engaged in extramarital sex." By contrast, "a

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83 Laura Dean et al., "Lesbian, Gay, Bisexual and Transgender Health: Findings and Concerns," JOURNAL OF THE GAY AND LESBIAN MEDICAL ASSOCIATION 4, no. 3 (2000): 101-51.

84 A. P. Bell and M. S. Weinberg, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN (New York: Simon and Schuster, 1978).

85 *Id.*

86 *Id.*

87 J. B. Lehmann, C. U. Lehmann, and P. J. Kelly, "Development and Health Care Needs of Lesbians," JOURNAL OF WOMEN'S HEALTH 7 (1998) 379-88.

88 704 F.Supp.2d at 993.

1981 study revealed that only two percent of homosexuals were monogamous or semi-monogamous -- generously defined as ten or fewer lifetime partners. . . ."[89]

D. The Interests of Children Justify a Preference for Traditional Marriage.

Judge Walker concluded that children raised in gay or lesbian families have equally successful outcomes.[90] This contradicts the bulk of modern scholarship. Married biological parents nurture children better than other parenting combinations. Children who live with their parents have better educational outcomes. They are more likely to achieve economic success. They have better physical and emotional health. They are less likely to commit crimes or abuse alcohol or drugs. They are less likely to experience physical abuse.[91]

"[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. . . . [I]t is not simply the presence of two parents. . . but the presence of *two biological parents* that seems to support children's development."[92]

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89 Jeffrey Satinover, HOMOSEXUALITY AND THE POLITICS OF TRUTH, Grand Rapids: Baker, 1996, 55, cited in GRUDEM at 226-27.

90 704 F.Supp.2d at 980-81, FF 69-71.

91 GRUDEM at 224-25, citations omitted.

92 Kristen Anderson Moore et al., "Marriage from a Child's Perspective: How Does Family Structure Affect Children, And What Can We Do about It?," CHILD TRENDS RESEARCH BRIEF, June 2002, at 1-2, 6, available at http://www.childtrends.org/files/MarriageRB602.pdf, cited in GEORGE at 258.

Although same-sex couples are permitted to adopt children, American experience with this novel family arrangement is limited. We would never permit the introduction of a new drug without thorough scientific testing, yet we are now conducting a social science experiment on a generation of children, based on little more than the hope that gay parenting will yield outcomes comparable to those of the traditional family. These are the kind of radical social changes that should be attempted slowly, if at all.[93]

IV. The Supreme Court Has Markedly Reduced The Power Of Traditional Moral Teachings To Influence Our Law.

Judge Walker's opinion in *Perry* built upon decades of Supreme Court jurisprudence that transformed the relationship between religious belief and public policy. It is impossible to conceive of the notion of same-sex marriage being taken seriously at any earlier stage in American legal history.

A. The Founders' Views about Faith and America.

The Founders -- meaning those who signed the Declaration of Independence, led our government under the Continental Congress, and forged our Constitution -- were generally men of Christian faith. They did not create a Nation that separated religious morality from public policy. To the contrary, the Founders

93 *Cf. Perry*, 704 F.Supp.2d at 999, where Judge Walker concluded that recognizing marriage for same-sex couples would not be a sweeping social change.

thought religion and government would have to support each other if freedom were to prevail. The Founders' statements and actions show beyond debate that they incorporated Christian faith into the fabric of the new republic. John Adams said that the Revolution "connected, in one indissoluble bond, the principles of civil government with the principles of Christianity."[94]

Our history includes countless instances where the founding generation, acting in official capacities, expressly endorsed Christian belief. At the beginning of the Revolutionary War, Congress designated May 17, 1776, as a national day "of humiliation, fasting and prayer; that we may with united hearts confess and bewail our manifold sins and transgressions and, by a sincere repentance and amendment of life, . . . and through the merits and mediation of Jesus Christ, obtain His pardon and forgiveness."[95] In response to the shortage of Bibles caused by the British embargo during the Revolutionary War, the Continental Congress appointed a committee to print Bibles in the colonies. The first English translation of the Bible ever printed in America bore a Congressional endorsement: "Whereupon, *Resolved*, That the United States in Congress assembled. . . recommend this edition of the Bible to the inhabitants of the United States."[96] The Founders considered it perfectly appropriate for government to endorse and encourage

94 Larry Schweikart and Michael Allen, A PATRIOT'S HISTORY OF THE UNITED STATES, 2004, at 71 (hereinafter cited as SCHWEIKART).

95 JOURNALS OF CONG. (1905), Vol. IV, 208-09 (May 17, 1776), *cited in* DAVID BARTON, ORIGINAL INTENT (3d ed. 2002) (hereinafter cited as BARTON), at 99.

96 JOURNALS OF THE CONT'L CONG. (1914), Vol. XXIII, 574 (Sept. 12, 1782), *cited in* BARTON at 108.

the reading of the Bible.

After Lord Cornwallis' surrender to end the Revolutionary War, Congress organized a procession to a local church to thank God for the victory.[97] When debates over the new Constitution were bogged down, Ben Franklin -- not considered one of the most religious Founders -- proposed prayer: "I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth -- *that God governs in the affairs of men.* And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid?"[98]

When George Washington was inaugurated as the first President under the new Constitution, his first official act was to pray:

> [I]t would be peculiarly improper to omit, in this first official act, my fervent supplications to that Almighty Being who rules over the universe. . . . No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States.[99]

On September 25, 1789 -- the same day Congress approved the final wording of the First Amendment -- Congress asked President Washington to declare a day of prayer, "[T]o be observed by acknowledging with grateful hearts the many signal favors of Almighty God, especially by affording them an opportunity peace-

97 JOURNALS OF THE CONT'L CONG. (1823), Vol. III, 679 (Oct. 24, 1781), *cited in* BARTON at 107-08.

98 Daniel L. Dreisbach and Mark David Hall, Eds., THE SACRED RIGHTS OF CONSCIENCE, 2009, at 348-49.

99 1 ANNALS OF CONG. 27-28 (1834.)

ably to establish a Constitution of government for their safety and happiness. . . ."[100] Rep. Tucker of South Carolina argued that Congress was barred by the First Amendment from doing so, because "it is a religious matter." Yet the resolution passed over his objection. This shows that the First Amendment was not intended to bar Congressional action endorsing or encouraging religion, but simply to prohibit the establishment of a national church.[101] The debates over the wording of the First Amendment make clear that there was no intent to create a secular government or prohibit government support for religion. There was no limit on the ability of churches to petition the government or influence policy. The only concern was that a national church would infringe upon liberty of conscience.[102]

As President, George Washington made frequent proclamations of the importance of religious faith to the political health of the new nation. In October 1789, he declared, "while just government protects all in their religious rights, true religion affords to government its surest support."[103] In the same vein, Washington said:

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great

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100 704 F.Supp.2d at 949-50.

101 Stephen Mansfield, TEN TORTURED WORDS, 2007 at 24 (hereinafter cited as MANSFIELD.)

102 MANSFIELD at 23. SEE ALSO BARTON at 115.

103 12 GEORGE WASHINGTON, THE WRITINGS OF GEORGE WASHINGTON 167 (Jared Sparks ed., American Stationers' Company 1838.)

> pillars of human happiness. . . . Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligation desert. . . ? And let us with caution indulge the supposition that morality can be maintained without religion. . . . [R]eason and experience both forbid us to expect that national morality can prevail, in exclusion of religious principle.[104]

At the same time the United States was framing its Constitution, the French Revolution was underway. "[T]he essential difference between the American Revolution and the French Revolution is that the American Revolution. . . was a religious event, whereas the French Revolution was an anti-religious event."[105] As France turned toward atheism, the American Founders reacted with disgust. Alexander Hamilton said:

> The attempt by the rulers of [France] to destroy all religious opinion and to pervert a whole people to atheism is a phenomenon of profligacy. . . . [T]o establish atheism on the ruins of Christianity [is] to deprive mankind of its best consolations and most animating hopes and to make a gloomy desert of the universe.[106]

These are a few of the dozens of statements that establish

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104 George Washington, Address of George Washington, President of the United States . . . Preparatory To His Declination 22-23 (George & Henry S. Keatinge eds., 1796), *cited in* BARTON at 117.

105 SCHWEIKART at 97.

106 21 ALEXANDER HAMILTON, THE PAPERS OF ALEXANDER HAMILTON 402-04 (Harold C. Syrett ed., Columbia Univ. Press 1979), *cited in* BARTON at 144-45.

beyond argument that our Founding Fathers were men of strong religious beliefs, who believed Providence to be responsible for the success of the Revolution, who considered religion to be indispensable to a free and civilized society, and who never intended the First Amendment to prohibit governmental encouragement of religion. The Founders' religious faith is also evident in the founding documents of our Nation.

B. The Declaration of Independence.

The Declaration of Independence contains several explicit references to Almighty God. The first paragraph reads as follows:

> When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and of nature's God entitles them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.[107]

In other words, the laws of nature and the laws of God entitle the American people to a separate and equal status among the other nations of the earth. The second paragraph of the Declaration contains these famous words:

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

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

life, liberty and the pursuit of happiness.[108]

According to the Founders, fundamental rights come from God, not from the English King or from any other government source. After listing a series of grievances against the King of England, the Declaration of Independence closed with this stirring paragraph:

> We, therefore, the Representatives of the United States of America, in general Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the Authority of the good people of these Colonies, solemnly publish and declare that these United Colonies are, and of right ought to be, free and independent States. . . . And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.[109]

Again, the Founders, in declaring the independence of our Nation and challenging the military might of the (then) strongest country on earth, explicitly invoked the protection of God Almighty. Of the fifty-six men who committed their lives, their fortunes and their sacred honor to our Nation's cause by signing the Declaration of Independence, twenty-four (nearly half) held seminary degrees.[110]

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108 *Id.* at para. 2.

109 *Id.* at para. 32.

110 David Barton, Address at National Litigation Academy, Laguna Niguel, Cal. (June 30, 2005.)

C. God in the Constitution

Aside from the First Amendment, religion appears in the Constitution in the provisions requiring state and federal officials to swear an oath "to support this Constitution. . . ."[111] By requiring officials to swear oaths, the Founders *presupposed* that public officials would believe in God. Rufus King, a signer of the Constitution, said that by an oath, "we appeal to the Supreme Being so to deal with us hereafter as we observe the obligation of our oaths."[112] In his farewell address, George Washington said, "[W]here is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths. . . ?"[113] Chancellor James Kent, sometimes called a Father of American Jurisprudence, referred to an oath of office as a "religious solemnity" and said that to administer an oath was to "call in the aid of religion."[114]

Arguing before the United States Supreme Court, Daniel Webster asserted:

> "What is an oath?" . . . [I]t is founded on a degree of consciousness that there is a Power above us that

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111 U.S. CONST. art. II, § 1. (the President); art. VI, cl. 3. (other federal and state officials).

112 REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, ASSEMBLED FOR THE PURPOSE OF AMENDING THE CONSTITUTION OF THE STATE OF NEW YORK 575 (E. & E. Hosford 1821) (statement of Rufus King given on Oct. 30, 1821.)

113 George Washington, Address of George Washington, President of the United States . . . Preparatory To His Declination 23 (George & Henry S. Keatinge eds., 1796.)

114 JAMES KENT, MEMOIRS AND LETTERS OF JAMES KENT 164 (William Kent ed., Little, Brown & Co. 1898), *cited in* BARTON at 37.

> will reward our virtues or punish our vices. . . . [O]ur system of oaths in all our courts, by which we hold liberty and property and all our rights, are founded on or rest on Christianity and a religious belief.[115]

By incorporating oaths into the Constitution, the Founders assumed that the maker of the oath would be a person of religious faith bound to testify honestly due to a fear of eternal damnation. The Founders manifestly did not intend to divorce religious and moral considerations from the government of our Nation.

D. The Original Intent of the First Amendment.

The First Amendment provides, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ."[116] Upon study of the history of the First Amendment in particular and the founding of our Nation in general, three conclusions are inevitable. First, the Founders intended to prohibit the federal government from establishing a national religion. Second, the Founders intended that the federal government leave religious matters to the states. Third, the Founders intended to give full constitutional protection to the free exercise of religion. Since the 1947 decision in *Everson v. Board of Education*,[117] our federal courts have departed markedly from

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115 Daniel Webster, Speech in Defense of the Christian Ministry, delivered in the Supreme Court of the United States in the case of Stephen Girard's Will (Feb. 10, 1844), *cited in* BARTON at 37-38.

116 U.S. CONST. amend I.

117 330 U.S. 1 (1947).

these precepts.

In enacting the First and Tenth Amendments, the Founders intended to prohibit the federal government from establishing a national religion but did not intend to prohibit the states from doing so. The current notion that states, cities and school districts may not even encourage religious belief is directly contrary to the intent of the First Amendment. All fifty state constitutions encourage religious practice, and some even gave Christianity a special status. For example, New Hampshire's Constitution read:

> And every denomination of Christians. . . shall be equally under the protection of the law: and no subordination of any one sect or denomination to another shall ever be established by law.[118]

The Constitution of Connecticut stated:

> And each and every society or denomination of Christians in this State shall have and enjoy the same and equal powers, rights, and privileges.[119]

While the First Amendment to the United States Constitution prohibited the federal government from establishing a national religion, it did not prohibit the states from establishing official

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118 THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA 4 (Norman & Bowen 1785) (discussing article 1, section 6 of the Constitution of New Hampshire).

119 THE CONSTITUTIONS OF THE SEVERAL STATES COMPOSING THE UNION 110 (Hogan & Thompson 1838) (discussing article 7, section 1 of the Constitution of Connecticut).

religions. Therefore, prohibiting state legislatures from enacting laws informed by religious belief, such as laws defining marriage based on Biblical truth, cannot be reconciled with the true meaning of the First Amendment.

E. Judicial Decisions Once Protected Public Morality.

At least until 1947, judicial decisions across the United States showed strong support and reverence for religious belief. In *Church of the Holy Trinity v. United States*,[120] the United States Attorney sought to enforce a federal anti-immigration law against a church that had hired a clergyman from England as its pastor. The Supreme Court ruled that the statute could not be used against the church, because "[N]o purpose of action against religion can be imputed to any legislation, State or national, because this is a religious people. . . . [T]his is a Christian nation."[121]

The Supreme Court traced the Christian heritage of America.[122] The first charter of Virginia, granted by King James I in 1606, was for the purpose of propagating the Christian religion.[123] Similar language is found in the various charters of the other colonies.[124] The Supreme Court in the *Holy Trinity* case, after many additional historical examples, turned to legal precedent to support its rationale:

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120 143 U.S. 457 (1892.)
121 *Holy Trinity*, 143 U.S. at 465, 471.
122 *Id.* at 465-66.
123 *Id.* at 466.
124 *Id.* at 465-68.

> [W]e find that in *Updegraph v. The Commonwealth*, it was decided that, "Christianity, general Christianity, is, and always has been, a part of the common law. . . not Christianity with an established church. . . but Christianity with liberty of conscience to all men." And in *The People v. Ruggles*, Chancellor Kent, the great commentator on American law, speaking as Chief Justice of the Supreme Court of New York, said: The people of this State, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice. . . . [W]e are a Christian people, and the morality of the country is deeply engrafted upon Christianity, and not upon the doctrines or worship of those impostors [other religions]." And in the famous case of *Vidal v. Girard's Executors*, this Court. . . observed: "It is also said, and truly, that the Christian religion is a part of the common law. . . ."[125]

The Supreme Court concluded:

> There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons: they are organic utterances; they speak the voice of the entire people. . . . These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.[126]

Updegraph involved a criminal action against a man who, during the course of a debate, asserted that the Holy Scriptures

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125 *Id.* at 470-71 (citations omitted.)

126 *Holy Trinity*, 143 U.S. at 470-71.

were mere fable and that the Bible contained lies.[127] Updegraph was convicted under a state law against blasphemy.[128] The mere existence of a statute prohibiting blasphemy shows that government support for religion was to be expected. On appeal, the Supreme Court of Pennsylvania affirmed the conviction. The court considered vilification of the Christian religion a serious matter.[129] Noting that "Christianity is and always has been a part of the common law," the court stated:

> Thus this wise legislature framed this great body of laws for a Christian country and a Christian people. . . . This is the Christianity of the common law. . . and thus it is [undeniably] proved that the laws and institutions of this State are built on the foundation of reverence for Christianity. . . . In this, the Constitution of the United States has made no alteration nor in the great body of the laws which was an incorporation of the common-law doctrine of Christianity.[130]

The other case cited in *Holy Trinity* was *People v. Ruggles*, decided by New York's highest court in 1811.[131] Like *Updegraph*, *Ruggles* involved a criminal indictment for blasphemous utterances.[132] Mr. Ruggles was convicted for saying, "Jesus Christ was a bastard and his mother must be a whore."[133] Chief Justice James

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127 *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 398 (Pa. 1824).

128 *Updegraph*, 11 Serg. & Rawle at 398-99.

129 *Id.*

130 *Id.* at 403.

131 *People v. Ruggles*, 8 Johns. 290 (N.Y. Sup. Ct. 1811).

132 *Ruggles*, 8 Johns. at 290.

133 *Id.*

Kent, one of the Fathers of American Jurisprudence, wrote:

> Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful. . . .The free, equal and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussion on any religious subject, is granted and secured; but to revile. . . the religion professed by almost the whole community is an abuse of that right. . . . [We are] people whose manners. . . and whose morals have been elevated and inspired. . . by means of the Christian religion.[134]

Justice Kent wrote that although the Constitution declined to establish a religion, it certainly did not prevent prosecution of offenses against religion and morality.[135] The Constitution never meant to withdraw religion from the notice of the law.[136] "To construe [the Constitution] as breaking down the common law barriers against licentious, wanton, and impious attacks upon Christianity itself, would be an enormous perversion of its meaning."[137]

As recently as the 1950s, the United States Supreme Court continued to recognize the religious heritage of American law. In *Zorach v. Clauson*,[138] the Court said:

> We are a religious people whose institutions presuppose a Supreme Being. . . . When the State encourages

134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 343 U.S. 306 (1952.)

> religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.[139]

From the Founding until relatively recent times, American courts consistently recognized the importance of protecting the virtue of society in general and the young in particular. This concern sometimes arose in the context of the moral threat posed by obscene materials:

> The destruction of morality renders the power of the government invalid. . . . The corruption of the public mind, in general, and debauching the manners of youth, in particular, by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences. . . . No man is permitted to corrupt *the morals of the people*.[140]

As of 1957, Supreme Court decisions followed the long-established view that indecency could be suppressed in the inter-

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139 *Zorach*, 343 U.S. at 312-14.

140 *Commonwealth v. Sharpless*, 2 Serg. & R. 91, 103, 104 (Sup. Ct. Pa. 1815) (emphasis added).

ests of public morality. In *Roth v. United States*,[141] the Court affirmed obscenity convictions based on the "common conscience of the community."[142] Protection of public decency remained a viable rationale for legislative action. Justice Harlan, concurring in part in *Roth*, emphasized that state legislatures had a rational basis to protect public morality:

> It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the *moral fabric* of society. . . . The State can reasonably draw the inference that over a long period of time, the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on *moral standards*.[143]

In the 1950s, courts not only upheld notions of public morality but allowed individual states the flexibility to determine their own moral standards. This was to change in the 1960s.

F. The Courts' Misuse of the "Wall Of Separation."

Over the first 150 years of our nation's history, Christianity was deemed to be an integral part of the American legal system. Decisions since 1947 purporting to erect a "wall of separation between church and state" represent a dramatic departure from American constitutional traditions on the proper role of religion in

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141 354 U.S. 476 (1957.)

