GROVE CITY COLLEGE

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ARTICLES

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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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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 inception, 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, as well as on HeinOnline. 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

Dear Reader,

We are pleased to bring you the 6th edition of the *Grove City College Journal of Law & Public Policy*, a special edition that marks the fifth anniversary of its inaugural publication. What began as an academic journal among Grove City College students, faculty, and alumni in the spring of 2010, the *Journal* has flourished into a vibrant, scholarly publication that continues to expand both its readership and authorship.

As the *Journal* has developed, its prevalence has extended well beyond the Grove City College community. Since its inception in 2010, the *Journal* has published articles written by students of Princeton University, Patrick Henry College, Duquesne University School of Law, Louisiana State University's Paul M. Hebert Law Center, and Harvard Law School, as well as legal professionals. It has also become accessible to thousands of readers domestically and abroad through its presence on HeinOnline.

This anniversary edition further parallels the beginning of a new era for both the *Journal* and Grove City College. This was the first edition published by a staff that did not contain a member who contributed to the original edition. We were also pleased to welcome our new faculty advisors Dr. Caleb A. Verbois, Assistant Professor of Political Science, and Grove City College's ninth president, The Honorable Paul J. McNulty. Due to the impressive backgrounds and character of Dr. Verbois and President McNulty, we know that the *Journal* will continue to demonstrate profound growth and maintain its scholarly excellence under their leadership.

Although transition marks this edition, the *Journal* remains dedicated to excellent student scholarship, promise of academic integrity, and its commitment to providing a platform for thoughtful and scholarly discourse. Our staff has expanded and changed, but our principles remain the same. The *Journal* will continue to uphold the values that served as a foundation for its commencement.

These articles further reflect a transition within our cultural and legal frameworks, especially in regard to the family. Whether these articles affirm or challenge your perspective on the topics they explore, I encourage you to utilize the ideas presented in this edition to shape your current understanding of these issues and to edify the principles and values that you hold.

It is remarkable to see how far the *Journal* has come in five years. As the *Journal* enters this next chapter, we promise to stand firm by the values that have contributed to its growth and success.

We are indebted to your support and sincerely thank you as we reflect on the past, study the present, and look forward to the future.

Claire A. W. Vetter '15

Editor-in-Chief

FOREWORD

Dear Reader,

We are pleased to release this latest edition of the *Grove City College Journal of Law & Public Policy*, a publication produced by undergraduate students of the College.

This edition, Volume 6, includes an interesting diversity of authors and issues. It blends the considerations of a seasoned public interest litigator, two law students, and three Grove City College students. With regard to content, legal and policy issues impacting the family are a dominant theme of this edition. There is also a clear breadth of topics, including religious liberty under the Affordable Care Act and on law school campuses, legislative term limits, libertarianism and the soul of the Republican Party, same-sex marriage, and insider trading enforcement standards.

The articles in this edition serve as a snapshot of many of the most significant questions of the present moment, ranging from constitutional interpretation to politics and political governance. Once again, the *Journal* offers a compelling source for learning and reflection.

Paul J. McNulty, '80, J.D.

President of Grove City College

THE SUPREME COURT CRAFTS A PRO-RELIGIOUS LIBERTY DECISION IN HOBBY LOBBY

Steven H. Aden*

ABSTRACT: *What do the Mennonite owners of a small cabinetmaking operation in Pennsylvania's Dutch Country have in common with the Evangelical owners of a nationwide craft store chain headquartered in Oklahoma? A great deal, actually. Besides their devout Christian faith and devotion to their large and close families, at least two other things: their faith-grounded commitment not to participate in what they regard as the destruction of human life through early abortion-causing drugs and devices, and their determination to protect that conscientious commitment through legal action. Their common convictions caused their two roads to converge at the U.S. Supreme Court, resulting in a precedent-setting decision that strengthened religious liberty for all Americans.*

*Senior Counsel, Alliance Defending Freedom, Washington, DC. I would like to thank Claire Rossell for her excellent work in helping prepare this draft. This article I dedicate to my son, Josiah A. Aden, who matriculates at Grove City College in Fall 2015, and to his future schoolmates and their generation, to whom will be entrusted the safekeeping of ephemeral but indispensable treasures such as rights of conscience and the rule of law. May they guard them with zeal and integrity.

What do the Mennonite owners of a small cabinetmaking operation in Pennsylvania's Dutch Country have in common with the Evangelical owners of a nationwide craft store chain headquartered in Oklahoma? *Senior Counsel, Alliance Defending Freedom, Washington, DC. I would like to thank Claire Rossell for her excellent work in helping prepare this draft. This article I dedicate to my son, Josiah A. Aden, who matriculates at Grove City College in Fall 2015, and to his future schoolmates and their generation, to whom will be entrusted the safekeeping of ephemeral but indispensable treasures such as rights of conscience and the rule of law. May they guard them with zeal and integrity.

A great deal, actually. Besides their devout Christian faith and devotion to their large and close families, the owners share at least two other things: their faith-grounded commitment not to participate in what they regard as the destruction of human life through early abortion-causing drugs and devices, and their determination to protect that conscientious commitment through legal action. Their common convictions caused their two roads to converge at the U.S. Supreme Court, resulting in a precedent-setting decision that strengthened religious liberty for all Americans.

I. The Affordable Care Act and Its Intended -- and Unintended -- Consequences.

In 2010, Congress passed the Patient Protection and Affordable Care Act of 2010 (ACA).[1] The ACA mandated that

2 124 Stat. 119; see generally Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S.Ct.

preventive care and screenings be included in many health insurance plans without imposing cost sharing on plan participants.[2] The ACA did not specify that contraception be included among these preventive services.[3] The ACA also exempted "grandfathered" health plans from the entire preventive care mandate, while still subjecting grandfathered plans to several other ACA requirements.[4]

Under regulations promulgated by the Department of Health and Human Services (HHS), the ACA preventive care rule was interpreted to require non-grandfathered, non-exempt group health plans or health insurance issuers to provide employees with contraceptives that are approved by the Food and Drug Administration (FDA).[5] This includes FDA-approved contraceptives, sterilizations and patient education and counseling for related drugs and devices that the government concedes function by "inhibiting implantation" of an embryo after its fertilization.[6] (This aspect of the ACA will be referred to as the "HHS Mandate.")

Employers that violate the Mandate are subject to govern-

2566 (2012) (upholding constitutionality of the Affordable Care Act against challenges under the Anti-Injunction Act, Commerce Clause, taxing power and Spending Clause.

2 42 U.S.C. § 300gg-13(a)(4).

3 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762 (2014).

4 42 U.S.C. § 18011. Regulations currently exempt from the women's preventive services requirement "churches," their "integrated auxiliaries" and "conventions or associations of churches," as well as the exclusively religious activities of any religious order. 45 C.F.R. § 147.131(a) (citing 26 U.S.C. § 6033(a)(3)(A)(i), (iii)).

5 45 C.F.R. § 147.130. See 42 U.S.C. § 300gg-13(a)(4).