142 *Id.* at 490.

143 *Id.* at 502 (Harlan, concurring in part and dissenting in part; emphasis added.)

our public policy. Those decisions, in turn, laid the groundwork for cases limiting the ability of the people and their elected representatives to prohibit sexual misconduct.

1. *Everson, Engel, Abington*

Over a relatively short period of time, the U.S. Supreme Court transformed the First Amendment from a "vibrant shield of protection" for religious freedom into "a sword to use against people of faith."[144] The journey begins with the 1947 decision, *Everson v. Board of Education*.[145] The issue in *Everson* was whether New Jersey tax dollars could be spent to transport students to a parochial school.[146] The Court allowed the public funding to continue.[147] Nevertheless, the case is critical for two reasons. First, no case before had applied the First Amendment to the states. *Everson* made every local official and school teacher a "state actor" forbidden to violate the Establishment Clause.[148] Second, *Everson* incorporated Thomas Jefferson's "wall of separation" language into American jurisprudence.[149] By dint of repetition, the phrase has taken on precedential force, even though it originated not in the First Amendment but in a simple letter from

144 ALAN SEARS & CRAIG OSTEN, THE ACLU VS. AMERICA 4 (Broadman & Holman Publishers 2005.)
145 330 U.S. 1 (1947).
146 *Everson*, 330 U.S. at 3.
147 *Id.*
148 *Id.* at 8.
149 *Id.* at 16.

President Jefferson to a Baptist congregation in Connecticut.[150]

Writing for the majority, Justice Hugo Black said, "the First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[151] He continued:

> The "establishment of religion" clause of the First Amendment means at least this: neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs in any religious organizations or groups and *vice versa*.[152]

Justice Black's formulation of the Establishment Clause was wrong on several counts. First, the First Amendment was explicitly aimed at Congress, not the states. Second, the case before the Court did not involve efforts to force anyone to go to church or to profess a belief in any religion. Nor did the case involve punishing anyone for professing religious beliefs or disbeliefs or church

150 BARTON at 43.
151 *Id.* at 18.
152 *Everson*, 330 U.S. at 15-16.

attendance or non-attendance. Third, "virtually everything Justice Black held to have been outlawed by the First Amendment was routinely done, on a daily basis, by the very people who wrote that amendment and annexed it to the Constitution: Tax-supported churches, religious requirements for public office, government-sponsored days of prayer, chaplains for the military forces, and so on in endless sequence."[153] Fourth, the separation of church and state had been previously interpreted by the Supreme Court to mean that laws could not interfere with religious expression unless acts justified by religious belief, such as polygamy, were subversive of peace and good order.[154] Nevertheless, Justice Black's use of the "wall of separation" metaphor laid the foundation for a series of cases that turned America from a Christian nation into a secular society.

In *McCollum v. Board of Education*,[155] the Court declared voluntary religious instruction for public school pupils unconstitutional.[156] Justice Felix Frankfurter's concurring opinion picked up *Everson*'s "wall of separation" language:

> Separation means separation, not something less. . . . It is the Court's duty to enforce this principle in its full integrity. . . . Illinois has here authorized the commingling of sectarian with secular instruction in the public schools. The Constitution of the United States forbids this.[157]

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153 M. STANTON EVANS, "The True Wall of Separation," AMERICAN SPECTATOR, Apr. 2007, available at http://findarticles.com/p/articles/mi_hb3465/is_200704/ai_n32216305/?tag=content;col1 (last viewed Nov. 7, 2011).

154 *Reynolds v. United States*, 98 U.S. 145 (1878.).

155 333 U.S. 203 (1948.)

156 *McCollum*, 333 U.S. at 207.

157 *Id.* at 231 (Frankfurter, J., concurring.)

Justice Frankfurter's opposition to commingling religious and secular instruction was in direct conflict with the history of Illinois in particular and the United States in general. The 1789 Northwest Ordinance, which provided for the Illinois territory, explicitly encouraged schools in the territory to teach "religion, morality, and knowledge."[158]

Engel v. Vitale[159] concerned a 22-word nondenominational prayer recited in New York public schools: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[160] The prayer was voluntary.[161] The school district did not compel any pupil to pray if parents objected.[162] Nevertheless, the Supreme Court decided that the prayer violated the Establishment Clause because "[p]rayer in [the] public school system breaches the constitutional wall of separation between Church and State."[163] The prayer in *Engel* did not establish a religion or even compel students to acknowledge religion. *Engel* expanded the Establishment Clause to forbid the mere presence of prayer in the public school.

In *School District of Abington Township v. Schempp*,[164] the Supreme Court found it unconstitutional for a student to open the public school day by reading, without comment, a chapter from

158 THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA 364 (Moore & Lake 1813).
159 370 U.S. 421 (1962.)
160 *Engel*, 370 U.S. at 422.
161 *Id.* at 424.
162 *Id.* at 423.
163 *Engel*, 370 U.S. at 425, 430.
164 374 U.S. 203 (1963.).

the Bible.[165] The *Abington* Court held that the purpose of the First Amendment was not merely to outlaw the official establishment of a single sect, but to create a complete and permanent separation of the spheres of religious activity and civil authority.[166] Of course, this completely reversed the intention of the Founding Fathers, who never tried to sever religious belief from its rightful position as the foundation of civil authority.[167]

In *Stone v. Graham*[168] the Supreme Court struck down a Kentucky law that the Ten Commandments should be posted on the walls of schools because the Commandments represented "the fundamental legal code of Western Civilization and the Common Law of the United States."[169] Rejecting the secular purpose announced by the legislature as a mere pretext, the Supreme Court found that the real purpose was "plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposedly secular purpose can blind us to that fact."[170] The Court conveniently ignored the fact that in the very Supreme Court chamber in which oral arguments were held is a prominent and permanent depiction of Moses with the Ten Commandments.[171]

These and other Supreme Court decisions, over a short peri-

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165 *Abington*, 374 U.S. at 205.

166 *Abington*, 374 U.S. at 217 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 31-32 (1947)).

167 BARTON at 164.

168 449 U.S. 39 (1980.)

169 *Stone*, 449 U.S. at 39.

170 *Id.* at 41.

171 *Lynch v. Donnelly*, 465 U.S. 668, 677 (1984), *cited in* BARTON at 171.

od of time, upset the well-understood relationship of Christianity and government that had prevailed for over 150 years. By forbidding the government from passing laws that would aid religion or using tax dollars to support religious institutions and by imposing a strict separation between church and state, the Court broke with history and gave birth to "an entire industry of litigation," to the point where "secularizing America became a profit-making venture."[172] As a result, a single atheist can sue to erase God from the Pledge of Allegiance or the Los Angeles County seal.[173]

2. *Griswold, Roe, Lawrence*

Over the same years that the Supreme Court was decreasing the influence of religious belief, it was expanding the constitutional protection for sexual practices long deemed immoral. In effect, the American people were riding a Supreme Court seesaw, where their religious freedoms were going down on one side while sexual immorality was going up on the other.

In *Griswold v. Connecticut*[174] the Court invalidated a state law prohibiting the use of contraceptives, finding a right to privacy, especially within the marital bedroom. The constitutionally-protected zone of sexual privacy soon expanded beyond the bounds of marriage. In *Eisenstadt v. Baird*[175] the Court struck down a law prohibiting the sale of contraceptives to unmarried

172 MANSFIELD at xv-xvii.
173 MANSFIELD at xvii-xviii.
174 381 U.S. 479, 485 (1965.)
175 405 U.S. 438, 454 (1972.)

persons. The Court added that "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[176] In *Carey v. Population Services Int'l*[177] the Court expanded the constitutional right to contraception to persons under 16. Needless to say, these decisions have tended to separate the procreative act from marriage and legitimize promiscuity.

In *Roe v. Wade*[178] the Court established a constitutional right to abortion as an exercise of liberty protected by the Due Process Clause. Other decisions, such as *Memoirs v. Massachusetts*[179] and *Redrup v. New York*[180] tended to legitimize the creation and possession of pornography. Having established a broad zone of sexual privacy that state legislatures could not reach, the Court retrenched a bit in deciding *Bowers v. Hardwick.*[181]

The most important precursor to *Perry* is, of course, *Lawrence v. Texas*, which reversed *Bowers* and held Texas' anti-sodomy statute unconstitutional.[182] The *Lawrence* court began by challenging the way *Bowers* had framed the issue presented. The question was not whether there was a fundamental right to commit sodomy. In fact, the *Lawrence* majority never squarely held that

176 *Id.* at 453.
177 431 U.S. 678 (1977.).
178 410 U.S. 113 (1973.)
179 383 U.S. 413(1966.)
180 386 U.S. 767 (1967.).
181 See Part II.C, *supra.*
182 539 U.S. 558 (2003.)

homosexual sodomy is a fundamental right.[183] Rather, the majority focuses on the personal relationship decisions that people make: "The laws involved in *Bowers* and here. . . touch[] upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[184] This seems to beg the question: Why is sodomy "within the liberty of persons to choose without being punished as criminals"? The Court's response seems to be that sodomy might be committed in the context of an enduring personal bond: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[185] Which part of the Constitution gives homosexuals this right? Apparently the same sexual liberty interest suddenly discovered in *Griswold*, *Eisenstadt,* and *Roe*.

The notion of determining whether sodomy was a fundamental American right would seem to depend on the traditions of American liberty, which would imply a look at history. The *Lawrence* Court preferred to consider only recent history: "[W]e think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding

183 539 U.S. at 594 (Scalia, J., dissenting).

184 539 U.S. at 567.

185 *Id.*

how to conduct their private lives in matters pertaining to sex."[186] The Court did not explain why ignoring centuries of legal and cultural tradition was useful in discerning whether a particular sexual act was "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." Obviously, however, in favoring recent events over traditional values, the Court was elevating the period of the Sexual Revolution over centuries of prior history. This is somewhat like determining the greatest football team of all time by looking only at the last five Super Bowls.

Seeing no need "to reach a definitive historical judgment,"[187] the *Lawrence* Court then attacked the moralistic foundations of *Bowers*. "It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'"[188]

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186 539 U.S. at 571-72.

187 *Id.* at 568.

188 *Id.* at 571, citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992.)

To the *Lawrence* Court, the fact that many persons, and the legislators representing them, held "profound and deep convictions" over the entire history of the United States condemning certain sexual acts as indecent and depraved was not important. The Court preferred to invoke the "emerging recognition" among American academics that criminal penalties for private sexual conduct should be relaxed. The Court cited with approval decisions by the British Parliament and the European Court of Human Rights to overturn laws against homosexual conduct.[189] In other words, the majority preferred the moral codes of Europe to those of Texas. The Court did not explain how such recent and foreign pronouncements could retroactively bestow fundamental right status on homosexual sodomy under the Due Process Clause of the *American* Constitution.

In fact, the *Lawrence* Court was re-writing the fundamental right standard altogether, and this is the model Judge Walker followed in *Perry*. Instead of looking to determine whether a right was "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty," both *Lawrence* and *Perry* were applying the "living document" theory of Constitutional jurisprudence, basing Constitutional law upon "evolving standards" as opposed to deeply-rooted traditions.[190] "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[191] In other

189 *Id.* at 572-73.

190 *See, e.g., Trop v. Dulles*, 356 U.S. 86 (1958) ("evolving standards of decency" as a guide to constitutional interpretation).

191 539 U.S. at 579.

words, our Constitution has no fixed meaning.

In dissent, Justice Scalia criticized the majority's notion that states are powerless to mandate moral codes with respect to private sexual conduct. "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity" could only be sustained because *Bowers* had validated "laws based on moral choices. . . ."[192] To the extent overruling *Bowers* makes it impermissible for states to legislate based on moral choices, *Lawrence* threatens "a massive disruption of the current social order."[193] If Texas had no rational basis for prohibiting homosexual sodomy, if "the promotion of majoritarian sexual morality is not even a *legitimate* state interest," then "criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity" cannot survive.[194]

Justice Scalia concluded his dissent bluntly: "Today's opinion is the product of a Court. . . that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. . . . [T]he Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view

192 *Id.* at 590.

193 *Id.* at 591 (Scalia, J., dissenting).

194 *Id.* at 599 (Scalia, J., dissenting; citations omitted.)

this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination. . . ."[195]

Having excluded prayer (*Engel*) and the Bible (*Abington*) from public schools; having outlawed legislation endorsing religious values (*Lemon*); and having overruled moral objections to contraception (*Griswold*), abortion (*Roe*) and now sodomy (*Lawrence*), the Supreme Court seems to have erased any principled, logical basis to uphold laws criminalizing other long-standing sexual offenses, at least if they are committed consensually and in private. It is difficult to see any path restoring traditional notions of sexual morality to American jurisprudence that does not confront the Court's Establishment Clause jurisprudence that so dramatically reduced the permissible role of religion in public policy.

V. Because Judge Walker Ruled Moral Objections Out-Of-Bounds, His Decision Was Based On Subordinate Considerations.

A. Whether Homosexuality Is an Immutable Characteristic.

One of the premises of Judge Walker's opinion was that homosexuality is an inherent and unchangeable characteristic.[196] Recent scientific research, however, calls this into question. A seven-year study followed 61 subjects and found that 23% suc-

195 *Id.* at 602 (Scalia, J., dissenting).

196 704 F.Supp. 2d at 966, FF 46.

cessfully converted from homosexual orientation to heterosexual. Another 30% remained chaste and no longer identified themselves as homosexual.[197]

But even assuming *arguendo* that homosexuality is an inherent, genetic phenomenon, it does not follow that homosexual acts are morally neutral.

> The fact is that there are plenty of genetically influenced traits that are nevertheless undesirable. Alcoholism may have a genetic basis, but it doesn't follow that alcoholics ought to drink excessively. Some people may have a genetic predisposition to violence, but they have no more right to attack their neighbors than anyone else. Persons with such tendencies cannot say "God made me this way" as an excuse for acting on their dispositions.[198]

As Professor George concludes, if we were to discover that the male of the species has a genetic predisposition toward multiple sex partners, that would not be a good argument for polygamy.[199]

Those who treat homosexuality as an inherent and unchangeable condition compare the ban on same-sex marriage to laws

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197 STANTON L. JONES AND MARK A. YARHOUSE, "A Longitudinal Study of Attempted Religiously-Mediated Sexual Orientation Change," JOURNAL OF SEX AND MARITAL THERAPY, 37:404-27 (2011), available at www.exgaystudy.org.

198 John Corvino, "Nature? Nurture? It Doesn't Matter," INDEPENDENT GAY FORUM (Aug. 12, 2004), cited in GEORGE at 284-85.

199 GEORGE at 285.

against interracial marriage.[200] Judge Walker did so in his *Perry* opinion.[201] "But the analogy fails: Anti-miscegenation was about whom to allow to marry, not what marriage was essentially about; and sex, unlike race, is rationally relevant to the latter question."[202] Race is not central to what marriage is, but sexual intercourse is. There was no doubt that it was possible for a man and a woman of different races to marry. The debate in the same-sex marriage situation is whether it is possible for two men or two women to marry, in other words, whether a same-sex "marriage" is a marriage at all.[203]

B. Whether Homosexuals Are Victims of Discrimination.

1. Circular Logic

Judge Walker cited a long history of what he called discrimination against gays and lesbians. One of the more interesting examples was a 1966 letter from the chairman of the Federal Civil Service Commission warning against the hiring of homosexuals by the government.

> Pertinent considerations here are the revulsion of other employees by homosexual conduct and the consequent

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200 Black Californians apparently did not appreciate the comparison. Two-thirds of black voters voted to uphold traditional marriage by supporting Proposition 8. Cara Mia DiMassa & Jessica Garrison, "Why Gays, Black Are Divided on Prop. 8," L.A. TIMES, Nov. 8, 2008, at A1, cited in GEORGE at 249 n.10.

201 704 F.Supp.2d at 957-58, FF 24-25.

202 GEORGE at 249.

203 *Id.*

> disruption of service efficiency, the apprehension caused other employees of homosexual advances, solicitations or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of the common toilet, shower and living facilities. . . .[204]

Judge Walker also cited a 1974 letter from the IRS to the Pride Foundation denying a Section 501(c)(3) tax exemption because advancing the welfare of the homosexual community was "perverted or deviate behavior. . . contrary to public policy and [is] therefore, not 'charitable.'"[205]

Of course, Judge Walker's use of these examples begs the question. If one assumes that homosexual conduct is normal and wholesome sexual expression, then such comments are indeed hostile and discriminatory. However, if one assumes the contrary, then discrimination against homosexuality may have a valid societal purpose. Judge Walker engaged in circular logic in decrying these comments as evidence of discrimination without addressing the central moral question. The ultimate questions are how our society wishes to treat homosexual conduct, and whether voters or judges should decide.

2. Whether the Traditional Marriage Definition Is Discriminatory.

There is precedent for the proposition that defining marriage

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204 704 F.Supp.2d at 981, FF 74(c.)

205 *Id.* at 981, FF 74(d).

as between one man and one woman simply does not constitute sex discrimination. As the New York Court of Appeals stated, "by limiting marriage to opposite-sex couples [the State] is not engaging in sex discrimination. The limitation does not put men and women in different classes, and give one class a benefit not given to the other. Women and Men are treated alike -- they are permitted to marry people of the opposite sex, but not people of their own sex."[206] Similarly, the Maryland Court of Appeals held that the Maryland marriage statute "prohibits equally both men and women from the same conduct," and so is not discriminatory.[207]

Assuming that the traditional marriage definition discriminates against same-sex couples, this does not necessarily make the discrimination unconstitutional. When it comes to driving, we discriminate against children, unlicensed drivers, and those who drive under the influence of alcohol. When it comes to marriage, we discriminate against men who wish to marry their mothers, their sisters, their first cousins, their pets, and other men. So the question is not whether marriage laws discriminate, but whether they do so on a legitimate basis.

3. Anti-Gay Discrimination Arguments Are Contrived.

The argument that homosexuals are victims of discrimination, similar to the kind of discrimination assailed by the 1960s

206 *Hernandez v. Robles*, 7 N.Y.3d 388, 821 NYS 2d 770, 855 N.E. 2d 1, 6 (2006.)

207 *Conaway v. Deane*, 401 Md. 219, 264, 932 A.2d 571, 598 (Md. 2007), cited in GRUDEM at 231.

civil rights movement, is part of a strategy hatched in a 1989 book called AFTER THE BALL.[208] AFTER THE BALL offered a specific propaganda program to desensitize and gradually convert those whom the authors repeatedly refer to as homo-hating bigots. They brazenly proposed a "calculated" and "manipulative" propaganda campaign.[209] Among other things, they proposed that gays be presented -- falsely -- as icons of normality. "[I]t makes no difference that the ads are lies; not to us, because we are using them to ethically good effect."[210] The success of their strategy would depend on hiding certain objectionable characteristics of gay culture, such as "drag queens and pederasts."[211] The strategy would be implemented through a relentless media campaign.[212] "You can forget about trying right up front to persuade folks that homosexuality is a *good* thing. But if you can get them to think it is just *another* thing -- meriting no more than a shrug of the shoulders -- then your battle for legal and social rights is virtually won."[213]

There are several major faults with the AFTER THE BALL strategy. First, it assumed that objections to homosexuality are based exclusively upon hatred or prejudice as opposed to intellectual or moral objection. Second, it was deceitful. The plan explicitly sought to win approval by presenting a falsely benign portrait of homosexuality. Third, it was premised on the argument that

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208 MARSHALL KIRK AND HUNTER MADSEN, AFTER THE BALL, Doubleday, New York, 1989 (hereinafter cited as KIRK).

209 KIRK at 161.

210 KIRK at 154.

211 KIRK at 147.

212 KIRK at 163.

213 KIRK at 177.

homosexuality is inherent and unchangeable, and therefore that moral choice is a "myth."[214] This, of course, is debatable.

C. Judge Walker's Debatable Conclusions about What Marriage Is.

Alexis DeTocqueville described the American family in his famous work, DEMOCRACY IN AMERICA:

> There is certainly no country in the world where the tie of marriage is more respected than in America or where conjugal happiness is more highly or worthily appreciated. . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace. There his pleasures are simple and natural, his joys are innocent and calm; and as he finds that an orderly life is the surest path to happiness, he accustoms himself easily to moderate his opinions as well as his tastes.[215]

The United States Supreme Court has long recognized the essential definition of marriage: "the idea of the family, as consisting in and springing from the union for life of one man and one woman" is "the sure foundation of all that is stable and noble in our civilization."[216] *Murphy v. Ramsey* was decided in the context of Utah's admission to the union. Utah had petitioned for statehood seven times from 1849 until 1896. Congress refused to admit Utah until that Mormon territory amended its state constitu-

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214 KIRK at 9.

215 ALEXIS DETOCQUEVILLE, DEMOCRACY IN AMERICA, 1:315.

216 *Murphy v. Ramsey*, 114 U.S. 45 (1885.)

tion to ban polygamy.[217]

Princeton Prof. George defines marriage this way: "Marriage is a comprehensive interpersonal union that is consummated and renewed by acts of organic bodily union and oriented to the bearing and rearing of children."[218] This definition requires that marriage be male/female, because only such a couple can achieve organic bodily union oriented to the bearing of children. The definition cannot include three or more persons, because three persons cannot achieve organic bodily union for purposes of reproduction.

According to Professor George, one of the distinguishing characteristics of marriage is "organic bodily union."[219] Sexual intercourse is uniquely capable of creating this kind of bodily union because two bodies, one male and one female, must be united for sexual reproduction.[220] This bodily union characterizes marriage, even though it does not always result in pregnancy and even if one of the partners is infertile. The fact remains that marriage has always been equated with the conjugal act.[221] Indeed it is the conjugal act that has always been treated as the consummation of a marriage, even if the marriage does not produce any children.[222] In the common law tradition, only coitus and no other sex act has been treated as consummation of a marriage.[223] By contrast, same-sex sexual activity is not reproductive in any sense,

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217 GRUDEM at 223.
218 GEORGE at 272.
219 *Id.* at 253.
220 *Id.* at 253-54.
221 *Id.* at 254.
222 *Id.* at 255.
223 *Id.* at 257.

and therefore lacks the orientation to procreation that characterizes marriage.[224]

One of the important public policy reasons to enshrine the traditional definition of marriage is both to facilitate the rearing of healthy children within marriage and to discourage the birth of illegitimate children outside marriage. In other words, the traditional, family-based definition of marriage not only serves to benefit the children raised by their biological parents, but offers a strong disincentive against people tempted to have out-of-wedlock children. By granting legal and economic advantages to married couples, society encourages them to join together and have all their children within the marital family, rather than by random sexual pairings. Likewise, traditional legal disabilities imposed upon illegitimate children were designed to channel sexual activity into the marital context to reduce the possibility of out-of-wedlock births.

It is hard to understand how Judge Walker could find that the citizens of California had no rational basis whatsoever for safeguarding the traditional definition of marriage. As Professor George explained:

> Marriages. . . are a matter of urgent public interest, as the record of almost every culture attests -- worth legally recognizing and regulating. Societies rely on families, built on strong marriages, to produce what they need but cannot form on their own: upright, decent people who make for reasonably conscientious, law-abiding citizens. As they mature, children benefit

224 *Id.* at 255, 257.

> from the love and care of both mother and father, and from the committed and exclusive love of their parents for each other.[225]

America's experience with the breakdown of the family in areas dominated by public assistance teaches us the importance of healthy families. As absentee fathers and illegitimate births became more common, social ills such as teen pregnancy, poverty, crime, drug abuse and health problems follow.[226] Separating the definition of marriage from its core, child-rearing function will only make our social problems worse and require ever increasing social welfare spending.[227] Given the fiscal realities in Sacramento and Washington, this would be a very bad outcome.

D. Judge Walker's Debatable Conclusions about Marriage And Children.

Judge Walker found as a matter of fact that "California law permits and encourages gays and lesbians to become parents through adoption, foster parenting or assistive reproductive technology. Approximately eighteen percent of same-sex couples in California are raising children."[228] The Attorney General of California admitted "that the laws of California recognize no relationship between a person's sexual orientation and his or her ability to

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225 *Id.* at 270.
226 *Id.*
227 *Id.*
228 704 F.Supp.2d at 968, FF 49.

raise children."[229] Judge Walker found that "the children of same-sex couples benefit when their parents can marry."[230]

Judge Walker made a fact finding that "children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted."[231] Based upon the evidence presented at trial, he found that "the research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology."[232] He also found that "children do not need to be raised by a male parent and a female parent to be well-adjusted, and having both a male and a female parent does not increase the likelihood that a child will be well-adjusted."[233] It would seem that these are value-laden political judgments more appropriately to be decided by legislative bodies in the context of a full-fledged public policy debate -- or the people in a referendum -- than by a trial court based upon whatever limited evidence was admitted.

The interests of children explain some of the norms that associated with marriage. Biologically, children can only have two parents, one male and one female. "So marriage, a reproductive type of community, requires two -- one of each sex."[234] Marriage is permanent because divorce would deprive the children of an intact biological family. Marriage is exclusive because infidelity "betrays and divides one's attention and responsibility to

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229 *Id.* at 968, FF 49(b).
230 *Id.* at 973, FF 56.
231 *Id.* at 980, FF 70.
232 *Id.*
233 *Id.* at 981, FF 71.
234 GEORGE at 273.

spouse and children, often with children from other couplings."[235]

Judge Walker concluded that only outmoded, sexist notions supported the idea of male/female parenting as beneficial to children. The best available social science teaches otherwise.[236] Our experience teaches "that children need both a mother and father; that men and women on average bring different gifts to the parenting enterprise; and that boys and girls need and tend to benefit from fathers and mothers in different ways."[237]

In the context of same-sex "marriage," there would be no inherent need for permanence or fidelity because there would be no biological children. Many gay marriage advocates have in fact sought not only to have access to marriage but to redefine it. Such a redefined marriage would likely eliminate the norms of permanence and/or infidelity. Unfortunately, these marriage norms are already beset by increasing rates of divorce and adultery in our society. Redefining marriage to include same-sex unions would only hasten this unfortunate trend.[238]

Some advocates for same-sex marriage have been outspoken about their hope to redefine marriage altogether. "Same-sex couples should 'fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely[, because t]he most subversive action lesbians and gay men can undertake. . . is to transform the notion of "family" entirely.'"[239]

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235 *Id.* at 259.

236 *Id.* at 263.

237 *Id.* at 263.

238 *Id.* at 262.

239 JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2005), cited in GEORGE at 278 n.100.

Whereas traditional marriage implies monogamous exclusivity, gay male couples, even those with fairly long-term relationships, tend to have sexual encounters outside the relationship. In a survey conducted in the 1980s, "more than sixty percent [of gay couples] entered the relationship expecting sexual exclusivity, but not one couple stayed sexually exclusive longer than five years."[240]

It is a radical social experiment on a generation of children to assume, without proof in advance, that same-sex parents will produce outcomes equal to that of the traditional male/female parenting model.

VI. Judge Walker Should Have Recused Himself.

Chief Judge Vaughn R. Walker presided over the *Perry v. Schwarnegger* case from its inception until his retirement in February 2011. He did not disclose his sexual orientation to counsel. After his retirement, on April 6, 2011, he disclosed to the media that he had been in a same-sex relationship for ten years.[241] It is unknown whether Judge Walker would marry his partner if same-sex marriage were legalized in California, but his opinion makes clear that he views same-sex marriage as a salutary benefit.

Where actual or suspected bias could call the impartiality of a court's decision into question, federal statutes require the judge to recuse himself. Title 28 of the United States Code,

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240 DAVID P. MCWHORTER & ANDREW M. MATTISON, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP 252-53 (1984), cited in GEORGE at 278 n.102.

241 Dan Levine, "Gay Judge Never Thought to Drop Marriage Case," Reuters, Apr. 6, 2011, available at http://www.reuters.com/article/2011/04/06/us-gaymarriage-judge-idUSTRE7356TA20110406 (last visited Nov. 7, 2011).

Section 455(a), requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[242] Section 455(b)(4) likewise requires a judge to recuse himself when he has "any. . . interest that could be substantially affected by the outcome of the proceeding."[243]

After learning that Judge Walker is homosexual, the Proponents of Proposition 8 filed a motion in the District Court asserting that because Judge Walker should have recused himself and did not, the court should vacate Judge Walker's decision in favor of same-sex marriage.[244] Employing the ancient maxim that "[n]o man is allowed to be a judge in his own cause," the Proponents argued that Judge Walker should have disclosed his homosexuality at the outset of the case or should have recused himself of his own volition. The new district court judge assigned to the case, Judge Ware, denied the motion.[245] Judge Ware decided that there was no evidence that Judge Walker intended to marry, so he did not have a direct interest in the outcome of the case. A line of federal precedents holds that a judge's minority status does not necessarily bar him from deciding a civil rights case involving members of that minority.[246]

As of this writing, Judge Ware's decision is on appeal before the Ninth Circuit.[247]

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242 28 U.S.C. § 455(a).

243 28 U.S.C. § 455(b)(4).

244 Motion to Vacate Judgment, *Perry v. Schwarzenegger*, No. 09-CV-2292 JW, document 768, filed Apr. 25, 2011.

245 Order Denying Motion to Vacate, *Perry v. Schwarzenegger*, No. 09-CV-2292 JW, document 797, filed June 14, 2011.

246 Id. at 5, n.8.

247 *Perry v. Brown*, No. 11-16577 (9th Cir.).

VII. Conclusion.

The *Perry* decision can only be properly understood against the backdrop of the Supreme Court cases that secularized America, downgrading religious influence while uplifting sexual license. *Everson* and its progeny, applying a distorted notion of the "wall of separation between church and state," have effectively disqualified religious morality as a valid basis for lawmaking. The First Amendment Establishment Clause cases, by prohibiting the people and their legislators from making moral choices for society, have paved the way for Fourteenth Amendment Due Process and Equal Protection cases that pay no heed whatsoever to traditional moral values concerning human sexuality. As a result, Judge Walker speedily dismissed moral objections to same-sex marriage as irrelevant and impermissible. Judge Walker then rendered an opinion that did not harmonize with the beliefs of most Americans who have gone to the polls, in California and elsewhere, to reaffirm the traditional definition of marriage.[248]

How did we get here? By separating church and state in a way our Founders never intended. Only a judicial system that had ruled Christian morality out-of-bounds could arrive at decisions like *Griswold*, *Roe*, *Lawrence*, and *Perry*. When our courts disregard the traditional moral principles upon which our Nation was founded, it is not surprising that they render decisions that conflict with the moral sense of the American people.

Only by restoring religious morality as an open and legiti-

248 *See* referendum results collected at note 2, *supra*.

mate consideration in lawmaking can we restore harmony between American public policy and traditional American notions of right and wrong. Unless we do, the adoption of same-sex marriage will inevitably put church and state at odds with each other. If the Constitution requires, as Judge Walker says it does, that same-sex marriages and opposite-sex marriages be treated as equivalent, then the state will be required to treat homosexual marriages as just as wholesome and proper as traditional marriages. This will be manifested, for example, in school curricula. People of faith who oppose this moral equivalency will be found guilty of discrimination. A federal court in California found that a student's religiously-based opinions against homosexuality could be banned by his school.[249] Likewise, an appellate court in Massachusetts held that a public school may, over parental objections, teach that homosexuality is morally good.[250]

Those who oppose homosexuality or same-sex marriage for religious or moral reasons are now, and will continue to be, castigated as hateful bigots.[251] "The implications are clear: If marriage is legally redefined, believing what every human society once believed about marriage -- namely, that it is a male-female union -- will increasingly be regarded as evidence of moral insanity, malice, prejudice, injustice, and hatred."[252] Many of those who wish to practice homosexuality are not content to do so in private.

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249 *Harper v. Poway Unified Sch. Dist.*, 345 F.Supp.2d 1096, 1122 (S.D. Ca. 2004), cited in GEORGE at 264.

250 *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), cited in GEORGE at 264.

251 Frank Rich, "The Bigot's Last Hurrah," N.Y. TIMES, Apr. 19, 2009 (Week in Review) at 10, cited in GEORGE at 265, n.50.

252 GEORGE at 265.

Rather, they insist upon obtaining legal validation for their view and then coercing everyone into agreement.

Arguments in favor of same-sex marriage can be overcome without reference to religious belief. "[T]he human good of marriage, and its implications for the common good of human communities, can be understood, analyzed, and discussed without engaging specifically theological issues and debates."[253] In other words, people of faith can win the marriage argument without citing the Bible or the Catechism. This is the prudent approach taken by the Alliance Defense Fund attorneys representing the Proposition 8 Proponents. The question posed by this paper is: Why should Christian Americans, and others opposed to same-sex marriage, have to fight with one hand tied behind their backs? Why should people of faith have to exclude faith-based arguments in American courts? Only because American courts have, by misusing the so-called "wall of separation between church and state," transformed America from a Christian nation into a secular one. Traditional marriage will be safe only when our courts again recognize the moral and religious principles upon which our Nation was founded.

253 GEORGE at 285.

FOREIGN PUBLIC DIPLOMACY POLICY: THE RHETORICAL TURN

*Randy E. Cole**

ABSTRACT: *This article makes a case for diplomats and academics to use public relations and rhetorical scholarship to inform their understanding of the formation and implementation of foreign public diplomacy policy—that is, the branch of U.S. diplomacy that deals in communicating directly with foreign publics, not their governments. The article approaches foreign public diplomacy as public relations practice via the scholarship in the field, the advocacy of national interests via a discussion of Machiavelli, Grotius and medieval international law, and finally in promoting mutual understanding to aid in the implementation of foreign policy. The article promotes a holistic approach, based in rhetorical scholarship, to serve as a model for making the case that public diplomacy scholarship may be situated in rhetoric and*

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"In contemporary politics and diplomacy, no other form better illustrates the place of rhetoric and discourse than public diplomacy."[1] One of the most exciting aspects of studying rhetoric is that rhetoric is not philosophical solipsism. It does not simply reflect on itself. Rhetoric always has one foot in the real world, and rhetorical scholarship helps one to understand how people experience, communicate and change their lived reality. Rhetoric and diplomacy at its best makes the world a better place in which to live. This essay connects the study of public diplomacy to communication scholarship. Much of the literature examining foreign public diplomacy policy and its related issues is not found in communication and rhetorical scholarship. Only recently, and infrequently at that, scholars have sought to tie public diplomacy policy philosophically to public relations scholarship.[2] A rhetorical or philosophical underpinning may offer great benefit to international public diplomacy policy formation and implementation.

Much of the work in public diplomacy scholarship is done in the fields of political science, international relations and international law. Fifty years ago, Richard McKeon saw the importance of moving the discussion in the direction of rhetorical theory and ethics: "The language of ethics has become an integral part

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1 G.D. MALONE, POLITICAL ADVOCACY AND CULTURAL COMMUNICATION: ORGANIZING THE NATION'S PUBLIC DIPLOMACY xi (1988).

2 *See* M. J. Dutta-Bergman, *U.S. Public Diplomacy in the Middle East: A Critical Cultural Approach*, 30 Journal of Communication Inquiry 102 (2006)., *and* J. Zhang & B.C. Schwarz, *Public Diplomacy to Promote Global Public Goods (GPG): and Conceptual Expansion, Ethical Grounds, and Rhetoric*, 35 Public Relations Review 382 (2009)., *and* J. Wang, *Telling the American Story to the World: The Purpose of U.S. Public Diplomacy in Historical Perspective*, 33 Public Relations Review 21 (2007.)

of normal communication in politics, business, labor unions, and international relations".[3] McKeon notes that terms like "decision-making," "policy politics," and the "engineering of consent" replace discussions of rhetoric as researchers attempt a bias-free engagement of ethics in the field of international relations and public diplomacy.[4] Defining public diplomacy policy with a rhetorical understanding in mind that believes all communication between people or organizations is not free of bias will open up an alternate development of the term.

Zhang and Swartz[5] cite three ways that international public diplomacy is defined in scholarship: as the cultivation of brand image, as the advocacy of national interests, and as promoting mutual understanding. This essay will examine public diplomacy as cultivating a brand image vis-à-vis the public relations literature and as the advocacy of national interests. A developed analysis of public diplomacy policy as promoting mutual understanding would require a discussion of the work of Hans-Georg Gadamer and Mikhail Bakhtin from the communications scholarship and is beyond the scope of this paper, but some attention to the topic will be folded into the discussion of the Zhang and Swartz's first two points. By examining Zhang and Swartz's definitions, this essay will offer a constructive communication-based hermeneutics and ethics by which to understand what is meant by the term "public

3 Richard McKeon, *The Ethics of International Influence*, 70 ETHICS 187, 187 (1960)

4 *Id.*

5 Zhang, *supra* note 2.

diplomacy policy."

Before exploring public diplomacy as one of the three strategies put forth by Zhang and Swartz and attempting a gestalt definition of the term, one must understand what public diplomacy does meta-strategically, especially in an increasingly globalized world. In a November 2010 article in *Foreign Affairs*, Secretary of State Hillary Clinton explains the strategy of State Department public diplomacy thus:

> But increasing global interconnectedness now necessitates reaching beyond governments to citizens directly and broadening the U.S. foreign policy portfolio to include issues once confined to the domestic sphere such as economic and environmental regulation, drugs and disease, organized crime, and world hunger... The QDDR [Quadrennial Diplomacy and Development Review] endorses a new public diplomacy strategy that makes public engagement every diplomat's duty, through town-hall meetings and interviews with the media, organized outreach, events in provincial towns and smaller communities, student exchange programs, and virtual connections that bring together citizens and civic organizations.[6]

Public diplomacy can be seen, then, as the work of communicating those policies with myriad foreign audiences. Malone holds: "What particularly sets public diplomacy apart from ordinary, or traditional, diplomacy is...that private individuals or publics,

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6 Hillary R. Clinton, *Leading Through Civilian Power*, 89 Foreign Affairs 13, 15-16 (2010).

rather than governments, are its immediate target."[7]

Public Diplomacy Policy as Cultivating Brand Image to Foreign Publics

Definitions of public diplomacy range from a unilateral rhetoric of advocacy to two-way dialogue, with most definitions being image- and identity-centered.[8] Likewise, Taylor[9] observes that public diplomacy is often conceived of as a one-way communication with one nation seeking to put forth a rhetoric of image cultivation in order to build positive brand image with publics who live in another country. Grunig argues that public diplomacy "consists essentially of the application of public relations to the strategic relationship of organizations with international publics."[10]

If so many definitions of public diplomacy—and practice of in the form of embassy press bureaus and media relations—rely so heavily on image cultivation, turning to scholarship on brand communication or management and image cultivation in the field of public relations will serve to anchor public diplomacy in the field of rhetoric and communication.

As early as the 1980s, attempts were made to philosophically connect the two in order to test whether the body of public relations scholarship might serve as a model for a similar discus-

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7 G.D. MALONE, POLITICAL ADVOCACY AND CULTURAL COMMUNICATION: ORGANIZING THE NATION'S PUBLIC DIPLOMACY 3 (1988.)