6 *Hobby Lobby*, Pet. Br. at 9 n.4 (conceding that Plan B (levonorgestrel), *ella* (ulipristal acetate) and copper Intrauterine Devices ("IUDs") may act to "prevent implantation" of a fertilized egg in the uterus).

ment lawsuits under the Employee Retirement Investment Security Act ("ERISA")[7] and fines of up to $100 per plan participant per day.[8] For a large employer like Hobby Lobby, the financial penalty would amount to hundreds of millions per year; even for a smaller one like Conestoga Wood Industries, the penalty would be tens of millions, an amount a Third Circuit judge acknowledged would "rapidly destroy [Conestoga's] business and the 950 jobs that go with it."[9]

What followed was a landslide of federal lawsuits perhaps unprecedented in modern legal history, all alleging that the HHS Mandate violated the religious conscience of individuals, corporations and organizations by mandating that they provide, subsidize and/or counsel employees regarding certain forms of contraceptives. As of this writing, more than a hundred complaints have been filed in dozens of federal court jurisdictions challenging some aspect of the HHS Mandate. The over four hundred litigants include Roman Catholic dioceses, Catholic and Evangelical-owned for-profit businesses, faith-based ministries representing a broad range of ecclesiastical and ecumenical viewpoints, private religious colleges and individuals.[10] The lawsuits alleged a variety of legal claims, but generally they plead at least

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7 See generally 29 U.S.C. Chap. 18.

8 29 U.S.C. § 1132; 26 U.S.C. § 4980D.

9 Conestoga Wood Specialties Corp. v. Sebelius, 724 F.3d 377, 392 (3rd Cir. 2013) (Jordan, C.J., dissenting).

10 Although the litigation is constantly changing and hence difficult to track, two "score cards" kept by public interest law firms that have been active in it, Alliance Defending Freedom and The Becket Fund for Religious Liberty, are available at http://www.alliancedefendingfreedom.org/News/PRDetail/8001 and http://www.becketfund.org/hhsinformationcentral/, respectively.

two and often three of the following: 1) the Mandate violates the right to free exercise of religion protected by the First Amendment to the U.S. Constitution;[11] 2) it violates the Religious Freedom Restoration Act ("RFRA")'s[12] protection against "substantial burdens" imposed on religious exercise under federal law; and 3) it was enacted or implemented without proper legal authority, and thus in violation of the Administrative Procedure Act.[13]

II. Conestoga Wood Industries and Hobby Lobby.

A. Mennonites vs. the Mandate.

The Hahn family are devout Mennonite Christians whose father founded Conestoga Wood Industries, a kitchen cabinet making company in East Earl, Pennsylvania, almost fifty years ago.[14] Like others in their centuries-old community of faith, they are hardworking and peaceful. They possess deeply held religious beliefs cherishing the sanctity of human life in all its stages, and they practice a profound integration of their faith into their daily activities, including their work.[15] The Mennonite faith teaches that taking a life, which includes causing the death of a human embryo after fertilization, is a sin against God.[16] The Hahn family therefore objects to providing employees with items that can harm

11 *I.e.*, the second clause of the First Amendment, which provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. Const., Amend. I

12 Religious Freedom Restoration Act of 1993, 107 Stat. 1488; 42 U.S.C. § 2000bb *et seq.*

13 5 U.S.C. § 500 *et seq.*

14 *Hobby Lobby*. 134 S.Ct. at 2764.

15 *Id.*

16 *Id.* n.12 (Mennonite Church USA Statement on Abortion); *Id.* at 2765.

a human embryo.[17]

The Hahn family solely owns and operates Conestoga, which employs over 950 people, many of them like-minded persons of faith from their community.[18] They believe that practicing business is a calling from God, in which they should integrate the gifts of their spiritual life and the virtues of Christian teaching.[19] Based on this belief, Conestoga has provided generous health insurance benefits to its employees, while omitting coverage of abortion and items that may prevent the implantation of an embryo into the uterus.[20]

The Mandate caused a crisis of conscience for the Hahns and Conestoga. It threatened massive fines of potentially $100 per plan-participant per day if the company and its owners did not set aside its sincerely held religious convictions and include abortifacient items in its health plan.[21] It also threatened government lawsuits requiring the religiously objectionable coverage,[22] and penalties against Conestoga's insurance company.[23]

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17 *Hobby Lobby*. 134 S.Ct. at 2764.

18 *Id.*

19 *Id.*

20 *Hobby Lobby*. 134 S.Ct. at 2765.

21 29 U.S.C. § 1132. For Conestoga, penalties and fines for failing to cover 950 employees would equal roughly $35 million per year. S.Ct. No. 13-256, Pet. at 7. If Conestoga attempted to avoid these fines by dropping health care coverage, it would incur a separate massive fine of 2,000 per fulltime employee per year, totaling approximately $1.9 million. 724 F.3d at 392; 26 U.S.C. § 4980H.

22 26 U.S.C. § 4980H.

23 "In general, the private health insurance requirements of Title XXVII of the PHSA, as amended by ACA, apply to health insurance issuers and to non-federal self-funded governmental group plans. Prior to ACA, state and local governments could elect to exempt their plans from certain requirements of the PHSA, subject to certain exceptions. However, this election is not applicable

In the face of the HHS Mandate's profound violation of their religious convictions, Conestoga and the Hahns (collectively "the Hahns") filed suit in the United States District Court for the Eastern District of Pennsylvania on December 4, 2012.[24] The complaint alleged that the Mandate violated RFRA, the Free Exercise Clause, and other provisions.[25]

The Hahns filed a motion for a temporary restraining order and preliminary injunction, asking for court relief from the Mandate before their health plan was renewed on January 1, 2013.[26] The district court granted the temporary restraining order on December 28, 2012, holding that the Hahns had "demonstrated a reasonable probability of success on the merits of their RFRA claim."[27]

Nevertheless, the district court denied the Hahns' request for a preliminary injunction on January 11, 2013.[28] The court held

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to the provisions added to the PHSA by ACA, and thus these plans are subject to ACA's federal health insurance standards....Health insurance issuers and governmental plans that fail to comply with the PHSA requirements may be subject to a maximum penalty of $100 per day for each individual with respect to which such a failure occurs." Cynthia Brougher, Religious Objections to Regulations for Coverage of Preventive Health Services 15-16 (Congressional Research Service, 2012).

24 Conestoga Wood Specialties Corp. et al. v. Sebelius, USDC E.Dist. Pa. No. 5:12-cv-06744-MSG.

25 Although the case ultimately did not turn on the other claims, they were the Administrative Procedure Act, 5 U.S.C. § 706 et seq., and the Establishment Clause, Due Process Clause and Equal Protection Clause of the U.S. Constitution.

26 Conestoga Wood Specialties Corp. et al. v. Sebelius , 917 F.2d 394, 400 (E. D. Pa. 2013).

27 Conestoga Wood Specialties Corp. et al. v. Sebelius, No. 5:12-cv-06744-MSG (USDC E. D. Pa. Dec. 28, 2012) (order granting temporary restraining order).

28 *Conestoga*, 917 F.2d at 419.

that Conestoga did not possess the ability to exercise religion under RFRA and the First Amendment because of its status as a for-profit corporation.[29] The district court also held that the Mandate did not substantially burden the religious exercise of the Hahn family members.[30] Lacking a preliminary injunction, Conestoga's health insurance plan issuer inserted coverage of the religiously objectionable items into its plan over the Hahns' protests.[31]

The Hahns appealed to the United States Court of Appeals for the Third Circuit on January 17, 2013, and also filed a motion for an injunction pending appeal.[32] A divided court of appeals panel denied their request for an injunction pending appeal on February 8, 2013.[33] On July 26, 2013, another divided Third Circuit panel affirmed the district court's denial of Petitioners' preliminary injunction motion, holding that for-profit corporations cannot engage in religious exercise and therefore are not entitled to protection under either RFRA or the First Amendment.[34] The panel also held that the Hahn family faced no "substantial burden" from the massive fines and lawsuit penalties the government threatened to impose on their family business unless they renounced their faith and complied with the Mandate.[35] The Third Circuit denied review by the full *en banc* court on August 14, 2013, over the dis-

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29 *Id.* at 411.

30 *Id.* at 413.

31 S.Ct. No. 13-256, Pet. at 8.

32 724 F.3d at 381.

33 Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., No. 13-1144, 2013 WL 1277419, at *3 (3d Cir. Feb. 8, 2013).

34 724 F.3d at 381.

35 *Id.* at 389.

sent of five of the circuit's twelve judges.[36]

B. HOBBY LOBBY AND HOBSON'S CHOICES.

David Green founded Hobby Lobby in his family's garage in 1970, and grew the business from a local craft store in Oklahoma City into a national chain of over 500 stores with more than 13,000 full-time employees.[37] Today, it is still owned by David Green with his wife Barbara Green and their three adult children. One of them, Mart Green, later founded Mardel, a chain of Christian booksellers with 35 stores and about 400 full-time employees, which joined Hobby Lobby in the litigation.[38]

The Greens organized their businesses "with express religious principles in mind."[39] Hobby Lobby's statement of purpose commits it to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles."[40] The Greens signed a statement of faith and a commitment as trustees of the company to conduct the business according to their religious beliefs and to "use the Green family assets to create, support, and leverage the efforts of Christian ministries."[41] Hobby Lobby sells no liquor or liquor-related products, it closes on Sundays, and on Christmas and Easter, it purchases hundreds of news-

36 *Conestoga*, No. 13-1144 (3d Cir. Aug. 14, 2013) (order denying review en banc).

37 S.Ct. No. 13-354, Pet. for Writ of Cert. at 7; 134 S.Ct. at 2765.

38 *Hobby Lobby*, 134 S.Ct. at 2765; S.Ct. No. 13-354, Pet. for Writ of Cert. at 7.

39 S.Ct. No. 13-354, Pet. at 8, quoting Hobby Lobby Store, Inc. v. Burwell, 723 F.3d 1114, 1122 (10th Cir. 2013).

40 134 S.Ct. at 2766.

41 *Id.*

paper advertisements inviting readers to "know Jesus as their Lord and Savior."[42]

The Greens' faith also impacts the insurance the company offers in its self-funded employee health plan.[43] The Greens believe that life begins at conception, it is worthy of protection, and that providing insurance coverage for items that put human embryos at risk makes them complicit in abortion.[44] Accordingly, the company's health plan excludes coverage for drugs that terminate pregnancy, like RU-486, and for drugs or devices that can prevent an embryo from implanting in the womb, namely, *ella*, Plan B drugs and two types of intrauterine devices.[45]

The HHS Mandate thus placed Hobby Lobby, like Conestoga, on the horns of a dilemma: either risk fines of $100 per day per employee, amounting to over $1.3 million per day, as well as Labor Department and private employee lawsuits, or capitulate and abandon the family's religious convictions.[46] Dropping insurance coverage would place the company at a severe competitive disadvantage and harm their employees – again at the cost of the Greens' religious convictions.[47]

Facing a Hobson's choice, the Greens, Hobby Lobby, and Mardel sued in the United States District Court for the Western District of Oklahoma.[48] They moved for a preliminary injunction,

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42 *Id.*
43 S.Ct. No. 13-354, Pet. at 9.
44 *Id.*
45 *Id.*
46 S.Ct. No. 13-354, Pet. at 10.
47 *Id.*
48 134 S.Ct. at 2766.

which the district court denied, holding that Hobby Lobby and Mardel, as for-profit corporations, had no free exercise rights and thus were not "persons" under RFRA.[49] The court also concluded that the Greens individually could not show a "substantial burden" on their religious exercise, because the mandate's burden on them was only "indirect and attenuated."[50] The Tenth Circuit Court of Appeals granted review and ordered an initial en banc hearing.[51] The full Tenth Circuit reversed the district court in a 5-3 decision, holding that Hobby Lobby and Mardel were in fact "persons" capable of religious exercise and could therefore sue under RFRA.[52] The en banc court also rejected the government's argument that RFRA excludes religious exercise by for-profit corporations. Four judges also found the Greens could sue individually under RFRA.[53] These four judges rejected the government's argument based on the prudential "shareholder standing rule," as that rule "does not bar corporate owners from bringing suit if they have 'a direct and personal interest in a cause of action.'"[54]

The en banc court next held that Hobby Lobby and Mardel were likely to succeed on their RFRA claim.[55] The court first rec-

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49 Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) *rev'd and remanded*, 723 F.3d 1114 (10th Cir. 2013) *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

50 870 F.Supp. 2d at 1294.

51 23 F.3d 1111, at 1125 (10th Cir. 2013).

52 *Id.* at 1140-47 (interpreting 42 U.S.C. § 2000bb-1(a)).

53 *Id.* at 1152-1157 (op. of Gorsuch, J., joined by Kelly and Tymkovich, JJ.); 1184-1189 (op. of Matheson, J.).

54 *Id.* at 1156 (quoting Franchise Tax Bd. v. Alcan Aluminum Ltd., 493 U.S. 331, 336 (1990)). The government later abandoned its shareholder standing argument.

55 *Id.* at 1140-47.

ognized Respondents' sincere religious belief (which the government did not dispute) that providing the mandated coverage would make them morally complicit in abortion.[56] The court then held that the mandate imposed a "substantial burden" on Respondents' exercise of religion because it pressured them to violate that belief.[57] Because the mandate forced Respondents to either "compromise their religious beliefs," "pay close to $475 million more in taxes every year, or pay roughly $26 million more in annual taxes and drop health-insurance benefits for all employees," the court found it "difficult to characterize the pressure as anything but substantial."[58]

The court rejected the government's argument that the burden on Respondents was too attenuated.[59] The government argued the burden was insubstantial, because an employee's decision to use contraception could not properly be attributed to her employer.[60] The court found this reasoning "fundamentally flawed," because it "requires an inquiry into the theological merit of the belief in question rather than the intensity of the coercion applied by the government to act contrary to those beliefs."[61]

The court then concluded that the mandate failed strict scrutiny review.[62] The government's asserted interests in "public health and gender equality" were not compelling "because

56 723 F.3d at 1142.
57 723 F.3d at 1141.
58 *Id.* at 1140-1141.
59 *Id.* at 1141-1142.
60 *Id.*
61 *Id.*
62 *Id.* at 1143.

they are 'broadly formulated,'" because the government offered "almost no justification for not 'granting specific exemptions to particular religious claimants,'" and because "the contraceptive-coverage requirement presently does not apply to tens of millions of people."[63] The court also held that the mandate was not the least restrictive means of achieving those over-broad interests because the government did "not articulate why accommodating [Respondents'] limited request fundamentally frustrates its goals."[64]

C. Conscience Comes to the High Court.

The Hahns and Conestoga Wood filed a petition for writ of certiorari in the Supreme Court, asking it to review the decisions of the Third Circuit.[65] The Hahns presented the Court with this issue: "Whether the religious owners of a family business, or their closely-held, for-profit corporation, have free exercise rights that are violated by the application of the contraceptive-coverage Mandate of the ACA."[66] The federal defendants in *Hobby Lobby* filed a petition for writ of certiorari asking for a review of the Tenth Circuit's decision against it.[67] The government's statement of the issue presented to the Court was cast as a clash between religious freedom and the rights of third persons: "[W]hether RFRA allows a for-profit corporation to deny its employees the health coverage

63 723 F.3d at 1143-44 (quoting O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 546 U.S. 418, 431 (2006).