8 Zhang, *supra* note 2.

9 M. TAYLOR, GLOBAL COMMUNICATION, INTERNATIONAL AFFAIRS AND THE MEDIA SINCE 1945 (1997).

10 J. E. Grunig, *Public Relations and International Affairs: Effects, Ethics and Responsibility*, 47 Journal of International Affairs 137, 143 (1993).

sion of foreign public diplomacy policy. It is interesting to note that at around the same time, during the Reagan years, a growing confusion in the State Department was emerging about what the term "public diplomacy" actually meant.[11] Most public diplomacy scholarship has remained outside the discipline of communication and rhetoric. According to Yun, "In the past decade public relations scholarship has made little serious effort to test what public relations theories best transfer to the study of public diplomacy and, simultaneously, to rigorously examine proposed conceptual convergence between both spheres."[12] Public relations scholarship in brand management and image cultivation will serve to flesh out a satisfactory definition for one of three rhetorical "prongs" of a gestalt conception of public diplomacy.

Cutlip, et. al. define public relations as "the management function that identifies, establishes, and maintains mutually beneficial relationships between an organization and the various public[s] on whom its success or failure depends."[13] Certainly, a major part of creating and sustaining a symbiotic relationship is wrapped up in creating and maintaining a favorable brand, especially in the case of foreign public diplomacy policy, where a given nation's brand may be largely unknown or misunderstood.

In her work on brand image, Chia-Hung examines the term "brand image" and offers that "brand image exists in the minds of consumers, as a result of how people perceive and interpret

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11 MALONE, *supra* note 1 at 90-91.

12 Yun, *supra* note 11 at 287, 288.

13 S.M. CUTLIP, A.H. CENTER, & G.M. BROOM, EFFECTIVE PUBLIC RELATIONS (1985).

the brand and the marketing activities surrounding it, thus going beyond the actual product itself."[14] Implicit in her definition is an understanding of ethos. The rhetor, a given nation in this case, is interpreted as a whole brand beyond the marketing and public relations activities surrounding it. Furthermore, if public diplomacy is to be understood as cultivating a brand image, ethos must be central to the definition.

Ethos is not a quality a rhetor possesses; it is attributed to the rhetor by the audience, based on factors such as competence or believability.[15] Credibility in Aristotle is conceived of as not emanating from the rhetor like logical and emotional appeals but as something bestowed upon the rhetor by his or her audience. "Aristotle's ethos may be defined as the element of speech that presents the speaker as trustworthy; or from the point of view of the hearer, as the element that makes the audience regard the speaker as trustworthy."[16] Central to brand management, then, is an audience-centered rhetoric, contingent on particularity.

In sum, creating affect, trust, and loyalty[17] as an agent of a nation to its various foreign publics is a deeply public relations-driven endeavor that requires the rhetorical giving of ethos by the composite audience. Clinton endorsed:

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14 H. Chia-Hung, *The Effect of Brand Image on Public Relations Perceptions and Customer Loyalty*, 25 International Journal of Management 237, 239 (2008).

15 ARISTOTLE, RHETORIC (1954).

16 J. WISSE, ETHOS AND PATHOS: FROM ARISTOTLE TO CICERO 33 (1989).

17 A. Chaudhuri & M.B. Holbrook, *The Chain of Effects from Brand Trust and Brand Affect to Brand Performance: The Role of Brand Loyalty*, 65 Journal of Marketing 81 (2001).

> a new public diplomacy strategy that makes public engagement every diplomat's duty, through town-hall meetings and interviews with the media, organized outreach, events in provincial towns and smaller communities, student exchange programs, and virtual connections that bring together citizens and civic organizations.[18]

Clinton appropriately titled her article "The New Diplomacy," and it draws largely from an implicit understanding of the nation as brand. For example, consider a town-hall meeting being organized by a public diplomacy professional in a small African village that will address a U.S. government development initiative to provide health care to that village. A public diplomacy professional would do well to keep in mind that creating affect, loyalty, and trust are subsumed into the need to gain ethos from his or her audience.

Creating affect, loyalty, and trust in working toward managing and growing the U.S. brand abroad finds tactical legs in public relations scholarship. Curtin and Gaither [19] propose a cultural-economic model of international public relations practice based on the circuit of culture. [20] Their model provides a public relations method of practice by "encompassing the infinite points in which culture and power meet in a complex dance between

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18 Clinton, *supra* note 6 at 13, 15-16.

19 P.A. Curtin & T.K. Gaither, *Privileging Identity, Difference and Power: The Circuit of Culture as a Basis for Public Relations Theory*, 17 Journal of Public Relations Research 91 (2005).

20 P. DU GAY, S. HALL, L. JANES, H. MACKAY & K. NEGUS, DOING CULTURAL STUDIES: THE STORY OF THE SONY WALKMAN (1997).

situational particulars and larger cultural practices."[21] Privileging cultural particulars in their public relations tactics and practice, Gaither and Curtin provide a public relations answer to Hall's assertion that "culture is threaded through all social practices."[22]

By adopting a set of public relations tactics that privilege deference to the other's culture in explaining and promoting U.S. objectives, public diplomacy officials may be better able to cultivate the American brand by building the three components of brand management. While this may take various forms depending on the specific nation and rhetorical situation in which a diplomat finds himself or herself, Curtin and Gaither privilege discursive practices as central to the ongoing process of meaning making, and by doing so, open up foreign public diplomacy policy formation to a sensitivity toward the temporal and specific cultural mores that comprise a given intercultural public relations diplomacy moment.[23]

Likewise, Myers elucidates the complexity of creating trust as part of brand management in public diplomacy.[24] He offers that the success of a diplomatic rhetorical act "depends upon the ability to establish trust with a composite audience, while at the same time communicating the terms of a negotiation, over which there will be subsequent bargaining."[25] He calls for a public diplo-

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21 Curtin & Gaither, *supra* note 21 at 91, 117.

22 S. Hall, *Cultural Studies: Two Paradigms*, 2 Media, Culture and Society 57, 58 (1980).

23 Curtin & Gaither, *supra* note 21 at 91.

24 F. Myers, *The Rhetorical Construction of Sincerity in International Negotiations: Great Britain's First Application for Admission into the Common Market*, 2 Rhetoric & Public Affairs 431, 431 (1999).

25 *Id.*

macy policy of transparency by subsequent press release and news conference to a meeting or speech act for those members of the audience not in attendance at the actual event. He also offers that diplomats should illustrate their commitment to the outlined objectives, whatever those objectives may be, echoing Isocrates' maxim that "the argument which is made by a man's life is of more weight than that which is furnished by words."[26]

Defining foreign public diplomacy policy strictly in terms of public relations, however, is not enough. Malone cites a disenchantment among public diplomacy practitioners when compared to public relations professionals.[27] While issues of policy advocacy and creating mutual understanding may be tantamount in public relations practice, it is important to remember that the work is still the work of advocating the national interests of the U.S. abroad.

Toward a Rhetorical Constructive Definition

The rhetorical purpose of American public diplomacy policy is to promote policy goals and earn trust and cooperation while attending to others through a good public relations strategy situated in a rhetorical-philosophical understanding of discourse and dialogue.

Malone adds a check here, pointing to history and cautioning against a weak foreign public diplomacy . He argues that an approach that emphasized "dialogue" by the Carter Adminis-

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26 W. L. Benoit, Accounts, excuses, apologies: A theory of image restoration strategies 69-70 (1995).

27 Malone, *supra* note 1.

tration in the 1970s is historically regarded as a weak approach, and that the strategy of foreign public diplomacy should be both intercultural dialogue and advocacy of U.S. policies in equal measure.[28]

In her discussion of public diplomacy, Hillary Clinton provides a point of practical application. In inviting dialogue with foreign publics, Clinton underscores what this strategy might look like. "I have held town-hall meetings with diverse groups of citizens on every continent I have visited...because the durability of partnerships abroad will depend on the attitudes of the people as well as the policies of their governments."[29] For the diplomat, then, public events such as these should be approached as "guest," that is to say they should be approached as an opportunity to learn about the other in such a way as to communicate the United States' interests more effectively as well as to be sensitive to cultural and national alterity.

A rhetorical definition of public diplomacy offers a rich body of knowledge by which to achieve policy goals and engage foreign publics. The field of public relations finds its historical roots in the public diplomacy initiatives of the German and British governments.[30] Moreover, public relations scholarship offers constructive ways in which to situate the tactical work in relation-

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28 *Id.* At 95.

29 Clinton, *supra* note 6 at 16.

30 *See* R.E. HIEBERT, COURIER TO THE CROWD: THE STORY OF IVY LEE AND THE DEVELOPMENT OF PUBLIC RELATIONS (1966)., *and* K. SRIRAMESH & D. VERCIC EDS., HANDBOOK OF GLOBAL PUBLIC RELATIONS (2003).

ship-building.[31] Dutta-Bergman echoes Clinton in pointing to a rhetorical turn in public diplomacy based on relationship-building as the cornerstone tactic to advancing U.S. foreign policy within a rhetorically situated understanding of the other culture:

> Communication scholars and practitioners working on public diplomacy can facilitate the development of relationship and work toward the creation of platforms that allow opportunities for developing mutual understanding... Tactically, the culture-centered approach builds on community-based strategies that focus on exploring mutually meaningful points of entry into the discursive space and include participatory methods of communication. For instance, town hall meetings and public discussion forums can serve as important tools for promoting mutual understanding through dialogue between cultures... Central to relationship-based public relations is the very idea that both participants in the relationship can be equally affected; that both participants are open to the possibilities of change based on the lessons learned from engaging in the relationship.[32]

Dutta-Bergman's tactical suggestions are important in an age when nations like the United States "find themselves more and more in the area of public relations as they attempt to influence the opinion of foreign publics".[33]

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31 *See* J. Zhang & B.C. Schwarz, *supra* note 2 at 382., *and* Yun, *supra* note 12 at 287., *and* M. J. Dutta-Bergman, *U.S. public diplomacy in the Middle East: A Critical Cultural Approach*, 30 Journal of Communication Inquiry 102 (2006).

32 Dutta-Bergman, *supra* note 55 at 121-122.

33 B.H. Signitzer & T. Coombs, *Public Relations and Public Diplomacy: Conceptual Convergences*, 18 Public Relations Review 137, 146 (1992).

A holistic rhetorically-situated definition of foreign public diplomacy policy privileges public relations-based mutual understanding that moves beyond a monologic tactic of promoting a brand but employs good public relations for dialogic understanding in order that in the work of promoting U.S. policy objectives, diplomats may find a philosophical ground for why they go about their work in such a way as they do. Public diplomacy officers are then the agents to move foreign relations from monologue, which seeks to gain influence over the receiver, to dialogue, which in being attentive to another's culture and customs, also serves to advance the communication of U.S. policy goals.[34]

Clinton cites public relations tactics that move beyond one-way communication such as press releases and radio broadcasts to tactics that invite face-to-face dialogue, like town-hall meetings and increased funding for exchange programs and development initiatives.[35] Peterson argues that public relations tactics that privilege dialogue are important in understanding that "image problems and foreign policy are not things apart."[36] Peterson argues for the centrality of public diplomacy in U.S. foreign policy to mitigate the terrorist acts of non-state actors.[37] He argues for a rhetorical turn in public diplomacy, especially at a time when the United States is fighting a war against non-state actors, thus requiring the U.S. to be more effective at communicating with

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34 R. ANDERSON, K.N. CISSNA, & R.C. ARNETT EDS., THE REACH OF DIALOGUE: CONFIRMATION, VOICE, AND COMMUNITY (1994).

35 Clinton, *supra* note 6 at 13.

36 P.G. Peterson, *Public Diplomacy and the War on Terrorism*, 81 Foreign Affairs 74, 75 (2002).

37 *Id.*

broad publics before non-state terrorist actors recruit them against America. "This requires a deeper understanding of foreign attitudes and more effective communication of U.S. policies. It also means fully integrating public diplomacy needs into the very foundation of American foreign policies in the first place."[38]

A rhetorical turn in foreign public diplomacy policy situates diplomacy professionals in a position to act, not only as communicators and advocates of American foreign policy, but also to close the feedback loop in providing constructive information about the narrative structures and traditions of foreign cultures. The public diplomacy officer communicates back to his notion the alterity of the other in order to more effectively develop and implement policy with foreign publics through an effective utilization of public relations tactics.

Conclusion

This essay sought to illustrate that the formation of international public diplomacy policy—that is, how American diplomacy communicates directly with the publics of foreign countries and not with the governments of those countries—can find much currency in the rhetorical and communications scholarship.

Perhaps a rhetorical turn in public diplomacy might yield what Buber [39]would call a "unity of contraries"—a strong America attentive to its own best interests and the best interests of the other, especially in an age when public diplomacy is now arguably

38 *Id.* at 75

39 M. BUBER, BETWEEN MAN AND MAN (1947).

more important than ever in this postmodern historical moment as U.S. diplomats are required to engage not only with foreign governments but with reticulate public spheres in order to mitigate competing rhetorics, many from non-state actors wishing to influence the populace of their own nations.[40]

40 G.A. HAUSER, VERNACULAR VOICES: THE RHETORIC AND RHETORICS OF PUBLIC SPHERES (1999).

THE U.S. SUPREME COURT DURING THE PROGRESSIVE ERA – UNFAIRLY MALIGNED

*Dr. John A. Sparks**

ABSTRACT: *During the Progressive Era, from 1890-1930, the Supreme Court carved a path of constitutional affirmation for progressive reform. This stemmed from the Fuller and White Courts and was apparent through rulings on income taxation, labor & working conditions, and the Interstate Commerce Clause. Incorporating the opinions of many noted legal scholars, the article argues that the Fuller and White Courts generally adhered to ideas of limited government, but that their decisions were not obstructive enough of government regulation to hinder Progressive policies from becoming law.*

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I. Introduction

The Supreme Court, led by Chief Justice Melville Fuller and later by Chief Justice Edward D. White, played an important role in shaping American public policy during the Progressive Era (1890-1930) by rendering decisions that had two general effects. This paper will concentrate on the Fuller Court though some of the decisions are from the White Court. In some cases, the Court protected freedom of enterprise and endeavor by blunting the effects of Progressive legislation at the state and federal levels. James Ely, referring to the Fuller Court summarizes this aspect of the Supreme Court during this era: "Although appointed by ten different presidents, the members of the Fuller Court shared a number of core constitutional values. Foremost among these were individual liberty and the idea of limited government".[1] Nevertheless, in other cases the Court under Fuller and White affirmed the constitutionality of Progressive legislation and therefore furthered reasonable but moderate regulation by reaching "...accommodation under which they were willing to allow some modification of the common law in order to permit the increased exercise of state and federal police powers".[2]

However, on balance, commentators have pointedly indicted the Court during this period for reining in Progressive legislation. These same commentators have lauded the Justices who favored Progressive action and who dissented in the cases striking down Progressive legislation. In the typical law school

1 JAMES ELY, THE FULLER COURT 103 (2003).

2 REBECCA SHOEMAKER, THE WHITE COURT 12 (2004).

classroom in the post WWII era, the decisions rendered during this era against Progressivism—often called the "Lochner Era" (after one of the key Supreme Court cases) were regarded as illiberal and reactionary and are still often presented that way today.[3] Recently there has been some much-needed revision by constitutional historians of this one-sided view of the Supreme Court during this era.[4] This paper will argue that the members of the Court, in their decisions on matters of taxation, labor and working conditions, and interstate commerce were generally consistent with the Founders' liberty and limited government views, but not entirely obstructive of increased governmental regulation.

II. Income Taxation and the Fuller Court

The Supreme Court became involved in the Progressive Era controversy over the propriety and constitutionality of the federal income tax as a result of a provision in the Wilson-Gorman Tariff Act of 1894. There Congress imposed a tax on "gains, profits, and income...received...by every citizen of the United States...derived from any kind of property, rents, interest, dividends, or salaries or from any profession, trade, employment or vocation...".[5] The 1894 tax, obviously an income tax, was immediately challenged in the courts and eventually found its way to

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3 ANNA M. KAUPER & FRANCIS BEYTAGH JR., CONSTITUTIONAL LAW: CASES AND MATERIALS 713 (1980).

4 MICHAEL PHILIPS, THE LOCHNER COURT, MYTH AND REALITY 3 (2001).; David E. Bernstein, *The Story of Lochner v. New York: Impediment to the Growth of the Regulatory State*, *in* CONSTITUTIONAL LAW STORIES 327 (Michael G. Dorf ed., 2004).; Melvin I. Urofsky, *State Courts and Protective Legislation Driving the Protective Era: A Reevaluation* 72 JOURNAL OF AMERICAN HISTORY 63 (1985).

5 Pollock v. Farmer's Loan & Trust Company, 158 U.S. 601, 639 (1895).

the U.S. Supreme Court where the case was heard and then, on motion, reheard. The case, *Pollock v. Farmer's Loan & Trust Co.*, was decided by the Court in 1895. The 5-4 majority found the tax to be unconstitutional.

The Pollock Decision and Two Classes of Taxes

The Fuller Court had to first deal with earlier precedents that seemed to support the idea of the constitutionality of a federal income tax. The most important was *Springer v. U.S.* in which a federal income tax imposed (but now expired) during the American Civil War had been upheld in 1881 when subjected to a constitutional challenge.[6] The key to understanding both decisions is to grasp the way the Constitution creates two large categories of taxes and attaches certain limitations to their imposition.

The U.S. Constitution creates "two great classes of taxes".[7] The first of these classes is one composed of "duties, imposts and excises", usually called together, "indirect taxes." Duties and imposts are tariffs levied against goods entering a port or crossing a border into the U.S. but produced abroad. "Excises" are taxes on particular products such as tobacco and alcoholic beverages. These two kinds of taxes are called "indirect" because the seller of the goods on which the taxes are imposed collects the taxes due as part of the purchase price and pays them. The tax is only "indirectly" paid by the consumer of the products, for example, when he purchases an imported good or one on which an excise is

6 Springer v. U.S., 102 U.S. 586 (1895).

7 158 U.S. at 618.

levied. The tax is viewed as "built into" the final purchase price.

According to Fuller's reading, the Founders expected the new federal government to be financed by indirect taxes, that is, by these same duties, imposts and excises.[8] In fact that was the case until WWI. "...(C)ustoms receipts constituted between 30 per cent and 58 per cent of the federal revenue during the entire period between the Civil War and WW I ...".[9] Federal excise taxes made up most of the rest of federal revenues generated by taxation. (We are leaving land sale revenues aside because strictly speaking they are not taxes.)

Direct taxes make up the second class of taxes mentioned by the Constitution. These are called "direct" simply because they are laid "directly" on the person who must pay the tax. So, for example, if a person is the owner of a piece of real estate and there is a tax on real estate, he or she must pay it directly. In *Pollock*, Fuller points out that state and local governments were expected by the Founders to raise their revenues by such direct taxes,[10] which is historically what they did and in many cases what they still do. A local real estate tax, for example, is a direct tax.

The Constitutional Limits on Taxation

In addition to recognizing these two great classes of taxes, the Constitution places certain limits on the way they are to be imposed by the federal government. "Duties, imposts and

8 *Id.* at 621.

9 Theda Skocpol, *Did the Civil War Further Democracy, in* DEMOCRACY REVOLUTION AND HISTORY 89-90 (1998).; OWEN M. FISS, OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 77 (1993).

10 158 U.S. at 621.

excises" (indirect taxes) must be "uniform throughout the United States," that is, they cannot be imposed on one region and not others. Direct taxes such as real estate taxes or income taxes must be "apportioned among the states" according to the number of representatives which the states have in Congress.[11]

The requirement of the apportionment of direct taxes always puzzles those who study this section. How did the Founders expect this apportionment to be accomplished if direct federal taxes were imposed? The way a direct tax would be put into effect was admittedly cumbersome and would require cooperation from the state governments. First the federal government would determine the total amount of federal revenue it wanted to raise and the kind of direct tax it wanted to use. Suppose Congress decided to raise $100 million dollars and simply passed an income tax for that purpose, that is, a tax on income earned by citizens. The total revenue goal, once set, would then have to be divided among the states based upon representation.[12] So, if state "A" had 5% of the total federal Congressional representatives and state " B" had 20%, state B would be required to raise a larger portion of the total amount of federal revenue, that is 20% of the revenue goal, while state "A" would only be required to raise 5% of the revenue goal.[13] Then it would be up to the state governments to set about collecting their apportioned amount by imposing the tax. U.S. Supreme Court Justice Fuller further maintained that the fed-

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11 U.S. CONST. art. I, § 9, cl. 9.; art. I, § 2, cl. 3.

12 158 U.S. at 623.

13 Erick M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2341 (1997).

eral government could collect the tax directly "if the state does not in the meantime assume and pay its quota and collect the amount according to its own system and in its own way".[14]

Direct Taxation and Apportionment—The Center of the Storm

These questions of direct taxation and apportionment were at the center of the controversy produced by the 1894 federal income tax being considered in Pollock and the earlier Civil War income tax considered in Springer. In both of the cases, if a federal income tax were viewed as a tax laid directly on U.S. citizens, then it would have to be apportioned among the states. If it were not determined to be a direct tax, then it would not require apportionment.

Fuller and the majority in *Pollock* rejected the *Springer* Court's earlier holding that had found the Civil War income tax to be an excise tax, making it an indirect tax and, therefore, not requiring apportionment among the states. The *Pollock* majority concluded that "...In this case our province is to determine whether this income tax... does or does not belong to the class of direct taxes. If it does, it is, being unapportioned, in violation of the constitution, and we must so declare".[15] That is precisely what the Pollock majority did, finding the 1894 income tax to be direct, unapportioned, and therefore, unconstitutional.

The *Pollock* decision made it necessary to either apportion any federal income tax passed or seek a constitutional

14 158 U.S. at 632.

15 *Id.* at 634.

amendment to negate the effects of *Pollock*. Beginning in 1905 and "for every session of Congress thereafter, an income tax bill was introduced".[16] Because of *Pollock*, a direct income tax statute would likely be unconstitutional which made a Constitutional Amendment necessary. It was passed by Congress and ratified in 1913 by three-quarters of state legislatures as required by the Constitution[17] and became the Sixteenth Amendment. So, the Court's efforts at restraint were eventually nullified but nullified in a way that was allowed by the amendment process in the Constitution.

Was the Court justified in striking down the income tax in *Pollock*? Was the decision constitutionally correct? Law Professor Erik M. Jensen, one of the leading experts on the apportionment-of-direct-taxes language, catalogues the reaction to the *Pollock* decision both immediately as well as over time as mostly negative, in fact, very negative.[18] For example, critics sometimes compared *Pollock* to the *Dred Scott* decision according to Jensen.[19] But, Jensen concludes: "Nevertheless, *Pollock* reached a defensible result".[20]

The first question: was the income tax of 1894 a direct tax? Though the Founders were certainly not as clear as they could have been on this issue, it is relatively clear that an income tax laid on U.S. citizens by the federal government is a direct tax. It is

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16 ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION 584 (1976).

17 OWEN M. FISS, OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 100 (1993).

18 Jensen, *supra* note 13, at 2334, 2370-2372.

19 *Id.* at 2370-71.

20 *Id.* at 2372.

certainly not a duty or excise.[21]

Because it was a direct tax, the income tax had to be apportioned among the states as described above. Otherwise, its imposition would be unconstitutional. Current commentators cannot deny the existence of the apportionment language, but Jensen maintains that they have attempted to relegate it to the status of an antiquated novelty that cannot override the broad and plenary language of taxing given in Article I, § 8.[22] Nevertheless, he points out that when the Founders granted the power to tax but attached the restraining hobbles of "uniformity" and "apportionment" to that grant of power, those restraints were meant to be taken seriously. The Founders knew the potentially destructive power of taxation and yet knew that civil government could not be financed without taxes.[23] To dismiss the limitations on taxation as technical anachronisms of the 18th century or, worse yet, to regard them as essentially meaningless, is to ignore what the Founders knew and what we have forgotten (though it may be taught to us once again very soon), that the power to tax is the power to destroy.[24]

So, returning to the issues in *Pollock*, the Founders seemed to have fitted the most "inhibiting bit" upon the "horse of direct taxation" by requiring that such taxation by the federal government be done only through the medium of apportionment. Are there good and understandable reasons for their more pronounced concern about direct taxes? Jensen offers several reasons which

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21 *Id.* at 2402.

22 *Id.* at 2346, 2348-2349.

23 *Id.* at 2349.

24 *Id.* at 2335-2338.

are here reduced to two.

First, indirect taxes can be avoided more readily than direct. If one is purchasing imported goods or goods on which excises are levied, an excessive indirect tax on either will result in fewer purchases of these goods.[25] By contrast, the direct tax is laid on the taxpayer directly and must be paid and therefore has the potential to be more burdensome because it is essentially unavoidable.

Secondly, direct taxes are the primary source of revenue for state and local governments. If the federal government makes substantial use of direct taxes, this may erode the tax base of the local and state governments.[26] Therefore, to reduce the likelihood of that happening, the federal government must meet the apportionment requirements which will make the use of direct federal taxes less attractive because apportionment is admittedly a cumbersome mechanism. The Fuller Court, therefore, was reflecting the Founders' concern about taxation and its impact. Historian Owen Fiss summarizes: "They (the members of the Fuller majority) saw the direct tax provision, like the social order itself, as a mechanism for reconciling the need to create power and the need to limit it".[27] The subsequent history of the use and abuse of the income tax by the Federal government is evidence of the wisdom of the Fuller Court and its inclinations.

One final note: Assume for the moment that the Sixteenth Amendment had not been passed. The reader can grasp how the apportionment requirement would act as a restraint on direct fed-

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25 *Id.* at 2337.

26 *Id.*

27 Fiss, *supra* note 17, at 93.

eral taxation by conducting a simple experiment. Suppose the federal government were to consider passing a national income tax. Apportionment of that tax would require each state to bear the burden of the income tax according to that state's population. Based on current population figures, California would have to bear 11.95% of the burden of the tax, followed by Texas (7.8%), New York (6.3%), Florida (6%), Illinois (4.2%), Pennsylvania (4%), Ohio (3.75%), Michigan (3.3%), Georgia (3.12%) and North Carolina (3.08%). Those ten states are the ten most populous and would have to collect over fifty percent of the tax from their constituents! (U.S. Census 2000, Apportionment of Population and Representatives by State).[28] The remaining forty states would divide up the rest of the requisition. How popular would such a tax apportionment be especially among the citizens of the most populous states? Keep in mind that the ten "high paying" states together have enough votes to defeat such a tax in the Congress and would likely do it. Apportionment, were it still in effect, would make the passage of a direct federal income tax politically difficult to say the least and that is undoubtedly what the Founders intended.

III. The Commerce Clause and the Fuller Court

The Fuller Court continued to be a restraint upon the legislative actions of the Federal government during the Progressive Era when Congress passed acts that relied upon an expanded

28 U.S. Census, *Apportionment Population and Number of Representatives by States,* U.S. DEPARTMENT OF COMMERCE (2000.)

interpretation of what is usually called the "interstate commerce clause." That clause is found among the Congressional powers enumerated in Article I, section 8 of the Constitution. Constitutional students will remember that this section grants Congress a long list of powers (power to tax, raise armies, coin money, establish post offices etc.) which the Founders understood were to be the sole bases for legislative action. The idea in a nutshell was that Congress was required to find a Constitutional provision among those enumerated powers for its contemplated legislation. If it could not find such a justifying power, then its authority to act in the way it was contemplating must not have been granted to it.

The particular power with which this part of the paper is concerned is found in clause 3 of section 8, Article I which gives Congress the power: "To regulate Commerce with foreign Nation, and among the several States, and with the Indian tribes..."

The Supreme Court early in its history was called upon to consider the meaning of that grant of power in the well-known 1824 case of *Gibbons v. Ogden*. There the Court ruled that the State of New York was interfering with commerce among the states when it granted a steamboat monopoly to Ogden and refused to let Gibbons run a similar boat line from New Jersey into New York waters even though Gibbons possessed a license to do so granted under a federal statute which sanctioned what was called "coasting trade."

Two clear principles emerged from that decision. State governments cannot pass legislation which impedes commercial

activities that cross state lines (Gibbons, 200).[29] To allow such interference by state governments is to permit barriers to be thrown up to the free movement of goods and to disrupt what the founders intended to be a huge free trading area. Secondly, the Court made it clear that there was a difference between external commerce, that is, that which crossed states lines, and the internal commerce of a state where transactions were conducted within the boundaries of a single state. The Federal government could protect external, that is, interstate commerce from the ill effects of individual state interference, but when it came to internal commerce, the states retained power to set their own laws (194).[30] So, in short, the *Gibbons* case recognized the difference between inter-state commerce and intra-state commerce. The former could be "regulated," that is made regular—protected from obstruction—by the Federal government, but the latter remained under state government control.

During the early years of what historians now call the Progressive Era, Congress made attempts to deal with what it saw as economic and social evils by passing legislation. The first "evil" addressed was the growth of large business enterprises, often in the form of the business trust. The second social "evil" descried by the Progressives was the continued existence of child labor in manufacturing. In the first instance, Congress passed the Sherman Anti-trust Act of 1890 and in the second instance, it passed a Federal Child Labor Act of 1916 which purported to prohibit,

29 Gibbons v. Ogden, 22 U.S. 1, 200 (1824.)

30 Id. at 194,

nationwide, labor by any child under the age of 14 years. In both instances, the Congress relied upon its power to regulate commerce found in Article I section 8.

Both statutes produced constitutional challenges resulting in the cases in 1895 of *United States v. E.C. Knight* and in 1918 of *Hammer v. Dagenhart* at which this papers now takes a closer look.

The *E.C. Knight* case concerned the merger of several sugar refining businesses under the control of a single entity, the American Sugar Refining Company. American purchased the stock of four Philadelphia refineries with its own stock, one of them, E.C. Knight.[31] The federal government brought suit to dismantle the merger under the Sherman Act section 2 making illegal the creation any combination in restraint of trade, in this case monopolization. The new consolidated refining company did control 98% of U.S. sugar refining business.

The question which Chief Justice Fuller addressed primarily was whether the commerce clause gave Congress the power to prohibit this merger and, in effect, to undo it. Fuller begins by saying that it is unnecessary to consider whether the resulting sugar refining combination might not in fact lower prices rather than impose higher ones, or whether new entrants to the field of refining might confront the combination with new competition, or whether, in fact, the stockholders of the Philadelphia businesses which were purchased might not present themselves as new competitors, though he seems to think these possibilities are worth

31 U.S. v. E.C. Knight Co., 156 U.S. 1, 9 (1895).

mentioning.[32] After all this "monopoly" was not a state-sponsored monopoly like those created by the English crown, or created by New York state in *Gibbons*, but a combination produced by the merger of producers that had formerly been competitors.[33]

He makes a clear distinction between the power of state governments to regulate monopolies and restraint of trade under state police powers on one hand, and the right of the Federal government to regulate truly interstate trade and commerce on the other. So the question becomes whether the merger in sugar refining is really commerce. As Fuller points out: "That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police powers of the State".[34] The Fuller majority found that the "contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations".[35] The purpose of the agreements was to aid and effect manufacturing and as Fuller put it: "Commerce succeeds to manufacture, and is not a part of it".[36] To rule otherwise, said Fuller, would be to endorse the view that "national power extends to all contracts, and combinations in manufacture, agriculture, mining and other productive industries whose ultimate result may affect external commerce, compara-

32 *Id.* at 10.
33 *Id.*
34 *Id.* at 12.
35 *Id.* at 17.
36 *Id.* at 12.

tively little of business operations and affairs would be left for state control".[37] By its unwillingness to expansively interpret the interstate commerce clause to include business contracts and combinations, the Court temporarily held back the force of Progressive legislation based on the invocation of the commerce clause. An interpretation which opened all business activity to the control of the federal government "...essentially allows the government to regulate anything that even indirectly burdens or affects interstate commerce (and) does away with the key understanding that the federal government has received only enumerated powers".[38]

Despite the ruling in the *Knight* case, the Federal legislature continued to attempt to reach social evils, as it saw them, by resorting to the interstate commerce clause. One sees that clearly in the case of *Hammer v. Dagenhart* (1916). The Federal Child Labor Act (Keating-Owen Act) maintained that goods shipped in interstate commerce which had been produced by child labor were prohibited by law. Under the Act, child labor was defined as employment of any person who was under 14 years of age. Workers who were between 14 and 16 could be employed but for no more than 8 hours per day.[39]

Mr. Dagenhart had two sons, one 13 and one 15 both of whom worked in the Fidelity Textile mill, a cotton mill in Charlotte North Carolina. Following the passage of the Act, Fidelity agreed to comply with the law's requirements. Dagenhart sued for

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37 *Id.* at 16.

38 Richard A. Epstein, *Toward a Revitalization of Contract Clause*, 73 VA. L. REV. 1387, 1987,1396 (1987).

39 Hammer v. Dagenheart, 247 U.S. 251, 268, 272 (1918).

an injunction against the enforcement of the Act.[40]

The Supreme Court majority followed the basic contours of the *E.C. Knight* case by ruling that there was a clear distinction between production and manufacturing of goods and "commerce". Epstein comments: "...the Court understood the statute [child labor law] for what it was: it was not an effort to control the goods themselves, but to prescribe the internal rules governing their manufacture within the state".[41] Justice Day, wrote: "The grant of power of Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it the authority to control the states in the exercise of their police powers over local trade and manufacture"[42] The Court regarded the evil aimed at child labor to have been completed before the goods themselves passed into the paths of commerce.[43] To allow the Federal law to insinuate itself backward into the labor contract and the manufacturing process was to allow Federal power to substitute itself for state police powers.

Justice Day went on to note that it was not that North Carolina and other states had no limitations on child labor: "...the brief of counsel states that every state in the Union has a law upon the subject, (child labor) limiting the right to thus employ children. In North Carolina, the state wherein is located the factory in which the employment was had in the present case, no child

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40 247 U.S. at 268.

41 Epstein, *supra* note 38, at 1980, 1427.

42 247 U.S. at 273-274.

43 *Id.* at 272.

under twelve years of age is permitted to work".[44] Commentators have also noted that "nascent labor unions opposed child workers because they undermined the wage structure...".[45] So all support for a single federal prohibition of child labor was not purely humanitarian.

The Court majority found the Federal Child Labor Act unconstitutional. To do otherwise,

> "would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states...The court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority federal and state to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution".[46]

This was the Supreme Court protecting the balance of power between the states and the federal government much as the Founders intended.

Moreover, from the perspective of economic well-being, the Court prevented a single nationwide working-age-requirement from being imposed. It recognized that the economic conditions of each state varied and that the lawful age for working was best left to the individual state legislatures. In actuality, child labor, due to

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44 *Id.* at 275.

45 Melvin I. Urofsky, *State Courts and Protective Legislation Driving the Protective Era: A Reevaluation* 72 JOURNAL OF AMERICAN HISTORY 69 (1985).

46 247 U.S. at 276.

increased wages and productivity of adult workers, was becoming less common. In 1899 3.4% of those employed in manufacturing were under 16 years old; that declined to 1.7% in 1914.[47] Admittedly, in some Southern states the percentage of young workers was higher.[48] But these regional variations required state laws that took into account state economic conditions and recognized that child labor laws could only be passed when economic conditions had improved enough to make child labor the exception rather than the rule.

IV. Employment, the Lochner case and the Court

Lastly we come to a series of cases in which the Court made rulings about Progressive legislation, produced by state legislatures, which attempted to regulate the working conditions and employment terms of workers in business enterprises. One case, in particular, has become a kind of "negative" exemplar for the Court's judicial actions in this area. The case is *Lochner v. New York* which was decided in 1905. In fact, this case, in which the Court found a state maximum hours law for bakers unconstitutional, has had its name attached to the period of time in which the Fuller Court made certain rulings against Progressive legislation—thus the term the "Lochner Era."

The facts of the case itself were relatively simple. Joseph Lochner was the owner of a small bakery in Utica New York. His operation was typical of bread bakeries at the turn of the centu-

47 GILBERT C. FITE & JIM E. REESE, AN ECONOMIC HISTORY OF THE UNITED STATES 390 (1965).

48 *Id.* at 391.

ry.[49] Although "almost three-quarters of the bread consumed in the United States was still baked at home..."[50] the number of commercial bakeries was increasing so that "the number of wage earners in the baking industry went from fewer than seven thousand in 1850 to more than sixty thousand in 1900—a rate of increase almost twice that of manufacturing in general".[51] Most bakeries were small as was the case with Lochner. "In 1899 78 percent employed four or fewer persons".[52] Lochner was in this category with four employees including himself (usually called the "boss baker").

There had been a variety of movements in the post Civil-War era to shorten the work day to eight hours.[53] The New York Bakeshop Act of 1895 was a species of this kind of legislation intended to improve working conditions in a particular trade. It passed New York's assembly (house) unanimously by a vote of 120-0 and the New York senate also unanimously 20-0.[54] It prohibited employees from working in a bakery for more than ten hours in one day or sixty hours in one week using language that made it clear that even if the workers voluntarily agreed to the extra hours, the law would be violated.[55]

Lochner was indicted by a grand jury in October, 1901 for violating the act when he employed Aman Schmitter for more

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49 Lochner v. New York, 198 U.S. 45, 52 (1905).
50 PAUL KENS, LOCHNER V. NEW YORK 6 (1998).
51 *Id.*
52 *Id.* at 7.
53 *Id.* at 15-18.
54 *Id.* at 64.
55 *Id.* at 89.

than the hours allowed by law. (Kens, the most detailed commentator on the case suspects that it was not Schmitter at all who complained but probably the state factory inspector who was responding to a complaint by the local bakers' union).[56]

Lochner and his legal counsel "offered absolutely no defense to the charges made against him...".[57] Apparently, they intended to appeal the case on the basis of the law and the constitutional issues involved which is what they did, taking the case through the New York state court system[58] and then to the U.S. Supreme Court.

The Supreme Court rendered its 5-4 decision with Justice Peckham penning the majority opinion. The central theme of the Peckham opinion is found in the second paragraph: "The statute necessarily interferes with the right of contract between the employer and employes (sic) concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution".[59] Peckham went on to point out that the Fourteenth Amendment, in section one, stated that life, liberty and property could not be taken from a person by the state without "due process of law." It was the liberty portion of the Fourteenth that was being interfered with, that is the liberty to buy labor, in the case of the employer or to sell labor, in the case of the

56 *Id.* at 90.
57 *Id.* at 91.
58 *Id.* at 92-95.
59 198 U.S. at 53.

employee. Liberty meant the freedom to make a contract for one's labor services and was a substantive right intended to be protected by the framers of the Fourteenth Amendment.

Peckham's opinion now turned from what the state could not do, that is interfere with liberty of contract, to what it could do in certain instances. As Peckham clearly indicates, state governments were allowed to properly exercise what are usually called their "police powers." These were powers, as Peckham put it that "...relate to the safety, health, morals and general welfare of the public".[60] In other words the liberty to make a contract was not a blank check allowing the citizen to make any kind of contract no matter what its purpose. For example, "a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution as coming under the liberty of person or of free contract".[61] It is these two values, freedom to contract, on one hand, and the state's interest in passing legislation protecting its citizens that the Court was called upon to consider and weigh.