64 723 F.3d at 1144.

65 S.Ct. No. 13-356 (Sep. 19, 2013).

66 *Id.* at I.

67 S.Ct. No. 13-354 (Sep. 19, 2013).

of contraceptives to which the employees are otherwise-entitled federal law, based on the religious objections of the corporation's owners."[68] On November 26, 2013, the Supreme Court granted review and consolidated the two cases.[69]

The Supreme Court held oral argument in the cases on March 25, 2014. The issue of the scope of legal protections for conscience was raised immediately, with Justices Elena Kagan and Sonia Sotomayor questioning the petitioners' attorney, Paul D. Clement, on the limits the law might impose on a religious employer's objection:

> Justice Sotomayor: Is your claim limited to sensitive materials like contraceptives or does it include items like blood transfusion, vaccines? For some religions, products made of pork? Is any claim under your theory that has a religious basis, could an employer preclude the use of those items as well?[70]

> Justice Kagan: Well, I mean, just take one of the things that Justice Sotomayor asked about, which is vaccinations, because there are many people who have religious objections to vaccinations. So suppose an employer does and -- and refuses to fund or wants not to fund vaccinations

68 *Id.* at I.

69 134 S.Ct. 678 (2013).

70 Sebelius v. Hobby Lobby, S.Ct. No. 13-354 and Conestoga Wood Specialties Corp. v. Sebelius, S.Ct. No. 13-356, Transcript of Proceedings, Mar. 25, 2014 at 4.

for her employees, what -- what happens then?[71]

Clement relied on the RFRA statute itself, arguing that in any case, "the first step in the analysis would be to ask whether or not there's a substantial burden on religious exercise."[72] "[I]f we assume we get past the substantial burden step of the analysis, then the next step of the analysis is the compelling interest and least restrictive alternatives analysis. And every case would have to be analyzed on its own."[73] He noted that particularly compelling cases may exist, which drew a two-word question from Justice Kagan: "Blood transfusions?"[74] Clement's reflexive answer, "Blood transfusions,"[75] appeared to confirm that he viewed such a case as potentially presenting an overriding government interest in mandating coverage. Yet he reiterated that "[E]ach one of these cases... would have to be evaluated on its own and apply the compelling interest-least restrictive alternative test and the substantial burdens part of the test."[76]

Arguing for HHS, Solicitor General Donald B. Verrilli, Jr. opened by citing the concern that informed the government's peti-

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71 Tr. at 5. This argumentum ad absurdum was taken up by other Justices later in the argument, as Justices Breyer and Kennedy raised questions about mandated participation in abortion. Tr. at 63-64 (J. Breyer); 75-76 (J. Kennedy). Verrelli denied that any present law would impose that mandate. Tr. at 75, but Chief Justice Roberts rejoined that for the families before the Court, that was their view – that the four contraceptives objected to caused abortion. Tr. at 76.

72 Tr. at 5, ll1-3.

73 Tr. at 5.

74 Tr. at 6.

75 *Id.*

76 *Id.* at 7.

tion in Hobby Lobby, that of the impact of conscientious objections on the interests of third parties.[77]

> General Verrilli: .... The touchstone for resolving this case is the principle Justice Jackson articulated in *Prince v. Massachusetts*. As he said, "Limitations which of necessity bound religious freedom begin to operate whenever activities begin to affect or collide with the liberties of others or of the public. Adherence to that principle is what makes possible the harmonious functioning of a society like ours, in which people of every faith live and work side by side."[78]

Chief Justice John Roberts rejoined, "That's a statement that is inconsistent with RFRA, isn't it? The whole point of RFRA is that Congress wanted to provide exceptions for the religious views of particular – including proprietors, individuals."[79] Verrilli responded that the point Justice Jackson was making in *Prince* was akin to the point the Court made in unanimity in *Cutter v. Wilkinson*[80] – "[W]hen you are analyzing what is required under RFRA, the court must take account of the way in which the requested accommodation will affect the rights and interests of third parties."[81] Finally, Justice Sotomayor asked Clement about the possible

77 *Id.* at 41.

78 *Id.* (quoting Prince v. Massachusetts, 321 U.S. 158, 177 (1944)).

79 *Id.* at 41.

80 Tr. at 42 (citing Cutter v. Wilkinson, 544 U.S. 709 (2005)).

81 Tr. at 42-43.

application of the accommodation HHS offered nonprofit religious employers, that of certifying their religious objection to contraception and directing their insurer or third-party administrator to provide cost-free coverage to their employees:

> Justice Sotomayor: Will your clients claim that filling out the form, if you're saying they would claim an exemption like the churches have already?

> Mr. Clement: We haven't been offered that accommodation, so we haven't had to decide what kind of objection, if any, we would make to that. But it's important to recognize that as I understand that litigation, the objection is not to the fact that the insurance or the provider pays for the contraception coverage. The whole debate is about how much complicity there has to be from the employer in order to trigger that coverage. And whatever the answer is for Little Sisters of the Poor, presumably you can extend the same thing to my clients and there wouldn't be a problem with that.[82]

III. The Decision in *Burwell v. Hobby Lobby*.

On June 30, 2014, the Court issued a narrowly split decision upholding the right of conscience of the Hahn and Green

82 Tr. at 86-87.

families and their businesses.[83] Five Justices held that RFRA protects the religious exercise of for-profit businesses, and that in this case, the HHS Mandate had imposed a substantial burden on the Hahns' and Greens' faith.[84] The majority also concluded that while the government's interest in providing contraceptive coverage to employees of all businesses, including faith-based ones, could be presumed to be "compelling" under RFRA, it had failed to prove that there were no means available to further that interest than by a direct imposition on the free exercise of religious adherents.[85]

The Court ruled as a preliminary matter that RFRA applies to regulations that govern the activities of closely held for-profit corporations like Conestoga, Hobby Lobby, and Mardel.[86] The majority rejected HHS's argument that the companies could not sue because they were for-profit[87] and that the owners could not sue because the regulations applied only to the companies.[88] The Justices noted that would leave merchants with a difficult choice: give up the right to seek judicial protection of their religious liberty or forgo the benefits of operating as corporations.[89]

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83 Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014).

84 *Id.* at 2755-56 (Syllabus of the Court setting forth holding concerning for-profit businesses under RFRA); *Id.* at 2757 (substantial burden analysis).