Peckham next reminds the reader that the Court had "upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones...".[62] Peckham cites two cases which illustrate the Court's willingness to support states in legitimate exercise of their police powers. Peckham refers to *Holden v. Hardy* where the Court upheld a Utah statute which limited the hours to eight per day one could work

60 *Id.* at 53.
61 *Id.* at 53-54.
62 *Id.* at 54.

in underground mining. Peckham notes that the Supreme Court of Utah regarded the conditions in underground mining and smelting as "peculiar" and warranting regulation and also argues that the Utah statute did allow for emergencies, which permitted employers to require more hours in those circumstances than the statute generally allowed.[63] Peckham then cites another case, *Jacobson v. Massachusetts* where the Court had upheld a state compulsory vaccination (small pox) statute as a valid exercise of the state's policy powers despite the defendant Jacobson's claim that his liberty was being taken from him by the statute.[64]

Peckham mentions those cases but views them as not "covering the one now before the court".[65] Further, in the opinion he explains why the majority has reached that conclusion as he discusses the difference between what he calls a "labor law" on one hand and a law "pertaining to the health" of a worker on the other.[66] If the Bakeshop Act is merely a labor law which seeks to fix the hours of work, then Peckham and the majority view it as "interfering with the liberty of person or the right of free contract by determining the hours of labor…".[67] Peckham and his majority colleagues believe that bakers are capable of taking care of themselves in determining their work schedules without the protection of the state.[68] Howard Gillman makes the point that "It did not help [New York] that the law [Bakeshop Act] was inserted into New

63 *Id.* at 45, 54-55.
64 *Id.* at 55.
65 *Id.* at 56.
66 *Id.* at 57.
67 *Id.*
68 *Id.*

York's Labor Code and not into its Public Health Regulation".[69] Gillman's observation seems to be born out by Peckham's discussion of whether or not the Bakeshop Act was intended for the protection of the health of the workers or for public health in general. Peckham says that the arguments about a public health impact are too "remote" when the claim is made that clean and wholesome bread is more likely to be produced by workers who are not overworked.[70] As far as the assertion that the maximum hours law is needed because baking is an unhealthy occupation, Peckham and the majority are not convinced. The opinion says "...the trade of baker has never been regarded as an unhealthy one".[71] Therefore, the public and personal health arguments which would be necessary to make the legislation a proper exercise of the police powers are not convincing to the Court. Consequently, the Bakeshop Act was deemed unconstitutional as an interference with liberty of contract under the due process clause of the Fourteenth Amendment.

Though the Court itself did not use the term, there developed in the New Deal era a phrase to describe anti-Progressive Lochnerian jurisprudence and that term was "substantive due process".[72] The term was meant to discredit and mock the Lochner approach. To these critics due process meant only procedural regularity which if followed in taking life, liberty or property

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69 HOWARD GILLMAN, THE CONSTITUTIONAL BESIEGED 128 (1993).

70 *Id.* at 57, 62.

71 *Id.* at 59.

72 Wayne McCormack, *Economic Substantive Due Process and the Right to Livelihood*, 82 KY. L.J. 397, 404 (1993-94).

would provide sufficient protection for citizens against government excess. By assigning the phrase "substantive due process" to the Lochnerian approach, they hoped to highlight what seemed to them to be a latent incompatibility.

Lochner Considered and Reconsidered

In fact, few cases have drawn criticism such as that heaped upon the Court majority in Lochner. Professor Michael J. Phillips describes the typical professional view of Lochner this way: " ...it remains a commonplace that during the first third of the century the Supreme Court frequently used due process to strike down Progressive social legislation, that this was an illegitimate exercise of judicial power, and the Court's conservative justices exercised such power either in the conscious service of business or in simple-minded thralldom to laissez-faire ideas that had outlived their time".[73] Bernstein says Lochner qualifies as "one of the most reviled Supreme Court cases of all times".[74] Law students and the legal profession, and with them judges and commentators, hold the view referred to by Phillips and Bernstein because of text references like this one from a well-regarded 1980 law school casebook: "*Lochner v. New York,* viewed from the perspective of hindsight, rather clearly marked the high-water mark of judicial control over state legislation relating to economic and social problems. The Court's hollow solicitude for the rights of overworked

73 MICHAEL PHILIPS, THE LOCHNER COURT, MYTH AND REALITY 2 (2001).

74 David E. Bernstein, *The Story of Lochner v. New York: Impediment to the Growth of the Regulatory State*, *in* CONSTITUTIONAL LAW STORIES 327 (Michael G. Dorf ed., 2004).

bakery employees did little to mask the majority's underlying motivation. As Justice Holmes' notable dissent reflected, the majority was in no uncertain terms imposing its judgment as to 'a particular economic theory' on the state (and federal) legislatures".[75] The reader can readily see in the language of this law school casebook the elements which Phillips highlights. This characterization of *Lochner* is the favorite one of those who favor more governmental regulatory action, beginning in the Progressive era, intensifying in the New Deal, and continuing today. However, *Lochner* has also been criticized by those on the right side of the political spectrum. The most striking example is the critique of *Lochner* provided by Judge Robert Bork.

Robert Bork is known for his "originalist" approach to judicial decision-making which calls for the judge to pay careful attention to what the drafters of Constitutional language meant when they drafted it, that is, their "original intent" as best that can be determined. According to Bork, judges should resist the temptation to interpret constitutional wording in a way that they themselves would prefer. Since Bork believes that the Framers intended the phrase "due process of law" in the Fourteenth Amendment to be entirely procedural, he is opposed to the broader interpretation of that clause which maintains that it embodies substantive protections of liberty and property, that is, the very substantive protections relied upon by the *Lochner* Court. In fact it is Bork, who when he determines that a judge is engaging in creating unenumerated rights into a particular constitutional clause, calls the

75 Kauper, *supra* note 3, at 713.

process "Lochnerizing".[76]

What is the truth about Lochner? How should that decision and the Fuller Court be regarded? Let's begin by taking the claims made against the Lochner Court one by one in light of current scholarship.

The Judicial Activism Claim

First, there are the claims (both from the left and right) that the Lochner Court was engaged in unjustified and excessive judicial activism, that is, that the Court became the self-declared arbiter of social legislation and struck down an inordinate amount of it.

Legal and historical scholarship about the Fuller Court and the White Court, in the last fifteen years has called that view into serious question. The work of Professor Michael J. Phillips in particular has produced that result. Phillips, after studying carefully and exhaustively the Lochner Era cases concludes: "In my view the conventional wisdom about old-time economic substantive due process is misleading at best and a caricature at worst".[77]

All aspects of Phillips' work on this issue are too long to be included in total in this paper but a few of his key conclusions will help readers to understand why he does not see the Fuller Court in the negative way in which it is usually portrayed.

First of all, the Fuller Court and the White Court in the Lochner Era actually upheld "many ...kinds of police power

76 Hadley Arkes, *Lochner v. New York and the Cast of Our Laws, in* GREAT CASES IN CONSTITUTIONAL LAW 94 (2000).

77 Philips, *supra* note 73, at 32.

measures"[78] Though private parties challenged a variety of health and environmental regulations imposed by the states, the Lochner court upheld them. For example, in *Jacobson v. Massachusetts* already mentioned, the Court refused to strike down a compulsory vaccination law saying that liberty was not absolute when it came to such laws. It upheld a state law requiring diseased trees to be cut down when they posed a threat to fruit trees in *Miller v. Schoene*.[79] In addition the Supreme Court in the pre-New Deal era did not find state workers' compensation laws to be unconstitutional under the due process clause even though they significantly changed the liability of employers for industrial accidents.[80] In the area of maximum hours laws, like the one in Lochner, the Court sometimes supported the state regulation in question against a due process liberty of contract challenge as in *Holden v. Hardy*, *Muller v. Oregon*. Admittedly, the facts in those cases seem to place the cases in the protection of health category—in *Holden*, underground mining and in *Muller*, women working—but the nuanced consideration that the Court gave those cases shows that its decisions were not reactionary and ideological as is often contended. In fact, Phillips calculated that the due process challenges of general police powers were unsuccessful by a ratio of 9 to 1 in this pre-New Deal period.[81]

Phillips' analysis and calculations also help to negate the claim by Justice Holmes and others that the Court was inordinate-

78 *Id.* at 47.
79 *Id.*
80 *Id.* at 54.
81 *Id.* at 57.

ly pro-business/laissez faire. A Court that was that ideologically committed would not have allowed the many pieces of legislation that it did to remain in effect.

The Expansive View of Due Process Claim

The second and more problematic contention of those who indict the Fuller Court and its reliance on the due process clause of the 14th Amendment is that the Court took an unjustifiably expansive view of the due process clause making what was intended as a requirement of procedural regularity into a set of substantive rights.

Robert Bork's Views

As mentioned above, Judge Robert Bork takes this position. According to his view, since the due process clause "was designed only to require fair procedures in implementing laws, there is no original understanding of what gives it substantive content. Thus, the judge who insists upon giving the due process clause such content must make it up".[82] His opinion of Chief Justice Peckham's decision in Lochner is, therefore, highly uncomplimentary: "In 1905 he [Peckham] wrote an opinion whose name lives in the law as the symbol, indeed the quintessence of judicial usurpation of power: *Lochner v. New York*".[83] Bork's objection is not really so much to the result in Lochner but to the what Bork calls "the undefined notion of substantive due process...which is

82 ROBERT H. BORK, THE TEMPTING OF AMERICA 43 (1990).

83 *Id.* at 44.

wholly without limits, as well as without legitimacy" and which "provided a warrant for later courts to legislate at will...using the due process clause to create new rights which are neither mentioned nor implied anywhere in the Constitution or its history".[84] Bork is referring primarily to the "right to privacy" first "discovered" by the Court in *Griswold v. Connecticut* and then eventually applied to negate a Texas statute outlawing abortion in *Roe v. Wade*. Bork says, in another context, that to be consistent one must reject the substantive due process reasoning of Lochner if he wants to reject the substantive due process reasoning of *Roe v. Wade*.[85] There is truth in that assertion. *Roe's* essential holding, according to the Court in later cases, is that the "Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall 'deprive any person of life, liberty, or property, without due process of law.' The controlling word in the case...is 'liberty'" (Casey, 846).[86] So, the reasoning in Roe and Casey sounds a great deal like the reasoning one finds in Lochner, the difference being that instead of finding a maximum hours law intruding on the substantive rights of liberty to contract, the modern Court finds that an anti-abortion law or regulations controlling abortion, is intruding on the substantive right of the liberty of the woman to terminate a pregnancy. This writer would argue that these two cases are only superficially parallel in that in the latter case, the Court ought to be considering the life of the

84 *Id.* at 49.

85 *Id.* at 225.

86 Planned Parenthood v. Casey, 505 U.S. 833 (1992)

unborn child. Ironically, the protection of unborn child's substantive right to life should be protected under the due process clause of the Fourteenth Amendment. But that discussion is beyond the purview of this paper.

Richard Epstein's Views

As a counter to Bork on this issue one should also consider the arguments of Richard Epstein. Epstein maintains that a result similar to that reached by the Lochner Court could better be reached by invoking the takings clause of the Fifth Amendment as applied to the states through the Fourteenth, or the impairment of contract clause found in Article I, section 10. Bork regards Epstein's approach as "more satisfactory" because Epstein is not relying upon undefined rights, meaning those whose contours and limits are unknown.[87] So, using the reasoning of Epstein, in a Lochner situation, the Court could still strike down the maximum hour law because it either impaired an existing contract between the employer and employee or because it imposed a burden on the employer, and, therefore, took his property without compensation.[88]

The question remains: was the "due process of law" language found in the Constitution intended to be read as entirely procedural? Was it a reference only to a process or were there substantive rights intended to be protected against encroachment contained in the language of due process?

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87 Bork, *supra* note 82, at 229.

88 Epstein, *supra* note 34, at 1984.

James Ely on Due Process

James W. Ely contends, convincingly, that "due process of law" derives from a phrase in the Magna Carta, namely the express "law of the land" and that it had a broad substantive meaning that was recognized by colonials like James Madison and later by distinguished commentators like Thomas Cooley. He further presents evidence from judicial decision in antebellum state courts. His conclusion that the position that substantive due process was not evolving before the Civil War was "untenable".[89] Bernard Siegan takes a similar position in Economics Liberties and the Constitution.

Levy and Mellor on Due Process

Another counter to Bork's procedural view of the due process clause of the Fourteenth Amendment is found in Levy and Mellor's work on key Supreme Court cases. Their contention is that the broad intent of the 14th amendment with its "due process" "privilege and immunities" and "equal protection" clauses was to protect the "newly freed slaves" and "all citizens" from state governments that would attempt to deny them certain "economic liberty: the right to contract and the right to own property." Because of the narrow and wrong interpretation of the privileges and immunities clause by the Supreme Court in the *Slaughter-House Cases* the courts, including the Supreme Court turned to other provisions of the Constitution – notably the Due Process

89 Ely, *supra* note 1, at 1999.

clauses of the Fifth and Fourteenth Amendments – to strike down state laws that took away fundamental liberties. Mellor and Levy then refer to *Lochner* as an example.[90] According to their view, the expansion of the due process clause to include more substance was in part attributable to the crabbed view of other parts of the Fourteenth Amendment, namely the Court's misinterpretation of the Privileges and Immunities clause promulgated by the *Slaughter-House Cases*.

Needless to say, the approach used in *Lochner* has been subjected to considerable scrutiny and criticism. At the time, and for our purposes, it blunted the thrust of the Progressive Era legislative agenda, and, later, its substantive due process language and approach became the judicial method used to create new and "unenumuerated rights"[91] inviting an attack from the right. Overall the Court's sensible and balanced approach to the tension between liberty and regulation should be respected not maligned.

90 Robert A. Levy & William Mellar, The Dirt Dozen: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom 186-88 (2008).

91 Bernstein, *supra* note 74, at 355.

MILLER'S GHOST:
THE IMPORTANCE OF *UNITED STATES V. MILLER* TO *DISTRICT OF COLUMBIA V. HELLER*

*Christopher A. Wetzel**

ABSTRACT: *The author surveys the 2nd Amendment by looking at United States v. Miller (1939) and District of Columbia v. Heller (2008), with especial attention given to the historical language of Miller that would eventually be applied to the Heller ruling. The case notes of Miller are outlined, as are the holdings written by Justice McReynolds. In its discussion of Heller, the article gives a strong expose of Justice Steven's decent, but rebuttals with Justice Scalia's majority opinion that upheld the Second Amendment, based upon a historical interpretation of the Second Amendment and Miller.*

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"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."
—United States Constitution, Amendment II

Americans are notably feisty in the protection of their rights, whether real or imagined. Perhaps this explains why the United States Congress has only occasionally passed laws that are sufficiently inconsistent with the Second Amendment to arouse the Supreme Court's challenge. The complex relationship of the two most prominent cases, 1939's *United States v. Miller*[1] and 2008's *District of Columbia v. Heller*[2], fueled the Court's debate. While the justices certainly wrestled with the language of the Second Amendment itself in *Heller*, an equally significant amount of wrangling took place over the meaning and application of *Miller*. Ultimately, however, the Court used *Miller* appropriately, despite Justice Stevens' opposition.

Regardless of Americans' determined attachment to their rights, it is somewhat surprising to find no major Second Amendment cases prior to *Miller*, although some gun restrictions have been in place since the colonial era. One potentially explanatory factor is the English common law's long tradition of including limited restrictions on gun ownership and usage. The government's power to regulate firearms was broadly accepted in the colonial period.[3] Americans had witnessed the largely incompetent performance of the militia during the Revolution (including a widespread lack of uniformity in training and equipment), and the need for its effectiveness was further demonstrated by Shays' Rebellion. The Constitutional Convention delegates consequently sought better military equipment and training for Americans by

1 United States v. Miller, 374 U.S. 104, (1939).

2 District of Columbia v. Heller, 554 U.S. 570, (2008).

3 See Michael A. Bellesiles, *Firearms Regulation: A Historical Overview*, 28 CRIME AND JUSTICE 137, 140-47 (2001) (detailing the history of English gun control laws).

ensuring the right to keep and bear arms and also by moving the militia from under state control to federal. [4] Antifederalists, however, feared that federal control would weaken the states' defense against federal tyranny; these concerns birthed the Second Amendment.[5] Throughout most of pre-*Miller* legal history, courts refused to find an individual right to arms and consistently upheld gun regulations.

Americans collectively grew more nervous about guns in the post-Civil War era. In the 1930s, motion picture production codes tightened regulations regarding the portrayal of firearms, especially automatic weapons.[6] In addition to silver screen portrayals, "highly publicized and often glamorous firearms incidents" increased public consciousness about the dangers of these arms and fostered support for further regulation. In response to 1929's infamous "St. Valentine's Day Massacre," President Franklin Roosevelt wanted to regulate both handguns and automatic weapons. Although the bill stalled until 1934, it eventually passed as the National Firearms Act of 1934.[7] Within the next five years, the law became the object of the most significant Second Amendment case at the time.

When Jack Miller and Frank Layton transported an unregistered short-barreled shotgun from Claremore, Oklahoma to Siloam Springs, Arkansas, they violated the National Firearms Act of 1934. The act prohibited the unauthorized transfer of shotguns with barrels less than eighteen inches in

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4 *Id.* at 148 (points out that the Constitution tasks Congress with "organizing, arming, and disciplining" the militia in Article I, Section 8).

5 See also Rudolph B. Lamy, *The Influence of History upon a Plain Text Reading of the Second Amendment to the Constitution of the United States*, 49, AM. J. LEGAL HIST. 217, 224 (Apr., 2007); Michael D. Ridberg, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38, U. CHI. L. REV. 185, 191 (1970) (asserting three historical reasons for arms rights: militia maintenance, deterrence of oppression, and self-defense).

6 Bellesiles, *supra* note 3, at 174.

7 Greg S. Weaver, *Firearms Deaths, Gun Availability, and Legal Regulatory Changes: Suggestions from the Data*, 92, CRIM. L. & CRIMINOLOGY 823, 824J. j (Spring-Summer 2002).

length in accordance with Congress' power to regulate interstate commerce. Miller and Layton subsequently filed a motion to quash their indictment, contending that the National Firearms Act was unconstitutional because it infringed upon their right to keep and bear arms. A district court sided with Miller, and the government appealed to the Supreme Court.[8]

Although claims of ambiguity have arisen during the recent debates over gun control, Justice James McReynolds' opinion for the Court in *U.S. v. Miller* is remarkably concise, and its reasoning plain. In stating the Court's reversal of the district court's decision, McReynolds stated:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[9]

Evidently, the relationship between a given class of weapon and the "preservation or efficiency of a well-regulated militia," is the critical factor in the Court's opinion. The issue of the Second Amendment as an individual or collective right is not addressed in the *Miller* opinion, despite the tendency of popular dialogue to

8 307 U.S. at 174-75.

9 *Id.* at 178.

argue that question.

For the Court, however, there was likely a political issue at hand as well as a textual one. As David Yassky asserts, *Miller* was not only a Second Amendment case but a New Deal case. "Indeed," says Yassky, "the National Firearms Act upheld in Miller was an important component of the New Deal program, and was touted as such in Roosevelt's political speeches."[10] The 1939 Court would have been loath to give precedence to an individual property right over the federal government's public welfare interest. Unlike the First Amendment, the Second did not (in the Court's eyes) provide a means of "ameliorating dangers of the new administrative state" and was not "rooted in key New Deal themes."[11] While the Court never openly declared these reasons, Yassky's conclusions on the Court's motives seem reasonable.