85 *Id.* at 2757-58 (Syllabus of the Court).

86 *Id.* at 2768-75, 2775 ("[W]e hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.").

87 *Id.* at 2769 ("According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion. Neither HHS nor the dissent, however, provides any persuasive explanation for this conclusion.").

88 134 S.Ct. at 2767.

89 *Id.* at 2767.

RFRA's text shows that Congress designed the statute to provide very broad protection for religious liberty and did not intend to put merchants to such a choice, according to the Court.[90] While Congress employed the legal fiction of including corporations within RFRA's definition of "persons," the purpose of extending rights to corporations is to protect the rights of those individuals who associated with the corporation, such as shareholders, officers, and employees.[91] "[P]rotecting the free-exercise rights of corporations like Hobby Lobby, Conestoga and Mardel protects the religious liberty of the humans who own and control those companies," the majority concluded.[92]

The Court stated that HHS and the dissenting Justices offered "no persuasive explanation" for their conclusion that corporations cannot "exercise . . . religion."[93] The corporate form alone cannot explain it because the government admitted RFRA protects nonprofit corporations.[94] Nor can the profit motive of businesses, because the Court has entertained free exercise claims of merchants.[95] Moreover, modern corporate law of the states,

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90 *Id.*

91 *Id.* at 2768.

92 *Id.* The Court also noted that it has entertained RFRA and free-exercise claims brought by nonprofit corporations. *Id.* at 2768-69. Moreover, the majority stated, "HHS's concession that a nonprofit corporation can be a 'person' under RFRA effectively dispatches any argument that the term does not reach for-profit corporations; no conceivable definition of 'person' includes natural persons and nonprofit corporations, but not for-profit corporations." *Id.* at 2769.

93 *Id.* at 2769.

94 *Id.*

95 *Id.*, citing Braunfeld v. Brown, 366 U. S. 599 (1961) (acknowledging free exercise rights of Orthodox Jewish merchants); see United States v. Lee, 455 U.S. 252, 257 (1982) (recognizing that "compulsory participation in the social

including those of Pennsylvania and Oklahoma, authorizes corporations to pursue any lawful purpose or business, necessarily including the pursuit of profit in conformity with the owners' religious principles.[96] Finally, the Court rejected HHS' contention that the difficulty of ascertaining the "beliefs" of large, publicly traded corporations indicates that Congress could not have intended to protect them, noting that HHS had not pointed to any example of a publicly traded corporation asserting RFRA rights, and that numerous practical restraints would likely prevent that from occurring.[97]

The majority went on to conclude that as applied to closely held corporations like Conestoga, Hobby Lobby and Mardel, the HHS Mandate violated RFRA.[98] The Mandate required the Hahns and Greens to engage in conduct that seriously violated their sincere religious belief that life begins at conception, on the pain of severe economic consequences if they refused or dropped coverage altogether.[99] Nor could the connection between what Hobby Lobby and Conestoga had to provide and the end they found to be morally wrong be said to be too attenuated because the employee chooses the coverage and contraceptive method she uses.[100] RFRA's question – which the majority accused HHS of "dodg[ing]"[101] is whether the mandate imposes a substantial

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security system interferes with [Amish employers'] free exercise rights").

96 *Id.* at 2771-72.

97 *Id.* at 2774-75.

98 *Id.* at 2775.

99 *Id.* at 2775-76.

100 *Id.* at 2777.

101 *Id.* at 2778.

burden on the objecting parties' ability to conduct business in accordance with their religious beliefs.[102] The Hahns' and Greens' beliefs implicated a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is immoral for a person to perform an act that is innocent in itself but has the effect of enabling or facilitating the commission of an immoral act by another.[103] It is not the Court's province to say that religious beliefs are mistaken or unreasonable, but only whether they are "honest," the Court observed.[104]

Finally, the Court assumed that the government's interest in guaranteeing cost-free access to the four challenged contraceptive methods was "compelling,"[105] but found it had failed to demonstrate that the Mandate was the least restrictive means of furthering that interest as RFRA requires.[106] HHS had other means of achieving its desired goal without burdening religious freedom, the Court held, such as assuming the cost of directly providing contraceptives to women unable to obtain coverage due to their employers' religious objections, or extending the accommodation HHS already offered certain religious nonprofit organizations to nonprofit employers.[107]

The four dissenting Justices, while not united on the

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102 *Id.*

103 *Id.*

104 *Id.* at 2779, citing Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 716 (1981).

105 *Id.* at 2780.

106 *Id.* at 2780 ("Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement.").

107 *Id.* at 2759.

question whether RFRA protects the free exercise of for-profit corporations,[108] maintained that the HHS Mandate did not impose a "substantial burden" on the parties' religious beliefs,[109] that any burden was overridden by the comparative interest in ensuring cost-free access to contraceptives,[110] and that no lesser restrictive means were available to further the government's interest.[111]

> In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ.[112]

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108 Op. of JJ. Ginsburg and Sotomayor, *Id.* at 2795 ("Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA."). Justices Breyer and Kagan wrote a separate dissent, agreeing with Justice Ginsburg that the plaintiffs' case failed on the merits, but stating their position that they "need not and do not decide whether either for-profit corporations or their owners may bring claims under [RFRA]." 134 S.Ct. at 2806.

109 134 S.Ct. at 2798-99.

110 *Id.* at 2787-806.

111 *Id.* at 2801-02.

112 *Id.* at 2787. On this basis, Justice Ginsburg, joined by Justice Sotomayor, distinguished the Court's subsequent decision of the same term affirming RFRA's application to a Muslim prisoner's claim that a grooming policy violated his religious beliefs. Holt v. Hobbs, 135 S.Ct. 853 (2015) ("Unlike the exemption this Court approved in *Burwell v. Hobby Lobby Stores*... accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief. On that understanding, I join the Court's opinion.") (citations omitted).

Writing the dissent, Justice Ginsburg invoked *Planned Parenthood v. Casey*, the Supreme Court's 1992 decision affirming the fundamental right to abortion found in *Roe v. Wade*,[113] as the foundation for the ACA's preventive care mandate:

> The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992). Congress acted on that understanding when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women's needs. Carrying out Congress' direction, the Department of Health and Human Services (HHS), in consultation with public health experts, promulgated regulations requiring group health plans to cover all forms of contraception approved by the Food and Drug Administration (FDA).[114]

Acknowledging that the Hahn and Green families' religious convictions were sincere,[115] the dissent nonetheless maintained that the majority "elides entirely the distinction between the sincerity of a challenger's religious belief and the substantiality of the bur-

113 Roe v. Wade, 410 U.S. 113, 122 (1973).
114 *Id.* at 2787-88.
115 *Id.* at 2798.

den placed on the challenger."[116] In this case, the dissent opined, the burden could not be described as "substantial" because "the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers."[117] The dissent seems to declaim that the act of funding the decisions of third parties could amount to a substantial burden on religious exercise:

> Should an employee of Hobby Lobby or Conestoga share the religious beliefs of the Greens and Hahns, she is of course under no compulsion to use the contraceptives in question. But "[n]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer's] decision or action."[118]

The majority reversed the decision of the Third Circuit, ordering the lower court to reconsider its decisions to deny Conestoga pre-

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116 *Id.* at 2799.