Yassky's ultimate conclusion—that *Miller* effectively reduced the Second Amendment to a tautology—is less convincing. He argues that the *Miller* decision could not have been primarily about classifying a weapon's protection under the Second Amendment based on whether or not it could be used by a militia. If this were the case, he says, the Court would have struck down another section of the National Firearms Act (NFA) that applied similar restrictions to machine guns, which were standard military equipment. He further contends that determining Second Amendment applicability based on military usage or non-usage would

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10 David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99, MICH. L. REV. 588, 664 (Dec., 2000).

11 *Id.* at 663 (observing that gun control was an important objective to Roosevelt in pursuit to the last of his "Four Freedoms": freedom from fear).

have "the perverse result that the deadlier a firearm is, the more likely it is to receive constitutional protection— because the military, of course, prefers weapons that are as efficient and effective at killing as possible."[12]

While convincing at first glance, Yassky's contentions can be countered both by closely examining the *Miller* opinion and by simple reasoning. Brandon P. Denning and Glenn H. Reynolds contend that *Miller* in no way rejects an individual rights interpretation of the Second Amendment but merely specifies that weapons unrelated to the militia are not guaranteed protection under the right to bear arms. Citing the Court's critical prefatory clause, "In the absence of any evidence tending to show that possession or use of a [sawed-off shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia," they argue that *Miller* implies that if such a connection had been established, the law could have been struck down.[13] It is difficult to argue with such plain logic with regard to the crucial section of the *Miller* opinion, which "avoided any sweeping statements regarding the scope of the Second Amendment."[14]

In addition to the simple appeal to the text of McReynolds' opinion, two further arguments can dispel Yassky's assertions regarding the "perverse effect" of relying on the military usage or non-usage distinction, as well as his contention that the Court under such reasoning would have been forced to strike

12 *Id.* at 666.

13 Brandon P. Denning & Glenn H. Reynolds, *Telling Miller's Tale: A Reply to David Yassky*, 65, LAW & CONTEMP. PROBS. 113, 116 (Spring 2002).

14 *Id.*

down the machine gun restrictions of the NFA. Regarding the former, Yassky ignores the fact that some legislation is inherently paradoxical and that such paradoxes are often unavoidable.[15] As for the machine gun regulations, these were simply not the subject of the case at hand. No "case or controversy" regarding that provision of the NFA existed and the Court had no reason to address it. Yassky's historical analysis of the Court's motives is helpful, but his interpretation of the *Miller* decision is flawed. Denning and Reynolds are more compelling in their argument that *Miller* says only that weapons not potentially related to a militia can be regulated or banned.

Curiously, *Miller* received little attention prior to the 2008 *Heller* case. It was cited as a precedent for the qualification of universal language in *Konigsberg v. State Bar of California*[16] and also with regard to its commerce clause implications.[17] It is also footnoted as evidence that Second Amendment rights are not wholly without limitation in *Lewis v. United States*[18] and in the upholding of the Brady Act in *Printz v. United States*.[19] In all these cases, however, *Miller* was quite literally a footnote to larger

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15 Consider welfare benefits paying more money to unwed mothers the more children they have. Surely the government does not wish to incentivize having more children out of wedlock, yet providing for these mothers requires more money for those with more children. Such "perverse effects" are not always readily avoidable.

16 Konigsberg v. State Bar of California, 366 U.S. 36, 49 (1961).

17 Heart of Atlanta Motel v. United States, 379 U.S. 241, 276 (1964) (citing United States v. Miller, 374 U.S. 104, (1939)) (upholding the use of Commerce Clause power to advance "ends not entirely commercial").

18 445 U.S. at 65.

19 Printz v. United States, 521 U.S. 898, 939 (1997) (Thomas, J., concurring).

and only tangentially-related decisions.

Miller became a much more hotly debated topic as the Roberts Court considered the case of *District of Columbia v. Heller*, a challenge to the constitutionality of Washington D.C.'s handgun ban. The focus of the debate over *Miller* is in the repartee between Justice Scalia in the opinion of the Court and Justice Stevens' dissenting opinion. Two questions are at issue between Scalia and Stevens, one explicit and the other implicit. The two openly dispute whether (according to *Miller*) questions of Second Amendment applicability are dependent on the class of weapon or on how the weapon was being used. There is also an implicit dispute about the degree to which *Miller* is applicable to the *Heller* case.

In *Heller*, the Court struck down Washington D.C.'s handgun ban, holding that it violated the individual right to keep and bear arms provided by the Second Amendment. Justice Stevens sharply dissented from this ruling:

> Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it *does* encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history, and our decision in *United States* v. *Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939), provide a clear answer to that question.[20]

20 554 U.S. at 636-37 (Stevens, J., dissenting).

While the first two grounds Stevens offers (the Amendment's text and history) certainly play a role, it is his analysis of *Miller* that forms the backbone of his dissent and his disagreement with Justice Scalia.

It is worth noting at the outset that there is no dispute over the individual or collective nature of the right to bear arms; despite popular debate on the subject, Stevens dispels in his opening sentence the notion that such a question is at issue and acknowledges that, at least according to *Miller*, the right to bear arms is an individual one.[21] What is debated is whether *Miller* permits the regulation of non-military arms (as Scalia asserts) or the non-military *usage* of arms regardless of whether or not those arms could be used militarily.

Stevens is clear from the beginning that he believes the *Miller* case held the latter rather than the former. He states unambiguously:

> The view of the Amendment we took in *Miller*--that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons--is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption.[22]

One of his dissent's critical problems is that he does not defend

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21 *Id.* at 636 (Stevens, J., dissenting).

22 *Id.* at 637-38 (Stevens, J., dissenting).

this interpretation of *Miller* but merely asserts that such was the position taken by the Court. He goes on to cite a litany of lower-court cases that take a similar interpretation of *Miller* but fails to explore the text of the *Miller* opinion to justify his interpretation. Ironically, he then criticizes Scalia's majority opinion as "a feeble attempt to distinguish *Miller* that places more emphasis on the Court's decisional process than on the reasoning in the opinion itself."[23] His lone attempt to cite another Supreme Court case is a casual reference to *Lewis v. United States*, which merely quotes *Miller*'s requirement of "some reasonable relationship to the preservation or efficiency of a well regulated militia," but does not expound upon whether a military class of weapon being used by a private citizen for non-military purposes bears such a relationship.[24]

Justice Stevens does make several points regarding the historical context of the Amendment in addition to his *Miller*-related arguments. He notes that the Second Amendment, while constructed similarly to state arms-rights provisions, does not specify non-military purposes (especially hunting and self-defense) as being protected even though at least two state provisions did so. He concludes, "The contrast between those two declarations and the Second Amendment . . . confirms that the Framers' single-minded focus in crafting the constitutional guarantee 'to keep and bear Arms' was on military uses of firearms, which they viewed in the context of service in state militias."[25] Additionally, Stevens

23 *Id.* at 639 (Stevens, J., dissenting).

24 445 U.S. at 65.

25 554 U.S. at 640-43 (Stevens, J., dissenting).

accused the majority of disparaging the significance of the prefatory clause of the amendment and debates the Court's inclusive construction of the phrase "the people."[26] While these arguments are certainly important to Stevens, the structure and tone of his dissent makes his interpretation of *Miller* the focal point.

Justice Stevens' dissent is tightly argued and superficially persuasive—until one reads the majority opinion. There, Justice Scalia carefully refutes each of Stevens' objections. By way of introduction, he criticizes Stevens for "overwhelming reliance" upon *Miller* and proceeds to dismantle Stevens' interpretation of that decision.[27] "And what is, according to Justice Stevens, the holding of *Miller* that demands such obeisance?" asks Scalia. "That the Second Amendment 'protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons.'"[28] In reality, he replies, *Miller* did not mean and could not have meant anything of the sort.

As might be expected, Scalia begins by disputing the reason for which the Court upheld the NFA's ban on short-barreled shotguns. He emphasizes the specificity of the Court's ruling in its critical introductory sentence: "In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and

26 *Id.* at 643-45 (Stevens, J., dissenting).

27 *Id.* at 621.

28 *Id.*

bear such an instrument."[29] He further observes that the Court devoted significant attention to the question of whether short-barreled shotguns were used in the military. Such an examination, he says, would have been unnecessary if Stevens' assessment of the Court's reasoning were correct; in that case, the Court need only have noted that Miller was not a militiaman and ended its reasoning there without bothering to examine the type of weapon and its absence among military equipment. Scalia concludes, "*Miller* stands only for the proposition that the Second Amendment right . . . extends only to certain types of weapons."[30]

Scalia further fleshes out the way in which *Miller* classifies weapons. The phrase "part of ordinary military equipment" must be read in its historical context. Since militiamen were expected to supply their own arms, "ordinary military equipment" means the type of arms commonly employed by average citizens.[31] According to Scalia, this explains the lack of challenge to the ban on machine guns, which Stevens had considered evidence that the *Miller* decision did not rest on weapon classification. The machine gun ban was neither challenged nor voluntarily struck down by the Court because machine guns were not "ordinary military equipment" by a militia-oriented definition. As Scalia concluded, "We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-

29 307 U.S. at 178 (emphasis added).

30 554 U.S. at 622-23.

31 *Id.* at 624-25.

barreled shotguns."[32] Scalia thus effectively dispatches Stevens' most prominent arguments—those relating to *Miller*.

Not only did Scalia readily correct Stevens' misinterpretation of *Miller*, he also emphasized Stevens' overuse of the *Miller* case. Having reached his conclusion that *Miller* says far less than what Stevens asserts, Scalia notes that it is "particularly wrong-headed" to extract further meaning from *Miller* because it was not intended to exposit the Second Amendment thoroughly.[33] Indeed, nowhere in the opinion (which, at a mere eight pages, is less than a quarter of the length of Stevens' dissent) does Justice McReynolds attempt to define the meaning of the Second Amendment, which is quoted once and only mentioned three times.[34] The vast majority of the opinion details the history of the term "militia," rather than concerning itself with the relationship between the Second Amendment's two clauses or the individual (or collective) nature of the right.[35]

In addition to these concerns, Scalia notes that Miller was not represented at all in the case before the Supreme Court, neither filing a brief nor appearing at oral argument: "reason enough, one would think, not to make that case the beginning and end of this Court's consideration of the Second Amendment."[36] Finally, Scalia dismisses with an acerbic footnote the lower court rulings to which Justice Stevens turned for support of his *Miller* interpre-

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32 *Id.* at 625.
33 *Id.* at 623.
34 307 U.S. at 176, 178.
35 See *Id.* at 178-82.
36 507 U.S. at 623.

tation:

> As for the "hundreds of judges," . . . who have relied on the view of the Second Amendment Justice Stevens claims we endorsed in *Miller:* If so, they over read *Miller.* And their erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms. In any event, it should not be thought that the cases decided by these judges would necessarily have come out differently under a proper interpretation of the right.[37]

Scalia ends with that pointed criticism and returns to the heart of the disagreement between himself and Justice Stevens—how to interpret *Miller* and how much to rely upon it.

Americans concerned with the protection of their rights rejoiced at the Court's decision in *District of Columbia v. Heller*, satisfied that the original intent of the Second Amendment had been upheld. They most likely remained unaware of the role played by a semi-obscure case from 1939: *United States v. Miller*. Justice Stevens doggedly insisted that this case set a precedent for the proscription of non-military usage of arms, citing lower court interpretations of *Miller* as well as historical evidence pointing toward such an interpretation. However, Stevens' arguments collapse when read alongside the majority opinion of Justice Scalia. By correcting Stevens' interpretation of *Miller*, demonstrating its limited relevance to thorough Second Amendment jurisprudence,

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37 *Id.* at 624, Fn. 24.

and contextualizing the history surrounding both *Miller* and the Second Amendment, Scalia powerfully defended the *Heller* decision against the dissenters. *Heller* remains a stalwart and accurate precedent for future Second Amendment jurisprudence.

THE EVOLUTION OF THE EXCLUSIONARY RULE

FROM *WEEKS V. UNITED STATES* AND *MAPP V. OHIO* TO *HERRING V. UNITED STATES* AND *HUDSON V. MICHIGAN*

*Jared M. Smith**

ABSTRACT: *From a historical perspective, this piece surveys the 'wild ride' of the Exclusionary rule, from the Fourth Amendment through Weeks v. United States (1914) , the Warren Court's interpretation in Mapp v. Ohio (1961) to the present. The author takes an interesting look at current Chief Justice Robert's interactions with it, first as an associate counsel to President Reagan, and then as the head of the Court in Herring v. US and Hudson v. Michigan. The article ends open-ended, hinting that the 'Good Faith Exception' and the 'Knock and Announce Rule' have moved to a conservative rollback of the Exclusionary Rule.*

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"The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[1]

Tom C. Clark
Associate Justice of the Supreme Court of the United States (1949-1967)

In popular culture, television police dramas frequently depict police officers searching a suspect's home without a search warrant. In reality, evidence gained without a warrant is typically inadmissible at the ensuing trial, which allows defendants to escape a guilty verdict. The reason for this conclusion is the Exclusionary Rule.

The Exclusionary Rule is one of the most fiercely debated topics in modern constitutional and criminal law. Opponents of the Rule argue that it is "not grounded in the Constitution, not a deterrent to police misconduct, and not helpful in the search for truth" in criminal proceedings.[2] By contrast, its supporters contend that the Rule is necessary because, like other guarantees in the Bill of Rights, the Fourth Amendment (which guards against unreasonable search and seizure) cannot enforce itself. One such supporter was Potter Stewart, the famed 20th century Associate Justice who wrote, "The rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it."[3]

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1 *Mapp v. Ohio*, 367 U.S 643, 659 (1961).

2 Timothy Lynch, "In Defense of the Exclusionary Rule," *Cato Briefing Papers* (Oct. 1998): 1.

3 *Elkins v. United States*, 364 U.S. 206, 217 (1960).

The Exclusionary Rule, while not explicitly outlined in the text of the Constitution, has evolved substantially throughout American history. Strengthened and expanded after its creation in 1914, the Rule was applied to the states in 1961 by the decidedly activist Warren Court. In the late 20th century, however, some began to advocate for the Rule's reformation or even termination. In 1983, John G. Roberts, then Associate Counsel to the President during the Reagan administration, wrote a memorandum in which he outlined his work on "the campaign to amend or abolish the exclusionary rule."[4] Additionally, when Samuel Alito was applying for a job in the Department of Justice in 1985, he wrote that his interest in the law had been motivated by disagreement with Warren Court decisions, particularly in the areas of criminal procedure, religious freedom, and voting rights.[5] As the current Chief Justice of the United States, Roberts has led a four-member voting bloc of the Court (including Justices Alito, Antonin Scalia, and Clarence Thomas) in launching a "rollback" assault on the Exclusionary Rule in the early 21st century. All that they lack to abolish the Rule completely is a reliable fifth vote.[6]

I. Creation of the Exclusionary Rule

The Exclusionary Rule is based upon the Fourth Amend-

4 John G. Roberts, "New Study on Exclusionary Rule" 4 January 1983, available from http://www.reagan.utexas.edu/roberts/Box24JGRExclusionaryRule1.pdf (accessed 26 March 2011).

5 Adam Liptak, "Justices Step Closer to Repeal of Evidence Ruling," *The New York Times*, January 30, 2009, http://www.nytimes.com/2009/01/31/washington/31scotus.html (accessed 26 March 2011).

6 Susan Bandes, "The Roberts Court and the Future of the Exclusionary Rule," *American Constitution Society for Law and Policy* (April 2009): 1.

ment to the U.S. Constitution, which reads,

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

The Rule allows a court to exclude from trial any evidence that the government has illegally obtained. The basis for exclusion is to protect the public from government intrusion by requiring a search warrant before evidence can be taken from private property.

The Exclusionary Rule's course through American history began with the drafting of the Fourth Amendment. As English legal history shows, the Fourth Amendment was not drafted to protect against wrongly seized evidence but as a reaction against the English use of general warrants and writs of assistance. General warrants were the subject of a controversy in England from 1762-1790. Issued by the Secretary of State in seditious libel cases, these warrants were issued, without probable cause, to apprehend persons who presented a threat to the Crown. These warrants were easily abused because they did not name specific individuals that were to be arrested, and they were valid for the duration of the life of the monarch under whose name they were issued.[7] In 1763, for example, officials used one warrant to arrest

7 Potter Stewart, "The Road to *Mapp v. Ohio* and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases," *Columbia Law Review*, 83 (Oct. 1983): 1369.

forty-nine people in three days.[8]

Writs of assistance were used by English officials in the American colonies to enforce unpopular trade and navigation acts from 1761-1776. These writs were strikingly similar to the general warrants used in England, but they were used instead to locate uncustomed goods that had been smuggled into the colonies. The writs empowered officials to search houses, vessels, warehouses, etc., for uncustomed goods, and their blanket authority lasted for the life of the reigning English monarch plus six months thereafter. These writs were not confined to any particular case, and they required no evidentiary showing or description of the place to be searched.[9]

In response to worries that the government could use both general warrants and writs of assistance in the new Republic, the Fourth Amendment was ratified by the states in 1791. Its second clause makes clear the Framers' rejection of general warrants and writs of assistance, as it demands that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[10] Although the text of the Amendment also prohibits unreasonable search and seizure, it was clearly ratified as a response to the warrantless searches the colonists had endured

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8 Id.

9 Phillip A Hubbart, *Making Sense of Search and Seizure Law: A Fourth Amendment Handbook* (Durham: Carolina Academic Press, 2005), 21-22.

10 United States Constitution, Amendment IV.

under English colonial rule.[11] From the time of its ratification up to 1886, however, the Fourth Amendment was hardly mentioned in Supreme Court cases, and almost no legal principles regarding evidence suppression were developed.[12]

This trend changed rapidly in the late 1800s and early 1900s. The first Supreme Court case associated with the development of the Exclusionary Rule is an 1886 case, *Boyd v. United States*.[13] *Boyd* involved a subpoena that demanded the production of private papers as evidence. The subpoena declared that if the documents were not produced, "the allegations which it is affirmed they will prove shall be taken as confessed."[14] In writing for the Court, Justice Joseph Bradley concluded that the compulsory production of private papers served to incriminate the defendants and thus violated the Fifth Amendment's right against self-incrimination.[15] The exclusion of evidence in *Boyd* was not a remedy for the Fourth Amendment, which Bradley said had also been violated, but rather a remedy for a Fifth Amendment violation.

In 1904, another case with implications for the Exclusionary Rule appeared before the Court. *Adams v. New York* dealt

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11 E.g., *Ker v. California*, 374 U.S. 23, 51 (1963) (Brennan, J., dissenting) ("Moreover, in addition to carrying forward the protections already afforded by English law, the Framers also meant by the Fourth Amendment to eliminate once and for all the odious practice of searches under general warrants and writs of assistance against which English law had generally left them helpless.").

12 Hubbart, *supra* note 9, at 42.

13 *Boyd v. United States*, 116 U.S. 616 (1886)

14 Id. at 621.

15 Id. at 634-635.

with a man convicted of illegal gambling.[16] A warrant for illegal gambling paraphernalia had been executed by the police; however, the resulting conviction relied upon the seizure of private papers. In writing for the Court, Justice William Day argued that *Boyd* did not apply, and there was no Fourth or Fifth Amendment violation. He reasoned that *Boyd* dealt only with compulsory production of private papers, which would violate the Fourth and Fifth Amendments. By contrast, the papers seized in *Adams* were "clearly competent as tending to establish the guilt of the accused of the offense charged," and that "the weight of authority as well as reason" limits the scope of review to the competency of the evidence, regardless of the means by which it was secured.[17] Thus, in the words of Justice Potter Stewart, the Court in *Adams* "seemed to bury the exclusionary rule - even before its birth was recognized."[18]

Ten years later, the Court for the first time suppressed evidence seized without a warrant from a private home as a remedy for a Fourth Amendment violation. In the 1914 case *Weeks v. United States*, the Court unanimously ruled that the Fourth Amendment protects only against "unreasonable search and seizure" by a federal officer in federal court.[19] Previously, the Court had ruled in *Adams* that evidence seized without a warrant could be introduced in court if the defense counsel did not file for the return of the evidence before the trial began; in this case, however, such a filing

16 *Adams v. New York*, 192 U.S. 585 (1904).