117 *Id.* at 2799.

118 *Id.* (quoting Grote v. Sebelius, 708 F.3d 850, 865 (7th Cir. 2013) (Rovner, J., dissenting)). See also *Id.* ("Even if one were to conclude that Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well being.... the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening.") (citation omitted).

liminary injunctive relief against the HHS Mandate, and affirmed the Tenth Circuit's injunction in favor of Hobby Lobby.[119] By the end of 2014, the district courts of Oklahoma and Pennsylvania had both entered permanent injunctions against the federal agencies that implement the ACA, ordering them not to apply the Mandate against these businesses or their owners or to impose the penalties for non-compliance the ACA provides through the Internal Revenue Code.[120]

IV. The Possible Consequences of Hobby Lobby.

Burwell v. Hobby Lobby bodes well for claims of religious conscience against federal statutory and regulatory impositions. The majority opinion's analysis amounts to a broad affirmation of the right of religious exercise in the context of impositions on both corporate and individual consciences, without excluding categories of exercise such as business activity. The full Court (including the dissent) reaffirmed the First Amendment principle that courts will not ordinarily inquire into the sincerity and centrality of claimants' religious beliefs.[121] The majority focused its "sub-

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119 *Id.* at 2785.

120 See Conestoga Wood Specialties Corp. v. Sebelius, No. 5:12-cv-06744, Order filed Oct. 9, 2014 ("Defendants are permanently enjoined from enforcing against Plaintiffs, their group health plan, and the group health insurance coverage provided in connection with that plan, the statute and regulations that require Plaintiffs to provide their employees coverage for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity[.]"); Hobby Lobby Stores, Inc. v. Sebelius, No. 5:12-cv-01000, Judgment filed Nov. 19, 2014 ("[D]efendants are permanently enjoined from enforcing against the corporate plaintiffs the regulations *Id*entified as the 'contraceptive mandate' in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).").

121 134 S.Ct. at 2778-2779, 2798.

stantial burden" analysis on the coercive effects of the government's penalties for non-compliance,[122] in contrast to the dissent, which reasoned that the plaintiffs were not substantially burdened by the requirement that they fund the independent choices of third-party employees.[123] Assuming for the sake of argument that the Mandate satisfied the "compelling interest" prong of the test, while noting that the proper application of the standard requires an assessment of the strength of the government's interests viz. the particular burden on the particular claimants,[124] the Court went on to hold that the Mandate was not a "narrowly tailored" means of advancing the government's interest in increasing access to contraceptives.[125] The Mandate was underinclusive, according to the majority, because it exempted potentially tens of millions of individuals through grandfathering existing plans and by providing statutory and regulatory exceptions to the employer Mandate and to the individual mandate and its penalties.[126]

Obviously, the *Hobby Lobby* decision has direct precedential application to the dozens of lawsuits involving for-profit religiously-owned businesses, and the perhaps thousands of sim-

122 *Id.* at 2775-2779.

123 *Id.* at 2797-2799. The dissent seemed to completely miss the point in this regard. The claim of religious accommodation was against having to directly fund what the plaintiffs regarded as immoral acts of employees. Unlike the funds in a pay check, which are fungible and may be directed by recipients to any licit or immoral purpose without attributing moral blame to the employer, the ACA mandates that employers pay for "preventive care" including pharmaceuticals that are inimical to human life. This involves a direct participation in the act and imbues moral culpability to the entity or person that knows the coverage will be used this way.

124 134 S.Ct. at 2779.

125 *Id.* at 2780-2783.

126 *Id.* at 2764.

ilarly-situated businesses. At this writing, the Justice Department is negotiating judgments with plaintiffs' counsel and entering dismissals of these lawsuits across the country.[127] Generally, Justice's position is that it will accept an entry of final injunctive relief and an award of reasonable fees and costs in all these cases.[128] Beyond the ACA context, *Hobby Lobby* augurs at least for legal recognition of the First Amendment right of free exercise and conscience of closely-held corporations and other forms of ownership such

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127 See, e.g, Briscoe, et al. v. Burwell, 1:13-cv-00285 (USDC Dist. Colo.); Newland v. Burwell, 1:12-cv-01123 (USDC Dist. Colo.); Sioux Chief MFG. Co, Inc. et al v. Burwell et al, 4:13-cv-00036 (USDC W.Dist. MO); Seneca Lumber Co. v. Burwell, 12-cv-00207 (USDC W.Dist. Pa.).

128 Generally, the form of judgment has sought to codify the legal relationship beween the partiesbased upon the state of the ACA regulations at the time of settlement, without anticipating the impact of potential future applications. For example, the judgment entered on behalf of Conestoga Wood provides:

> Defendants are permanently ENJOINED from enforcing against Plaintiffs, their group health plan, and the group health insurance coverage provided in connection with that plan, the statute and regulations that require Plaintiffs to provide their employees coverage for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity[.]" See, e.g., 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv); 77 Fed. Reg. 8725 (Feb. 15, 2012).1 This Order applies only to requirements regarding the provision of coverage for the contraceptive services to which Plaintiffs object on religious grounds. It should not be construed as applying to any other healthcare coverage required by law, including coverage of the other services required by the regulations regarding Women's Preventive Healthcare.

No. 5:12-cv-06744 (Docket No. 82, filed Oct. 2, 2014). The court further stated, "At the urging of the Government, and in an overabundance of caution, we note that should any future legislation or regulation come into effect providing for-profit entities a religious accommodation to the contraceptive coverage mandate, the Government reserves its right to enforce such legislation or regulation against Plaintiffs." *Id.*, n.1.

as Limited Liability Corporations ("LLCs") and partnerships, although the Supreme Court's limitation of its holding to this context suggests that it will balance the litigants' interests differently in a case involving public ownership.

It would appear at first blush that a decision for corporate free exercise by for-profit businesses would naturally sweep in nonprofit religious organizations such as ministries, ecclesiastical organizations and schools. If a commercial enterprise can exercise faith in the workplace, surely all the more so for a faith-based nonprofit organization. In the ACA context, however, an HHS rule creating an "accommodation" for many nonprofit corporations has perpetuated the litigation.[129] The rule permits nonprofits to inform HHS by notification that it is a religious nonprofit that objects to providing preventive services to its employees, and HHS will require the nonprofit's carrier or third-party administrator to provide coverage to the nonprofit's employees. Most of the claimants that fell within the scope of the "accommodation" have refused it and chosen to continue to press the issue in court, asserting that the notification is a form of providing for coverage for objectionable drugs in which they cannot participate.[130]

Finally, there is at least one lawsuit on behalf of a non-

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129 Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092 (Aug. 27, 2014) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510 & 2590; and 45 C.F.R. pt. 147); see also 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii).

130 Just before this article went to print, the U.S. Supreme Court appears to have given renewed vitality to these cases by granting, vacating and remanding the petition for writ of certiorari of Notre Dame University for further consideration in light of *Hobby Lobby*. Univ. of Notre Dame v. Burwell, Sup. Ct. No. 14-392 (Mar. 9, 2015). Notre Dame had argued that Hobby Lobby did not require a holding that the accommodation cured the RFRA violation.

profit non-religious association and its employees, which argues that providing coverage for abortion-causing drugs violates its corporate right of equal protection, its right to non-arbitrary rules under the Administrative Procedure Act, and, in the case of the individual employees, their rights under RFRA.[131] Additionally, persons subject to the Individual Mandate allege that their right to conscientious objection to purchasing coverage for elective abortion on the ACA-created state exchange system violates their right to free exercise and RFRA.[132]

Whether within the context of the ACA and its mandates, or beyond it in other situations involving federal statutory and regulatory impositions on corporate and individual conscience, *Burwell v. Hobby Lobby* will continue to impress upon federal courts the need to show deference to claims of burden on religious exercise even in the business context, as well as the importance of a searching analysis of the means government chooses to further its chosen ends that trammel religious conscience.

131 March for Life, et al. v. Burwell, No. 14-cv-1149 (USDC D.C.).

132 Bracy v. Burwell, No. 3:14-c-00593 (D. Conn. Filed May 1, 2014); Howe v. Burwell, No. 2:15-cv-6 (D. Vt. Filed Jan. 14, 2015); Doe v. Burwell (D.R.I. Filed Jan. 1, 2015).

WHITEWOOD V. WOLF

Jonathon Nelson*

ABSTRACT: *The decision in the 2014 case Whitewood v. Wolf was monumental for the future of marriage in the Commonwealth of Pennsylvania. Continuing in the precedent of the 2013 Supreme Court decision of United States v. Windsor, the U.S. District Court of Pennsylvania declared Pennsylvania's marriage laws to be unconstitutional according to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, removing the ban on same-sex marriage in the Commonwealth. The Whitewood decision not only represents a huge change in the cultural attitude toward marriage, but is also a continuation of the expansion of the federal courts' use of the U.S. Constitution to strike down state laws. For those who support the decision, it is seen as a necessary step for making the Constitution work for all citizens, including same-sex couples. For those who oppose the decision, it is seen as a dangerous step towards the complete undermining of federalism and the eroding of our cultural traditions.*

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I. Introduction

In *Whitewood v. Wolf*, the U.S. District Court for the Middle District of Pennsylvania ruled that the 1996 law banning same-sex marriage in the Commonwealth was unconstitutional. The court found that Pennsylvania's marriage laws violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. This decision, while not surprising given the contemporary cultural climate, may be a continuation of Federal Courts undermining federalism to promote political ends; whether this is good or bad may depend on one's own political ideology. Regardless, the decision is here to stay and will likely be used to expand the legalization of same-sex marriage in other states.

II. Procedural History

The Plaintiffs included eleven same-sex couples, five of whom were seeking marriage within the Commonwealth and six of whom desired to have their out-of-state marriages officially recognized by the Commonwealth. The Plaintiffs filed the suit on July 9, 2013 against the Defendants, who included Governor Thomas Corbett and Michael Wolf, Secretary of the Pennsylvania Department of Health. On September 30, Defendants filed motions to dismiss, and during these proceedings the Plaintiffs voluntarily dismissed Corbett and two other Defendants from the case. On November 7, Plaintiffs filed an amended complaint against Defendants Wolf and Petrille, and the Defendants' motion to dismiss was rejected on November 15. After the conclusion of

discovery, the parties filed cross-motions for summary judgment; the parties agreed that there were no genuine disputes of material fact. Therefore, the constitutional issues presented to the Court were "fully at issue and ripe for [their] disposition."[1]

III. Legal Background

In 1996, the Pennsylvania state legislature amended its marriage laws to include anti-ceremony and anti-recognition provisions applicable to same-sex couples. The amendment explicitly defined marriage as "[a] civil contract by which one man and one woman take each other for husband and wife."[2] The amendment also made "void in this Commonwealth" any "marriage between persons of the same sex . . . entered into in another state or foreign jurisdiction, even if valid where entered into."[3] The Pennsylvania legislature cited "moral opposition" as the primary reason for banning same-sex marriages in the Commonwealth.[4] These statutes are often referred to as Pennsylvania's Defense of Marriage Act (DOMA), in reference to the Federal law of the same name.

IV. The Case

A. Facts

There were no genuine disputes of material fact from either party. The Plaintiffs filed the suit in order to receive legal recognition from their home state of the relationships that were

1 Whitewood v. Wolf, 992 F.Supp.2d 410, 10 (M.D. Pa. 2014).
2 Marriage Law, 23 Pa. C.S. § 1102 (1996).
3 Marriage Law, 23 Pa. C.S. § 1704 (1996).
4 *Id.*

already in place; according to the majority opinion, "the plaintiff couples are spouses in every sense, except that the laws of the Commonwealth prevent them from being recognized as such."[5] The Court's opinion cited four ways in which each of the couples were already living as spouses, and thus should be treated as such in the eyes of the law:[6]

For better, for worse: These couples had blended their property and finances, buying homes and making decisions together. Some of them had started families by giving birth to or adopting children. Pennsylvania's marriage laws cause hardship for these couples, from extra property taxes to adoption complications.

For richer, for poorer: While the Plaintiff couples have shared their financial resources together, without the recognition of marriage, it is more difficult for them to be financially secure.

In sickness and in health: Since the Commonwealth of Pennsylvania considers the couples legal strangers, they may be left vulnerable in times of medical emergencies, even with the preparation of powers of attorney.

Until death do us part: Like many traditionally married couples, the Plaintiff couples have demonstrated intentions of living their lives together. The lack of recognition of their relationships by the Commonwealth makes this more difficult.

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5 Whitewood v. Wolf, 992 F.Supp.2d at 4.

6 *Id.* at 5-8.

B. Judicial Reasoning

In the end, the Court found that Pennsylvania's Marriage Laws violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and therefore struck down the restrictions on same-sex marriage. However, before the Defendants had to defend the same-sex marriage ban against the Due Process and Equal Protection Clauses, they raised two preliminary challenges to the Plaintiffs. First, the Defendants contended that the Supreme Court's 1974 decision in *Baker v. Nelson* established precedent for there to be "no substantial federal question implicated by any of Plaintiffs' claims."[7] The Court rejected this defense, considering that there were "significant doctrinal developments in the four decades that have elapsed since it was announced by the Supreme Court."[8] The Court found no reason to depart from their sister district courts' in rejecting Baker's precedential value.

Second, the Defendants contended that the Plaintiffs lacked a burden of proof necessary under the statute 42 U.S.C. § 1983. This defense rests on the Defendants' assertion that they did not enforce Marriage Laws in such a way as to cause the Plaintiffs cognizable injury.[9] The Court used the precedent set in the 2013 Supreme Court decision in *United States v. Windsor* to reject this argument. In *Windsor*, the Supreme Court decided that the non-recognition of same-sex couples' marriages causes stigmatizing, cognizable harms against same-sex couples, which would reason-

7 *Id.* at 10.

8 *Id.* at 11.

9 *Id.* at 14.

ably include those who live in Pennsylvania and are subject to the Marriage Laws of the Commonwealth. Thus, the Court determined that the Plaintiffs had cause for their complaint.