17 Stewart, *supra* note 7 at 1374.

18 Id.

19 *Weeks v. United States* 232 U.S 383 (1914).

had been made by the defense.[20] Therefore, because the evidence should have been returned before trial under *Adams*, the Court held that the government violated the Fourth Amendment when it introduced the evidence at trial, which should have been excluded as a remedy for the government's Fourth Amendment violation.[21] Interestingly, Justice Day again wrote the majority opinion in *Weeks*. In this case, the Court created the Exclusionary Rule, but it only applied to cases involving the federal government.

II. The Rule Expands

While the *Weeks* opinion established the Exclusionary Rule, its power remained limited. The Rule only excluded evidence obtained by the federal government, because *Weeks* dealt with evidence seized by a U.S. Marshal. Further, under *Boyd*, exclusion of evidence was a by-product of the Fifth Amendment, not the Fourth Amendment. Thus, only testimonial evidence could be excluded, such as books, papers, etc., but contraband, such as drugs, guns, etc., could be admissible in court.[22] Also under *Weeks*, exclusion of evidence was a result of the Fourth Amendment's mandate that the government return wrongfully seized property. [23] In these cases, it seemed that *Adams* allowed the inclusion of any evidence the government obtained in violation of the Fourth Amendment unless it fell within the parameters

20 *Adams v. New York*, 192 U.S. 585 (1904).
21 *Weeks*, *supra* note 19 at 398.
22 Stewart, *supra* note 7 at 1375.
23 Id.

of either *Boyd* or *Weeks*.[24]

This began to change, however, in the early 1920s. In the 1920 case *Silverthorne Lumber Co. v. United States*, the Court ruled that simply returning illegally seized evidence, while still facing prosecution based upon that evidence, was not a viable remedy for a Fourth Amendment violation.[25] In this case, federal agents had returned illegally seized evidence after photographs of the evidence had been taken. The agents believed that they were acting within the bounds of *Boyd*, *Adams*, and *Weeks*, which they felt required only the return of illegally seized evidence rather than a prohibition on illegal searches. Justice Oliver Wendell Holmes, however, held otherwise. He reasoned that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall it not be used at all."[26] This decision created the "Fruit of the Poisonous Tree" doctrine, which bars the admission of any evidence seized as a result of other illegally seized evidence.[27]

The next year, the Court again expanded the scope of the Rule. In *Gouled v. United States*, the Court ruled that illegally seized evidence must be suppressed, despite the fact that the motion of suppression was not filed until the trial had begun.[28] In this case, government agents illegally seized several of Gouled's

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24 Id.

25 *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

26 Id. at 392.

27 Craig R. Ducat, *Constitutional Interpretation* (Boston: Wadsworth, Cengage Learning, 2009), 536.

28 *Gouled v. United States*, 255 U. S. 298 (1921).

papers without his knowledge. Because he was unaware of the seizure, Gouled did not move before trial for the return of the papers as was necessary under *Adams*. Gouled was consequently forced to seek the suppression of the papers at trial when he first learned of the seizure. It seemed as though the motion had little hope under the long-settled rule of *Adams*, but the Court held that the Fourth Amendment required the evidence to be suppressed. In the majority opinion, Justice John Clarke effectively overruled *Adams* without even citing it:[29]

> The objection was not too late, for, coming as it did promptly upon the first notice the defendant had that the Government was in possession of the paper[s], the rule of practice relied upon, that such an objection will not be entertained unless made before trial, was obviously inapplicable.[30]

By holding that the admission of the evidence seized in violation of the Fourth Amendment also violated the Fifth Amendment, *Gouled* overturned the decision in *Adams*.[31]

While *Silverthorne* and *Gouled* greatly expanded the rules for suppressing evidence in federal trials, the full expansion of the Rule was not yet complete. This final development came in the form of 1925's *Agnello v. United States*.[32] In this case, the federal government had illegally seized cocaine from Agnello's home. Under *Adams*, the Court only suppressed testimonial evidence,

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29 Stewart, *supra* note 7 at 1376.

30 *Gouled*, *supra* note 28 at 305.

31 Stewart, *supra* note 7 at 1376.

32 *Agnello v. United States*, 269 U.S. 20 (1925).

but it took this opportunity to conclusively overrule *Adams*. In an opinion written by Justice Pierce Butler, the Court attached no significance to the distinction between drugs and papers.[33] The Court reasoned that because Agnello maintained that the cocaine was not his, he could not have moved for its suppression without forfeiting his Fifth Amendment right against self-incrimination. Thus, the evidence must be excluded from trial because the right against self-incrimination must always prevail over the rule outlined in *Adams*. Butler stated the court's opinion:

> Where, by uncontroverted facts, it appears that a search and seizure were made in violation of the Fourth Amendment, there is no reason why one whose rights have been so violated and who is sought to be incriminated by evidence so obtained, may not invoke protection of the Fifth Amendment immediately and without any application for the return of the thing seized.[34]

Therefore, *Agnello* established that a defendant does not have to move to suppress contraband evidence prior to trial, finally overruling *Adams*.[35]

By 1925, it was clear that suppression of evidence required both Fourth and Fifth Amendment violations. Indeed, all of the cases mentioned cited the Fifth Amendment, not the Fourth, as the basis for exclusion, despite the fact that the defendants argued the searches themselves were illegal under the Fourth Amendment.

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33 Stewart, *supra* note 7 at 1377.

34 *Agnello*, *supra* note 32 at 34.

35 Stewart, *supra* note 7 at 1377.

According to Justice Stewart, it would take several years and many cases before courts would cease to cite the Fifth Amendment, along with the Fourth, as the basis for exclusion, but it is fair to say that by 1925, the annexation of the Exclusionary Rule to the Fourth Amendment was complete.[36] After the Rule's expansion in the early 20th century, it was still only applicable to federal trials; however, the courts soon began to apply the Exclusionary Rule to the states.

III. Incorporation of the Exclusionary Rule

The question of applying the Rule to state trials first came to the Court in 1949 in *Wolf v. Colorado*.[37] In the majority opinion, Justice Felix Frankfurter presented the issue in question:

> Does a conviction by a State court for a State offense deny the "due process of law" required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks*...?[38]

To begin, the Court reasoned that the Fourth Amendment's prohibition on unreasonable searches and seizures was "implicit in the concept of ordered liberty"[39] and therefore enforceable against

36 Id.
37 *Wolf v. Colorado*, 338 U.S. 25 (1949).
38 Id. at 25-26.
39 Id. at 27.

the states by way of the Fourteenth Amendment.[40] This, however, amounted to nothing more than an incorporation of rhetoric, as no mechanism for enforcement of the Fourth Amendment to the states was outlined by the Court.[41] The Court argued that there were remedies other than the Exclusionary Rule available to the states to enforce the prohibition against unreasonable search and seizures:

> There are, moreover, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country.[42]

Thus, the Court ruled that while the right against unreasonable searches and seizures was extended to the states by the Fourteenth Amendment, the Exclusionary Rule as a remedy for such a violation was not.[43]

In 1960, another case greatly influenced the reach of the Rule in the states. In *Elkins v. United States*,[44] the Court overruled the "Silver Platter Doctrine" that allowed evidence seized ille-

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40 Stewart, *supra* note 7 at 1378.

41 Ducat, *supra* note 27 at 605.

42 *Wolf*, *supra* note 37 at 32.

43 Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* (Durham: Carolina Academic Press, 2008), 615.

44 *Elkins v. United States*, 364 U.S. 206 (1960).

gally by state agents to be used in federal court.[45] In the majority opinion, Justice Potter Stewart wrote that the Fourteenth Amendment's limitations on state governments were coextensive with the Fourth Amendment's limitations on the federal government.[46] Thus, any search conducted by state agents that would have violated the Fourth Amendment if it had been conducted by federal agents would violate the Fourteenth Amendment.[47] Once the Fourth and Fourteenth Amendments were equated, full application of the Exclusionary Rule to the states, despite the *Wolf* precedent, was just one step away. Stewart reasoned, "[I]f the Fourth and Fourteenth Amendments created identical prohibitions, and if in federal cases the exclusion of evidence was required to enforce this ban, then exclusion should also be an integral part of the Fourteenth Amendment as well."[48]

That final application of the Rule to the states came in the 1961 landmark case of *Mapp v. Ohio.*[49] In writing for the majority, Justice Tom Clark argued that illegally seized evidence could not be used to convict a defendant under the *Weeks* rule.[50] Because the violation was so blatant, the Court could not tolerate such action by allowing the evidence to be admitted at trial.[51] Thus, the Court extended the Exclusionary Rule as outlined in

45 Clancy, *supra* note 43 at 617.
46 *Elkins*, *supra* note 44 at 215.
47 Stewart, *supra* note 7 at 1380.
48 Id.
49 *Mapp v. Ohio*, 367 U.S. 643 (1961).
50 Hubbart, *supra* note 9 at 335.
51 Id. at 336.

Weeks to the states and overruled *Wolf*.[52] After *Mapp*, the full Exclusionary Rule applied to both the federal and state governments.

IV. The Roberts "Rollback"

Conservatives have called for the modification, and even abolition of the rule in the late 20th century. Indeed, with Chief Justice John G. Roberts leading a near conservative majority on the current Supreme Court, there seems to be a modern assault on the Exclusionary Rule. Two important cases, *Herring v. United States*[53] and *Hudson v. Michigan*, demonstrate this recent trend.[54]

In *Herring*, the Court took up the issue of the objectively reasonable "Good Faith Exception" to the Exclusionary Rule, which is the most important exception to the Rule.[55] The underlying principle of this exception is that the deterrent effects of suppressing the illegally seized evidence do not outweigh the social costs of allowing the evidence to be admitted at trial. Thus, illegally seized evidence should not be suppressed if the officer has a reasonable good faith that his actions were consistent with a proper Fourth Amendment search. In the officer's mind, he has obeyed the Fourth Amendment; therefore, suppressing the evidence would not deter the officer from disobeying it in the future because he believes he has already obeyed it.

Previous case law had created and upheld the Good Faith

52 Id. at 335-336.

53 *Herring v. United States*, 555 U.S. 135 (2009).

54 *Hudson v. Michigan*, 547 U.S. 586 (2006).

55 Hubbart, *supra* note 9 at 349.

Exception, starting with its creation in *United States v. Leon* in 1984,[56] where the Court held that the Exclusionary Rule is not applicable if evidence is seized with a warrant that is ultimately found to be invalid.[57] That same year, another case extended the Good Faith Exception to cover homicide evidence seized with a narcotics warrant in *Massachusetts v. Sheppard*.[58] Eventually, the Good Faith Exception would come to cover evidence seized based upon a state law that was later found to be unconstitutional in *Illinois v. Krull*,[59] as well as evidence seized based upon a court-generated computer error in making an arrest in *Arizona v. Evans*.[60] The Good Faith Exception did not achieve expanded coverage in criminal trials, however, until *Herring* in 2009.

In his majority opinion in *Herring*, Chief Justice Roberts strengthened the Exception and cut back the Rule's reach in search and seizure cases. The Court argued that the Exclusionary Rule should be limited to "flagrant or deliberate" violations of Fourth Amendment rights.[61] In the case at hand, the court ruled that the computer error in question that led to a search and arrest was not flagrant or deliberate; thus, the evidence seized could be admitted in court. Despite precedent to the contrary, the Court argued that since *Leon*, the Court had "never applied the rule to exclude evidence obtained in violation of the Fourth Amendment, where the police conduct was no more intentional or culpable than [the

56 *United States v. Leon*, 468 U.S. 897 (1984).
57 Clancy, *supra* note 43 at 647.
58 *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).
59 *Illinois v. Krull*, 480 U.S. 340 (1987).
60 *Arizona v. Evans*, 514 U.S. 1 (1995).
61 *Herring*, *supra* note 53 at 143.

conduct involved in *Herring*]."[62] Thus, the Court said, "As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[63] Here, the Court could find no such conduct or negligence and ruled that the evidence could be admitted at trial.

According to law professor Michael Vitiello, the Court's broad language in *Herring* seems to be a wholesale expansion of police power.[64] Roberts and the majority declined to suppress the fruits of illegal searches and seizures if the police acted *negligently* rather than *flagrantly*.[65] Here, the Court based this holding on the fact that "isolated instances of negligent wrongdoing are unlikely to be deterred by exclusion..."[66]

Some argue that the *Herring* decision could arguably support a more general exception to the Rule that applies to all police conduct, including warrantless searches.[67] However, the decision simply extended the holding in *Evans* which held that errors made by a judicial clerk do not trigger the Exclusionary Rule.[68] *Herring*

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62 Id. at 144.

63 Id.

64 Michael Vitiello, "*Herring v. United States*: *Mapp*'s 'Artless' Overruling?," *Nevada Law Journal* 10 (Winter 2009): 176.

65 Susan Bandes, "The Roberts Court and the Future of the Exclusionary Rule," *American Constitution Society for Law and Policy* (April 2009): 6 (emphasis added).

66 Id.

67 Matthew A. Josephson, "To Exclude or Not to Exclude: The Future of the Exclusionary Rule After *Herring v. United States*," *Creighton Law Review* 43 (Dec. 2009): 198.

68 *Evans*, *supra* note 60.

simply extended that holding to police clerks.[69] Under its ruling, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system"[70] in order to trigger the Rule.[71] In this case, Roberts clearly seeks to clarify the Rule, if not change it altogether.

The *Herring* decision came just three years after an arguably more important Exclusionary Rule case, *Hudson v. Michigan*, which dealt with the "Knock and Announce Rule" outlined by the Court in the 1995 case of *Wilson v. Arkansas*. In *Wilson*, the Court unanimously held that an officer must announce his presence before entering a home to execute a warrant.[72] In the opinion of the Court, Justice Clarence Thomas wrote:

> At the time of the framing [of the Fourth Amendment], the common law of search and seizure recognized a law enforcement officer's authority to break open the doors of a dwelling, but generally indicated that he first ought to announce his presence and authority. In this case, we hold that this common-law "knock and announce" principle forms a part of the reasonableness inquiry under the Fourth Amendment.[73]

From this case, the Knock and Announce Rule became a concept of American law. However, the Court did point out that this was not an absolute rule but a factor to take into account when assess-

69 Josephson, *supra* note 67 at 202.

70 *Herring*, *supra* note 53 144

71 Josephson, *supra* note 67 at 202.

72 *Wilson v. Arkansas*, 514 U.S. 927 (1995).

73 Id. at 929.

ing a search's reasonableness.[74] This position was reaffirmed two years later when the Court unanimously held there were no categorical exceptions to the Knock and Announce Rule in *Richards v. Wisconsin.*[75] In the *Richards* majority opinion, Justice John Paul Stevens wrote:

> We recognized in *Wilson* that the knock-and-announce requirement could give way "under circumstances presenting a threat of physical violence" or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given."[76]

Thus, the determination whether or not to knock and announce would have to be made under a case-by-case basis.[77] Indeed, the Court found that a period 15 to 20 seconds was reasonable between announcement and entry by police into a home,[78] but has left the waiting period to be determined by the totality of the circumstances.[79] This ambiguity allowed lower federal courts to find even shorter time periods to be reasonable. Also, courts are able to issue "no-knock" warrants to police when they believe that destruction of evidence will occur or that the officers will be put in danger if they knock and announce before entry.[80]

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74 Ducat, *supra* note 27 at 633.

75 *Richards v. Wisconsin*, 520 U.S. 385 (1997).

76 Id. at 391.

77 Ducat, *supra* note 27 at 633.

78 *United States v. Banks*, 540 U.S. 31 (2003).

79 *United States v. Jenkins*, 175 F.3d 1381, 1213 (10 Cir. 1999) (stating the Supreme Court has no established a clear standard to determine the amount of time officers must wait to make entry).

80 E.g. *United States v. Segura-Baltazar*, 448 F.3d 1381 (11th Cir. 2006).

The validity of the Knock and Announce Rule came under attack by the Roberts Court in *Hudson.* In his majority opinion, Justice Antonin Scalia argued that a violation of the Knock and Announce Rule by police does not require the suppression of the evidence found in the search. The officer had announced his presence before entering Hudson's home but waited a mere three to five seconds before entering.[81] Because the State of Michigan had conceded a violation of the Knock and Announce Rule at trial, the Court simply had to determine "whether the exclusionary rule is [an] appropriate [remedy] for violation of the knock-and-announce requirement."[82]

In the majority opinion, Scalia argued that suppression of evidence is always the last resort of the courts, not the first impulse.[83] He argued that the Knock and Announce Rule has three uses: (1) protect human life and limb, because an unannounced entry may provoke violence in self-defense by the surprised resident; (2) allow individuals the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry; and (3) give residents the "opportunity to prepare themselves for" the police by allowing them to "pull on clothes or get out of bed."[84] However, Scalia then noted:

> What the knock-and-announce rule has never protected, however, is one's interest in preventing the government

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81 *Hudson, supra* note 54 at 588.

82 James J. Tomkovicz, "*Hudson v. Michigan* and the Future of Fourth Amendment Exclusion," *Iowa Law Review* 93 (2008): 1823.

83 Id. at 1823-1824.

84 Albert W. Alschuler, "The Exclusionary Rule and Causation: *Hudson v. Michigan* and Its Ancestors," *Iowa Law Review* 93 (2008): 1762.

> from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.[85]

Stated differently, because none of the three interests were violated in the case, the Exclusionary Rule does not apply, and the evidence can be admitted at trial. According to Scalia, the police did not violate the Fourth Amendment by entering the home just a few seconds after announcing their presence.

Hudson clearly serves as a direct attack on the Exclusionary Rule. Previously, evidence could be suppressed for nearly all Fourth Amendment violations. The Court, however, ruled in *Hudson* that a Fourth Amendment violation, in this case, a violation of the Knock and Announce Rule, does not require the suppression of evidence at trial. Indeed, after the decision was announced, some wondered if the Exclusionary Rule was now obsolete.[86] Interestingly, Justice Thomas, who outlined the Knock and Announce Rule in *Wilson*, joined Scalia's majority opinion in *Hudson*.

V. Conclusion

The Exclusionary Rule has undergone a notable evolution in American history. Its basis, the Fourth Amendment, was clearly not written to exclude evidence but rather to protect against general warrants and writs of assistance. With the creation of the Rule in *Weeks v. United States* and its application to the states in *Mapp*

85 *Hudson*, *supra* note 54 at 593.

86 Bandes, *supra* note 6 at 7.

v. Ohio, the Rule had a substantial influence on criminal trials. The Roberts Court, however, has proceeded to launch its attack on the Rule in *Herring v. United States* and *Hudson v. Michigan*. These decisions on the Good Faith Exception and the Knock and Announce Rule have called the future of the Exclusionary Rule into question. As Scalia noted in *Hudson*:

> We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.[87]

Indeed, time will tell if the Exclusionary Rule will regain its strength, or if the Roberts Court's constraints will continue to weaken its reach.

87 *Hudson*, *supra* note 54 at 597.