After dismissing these two preliminary challenges from the Defendants, the Court turned to the substantive constitutional questions raised by the Plaintiffs challenge to the Marriage Laws. The first question was whether the Marriage Laws violate the Plaintiffs' due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution. The second question was whether the Marriage Laws violate the Plaintiffs' rights to equal protection, also guaranteed by the Fourteenth Amendment.

The Due Process Clause preserves the individual's right to liberty, defined by the Supreme Court as "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[10] The fundamental right to marry is included within this right to liberty. Both parties agreed on this, but the conflict occurred over whether the fundamental right to marry includes marriage to a person of the same-sex.[11] The Court cited the Supreme Court's 1967 decision in *Loving v. Virginia*, which overturned a longstanding ban on interracial marriage, as precedent for clarifying "the boundaries of the fundamental right to marry when tested by new societal norms."[12] More recently and relevantly, in *Lawrence v. Texas* the Supreme Court found that gay and lesbian individuals do not forfeit their constitutional rights

10 Whitney v. California, 274 U.S. 357, 851 (1927).

11 Whitewood v. Wolf, 992 F.Supp.2d at 4.

12 *Id.* at 18.

simply because of their sexual orientation, therefore same-sex couples do not forfeit their fundamental right to marry. Thus, the Court majority found that 23 Pa. C.S. § 1102 violates this fundamental right to marry and is unconstitutional. The Court also decided that 23 Pa. C.S. § 1704, which refuses to acknowledge same-sex marriages legally performed in other jurisdictions, also violates the Plaintiffs' fundamental liberty and is unconstitutional.[13]

The Equal Protection Clause prohibits states from denying the equal protection of its laws to any person within its jurisdiction. Laws reviewed under the Equal Protection Clause are subject to three different kinds of scrutiny depending upon the demographics of who the law is imposed upon. Strict scrutiny is reserved for laws engendering suspect classifications, such as race or national origin. Intermediate scrutiny is applied to statutes engendering "quasi-suspect" classifications, such as sex or illegitimacy. Rational-basis review is used when the statute does not target a suspect or quasi-suspect group. The Defendants argued for rational-basis review, while the Plaintiffs argued for intermediate scrutiny. In order for intermediate scrutiny to be applied here, the Court must determine whether classifications based on sexual orientation can be qualified as quasi-suspect. The Supreme Court has established four criteria for determining whether a class qualifies as a quasi-suspect: (1) the group has been historically been subjected to "purposeful unequal treatment"[14]; (2) the characteristic

13 *Id.* at 21.

14 *Id.* at 27.

of the class "bears no relation to ability to perform or contribute to society"[15]; (3) the class exhibits characteristics that define them as a discrete group; and (4) the class is "a minority or politically powerless."[16] The Court determined that gay and lesbian individuals fulfill the first criteria, citing the law in question as an example, and that the second and third criteria were fulfilled axiomatically. The Court also found that the fourth criteria is weakly, but sufficiently fulfilled. Thus, through the fulfillment of these four criteria, intermediate scrutiny is applied to the statutes.[17]

In order for the statutes "to survive intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective."[18] The Defendants argued that the governmental objectives served by the Marriage Laws included "the promotion of procreation, child-rearing and the well-being of children, tradition, and economic protection of Pennsylvania businesses."[19] According to the Court, the Defendants only argue that these objectives are "legitimate," not the required "important"; further, the Defendants fail to "explain the relationship between the classification and the governmental objectives served."[20] Thus, the Court found that the Marriage Laws do not overcome intermediate scrutiny and violate the Equal Protection Clause, and therefore are unconstitutional.

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15 *Id.*
16 *Id.* at 28.
17 *Id.* at 36.
18 *Id.* at 23.
19 *Id.* at 37.
20 *Id.*

V. Implications of the Case

The decision in *Whitewood* seems to be a sensible continuation of the Supreme Court's decision in *United States v. Windsor*. The landmark decision in *Windsor* overturned decades of marriage law that prohibited same-sex marriage. What differentiates *Whitewood* and other similar cases is the use of the Federal Court system to overturn a *state* law. In his dissenting opinion in *Windsor*, Justice Scalia warned the Court that, despite the intentions of Justice Kennedy in his majority opinion, this case would be used to justify future overturns of state bans of same-sex marriage.[21] Scalia argues, "By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition."[22] Supporters of same-sex marriage, such as the American Civil Liberties Union (ACLU), happily agreed with Scalia's analysis.[23] The decision in *Windsor* may have even given groups like the ACLU encouragement to fight against same-sex marriage bans on the state level, including Pennsylvania's laws in this case. The *Whitewood* decision has proven Scalia's concerns, and the ACLU's optimism, to be justified.

Another implication of both the *Windsor* and *Whitewood* decisions is the continued expansion of the Federal Courts' use of the Equal Protection Clause to strike down state laws. While the original intended purpose of the Fourteenth Amendment was

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21 United States v. Windsor. 570 U.S. ___ (2013). Docket No. 12-307.

22 *Id.* at 24 (Scalia, J., dissenting).

23 Josh Gerstein, *The DOMA decision ripple effect*. Politico. June 26, 2013. http://www.politico.com/story/2013/06/doma-decision-gay-marriage-ripple-effect-93479.html?hp=t1_3.

to prevent the states from passing laws which violated the constitutional rights of their citizens, the most contextual reading of the Amendment would interpret the Equal Protection Clause to be primarily concerned with race or ethnicity;[24] in these cases, the discriminated class is sexual orientation. The Supreme Court recognizes this distinction, using the term "quasi-suspect" to differentiate the historically protected classes of race or national origin from the more recently protected classes of gender or sexual orientation.

The use of the quasi-suspect classification for intermediate scrutiny in association with the Equal Protection Clause is fairly new. The first use of intermediate scrutiny was by the Supreme Court in the 1988 decision in *Clark v. Jeter*.[25] Gender was introduced as a quasi-suspect classification in the 1996 decision in *United States v. Virginia*.[26] The decision in *Windsor* in 2013, however, was the very first time that the quasi-suspect classification was applied to gay and lesbian individuals. The *Whitewood* decision continues in the precedent set by the *Windsor* decision, further expanding the power of the quasi-suspect classification in constitutional cases. The major difference is that the *Whitewood* decision uses intermediate scrutiny to undermine federalism; Justices Roberts and Scalia claimed that federalism was used to defend the *Windsor* decision.[27]

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24 *Equal Protection: An Overview*, CORNELL UNIVERSITY LAW SCHOOL, http://www.law.cornell.edu/wex/equal_protection.

25 Clark v. Jeter, 486 U.S. 456 (1988).

26 United States v. Virginia, 518 U.S. 515 (1996).

27 United States v. Windsor, 570 U.S. ___ (2013), Docket No. 12-307 at 2 (Roberts, J., dissenting) and 15 (Scalia, J., dissenting).

The *Whitewood* decision's impact has already been seen, as the precedent for quasi-suspect classification of gay and lesbian individuals has been used in several sister district court decisions to overturn or amend same-sex marriage laws.[28]

VI. Conclusion

While the broader judicial implications of the decision may yet to be seen, the decision in *Whitewood v. Wolf* is certainly a major change for marriage in Pennsylvania as the Commonwealth becomes the nineteenth state to declare same-sex marriage legal. For those who favor same-sex marriage, it is a step forward to a more just system that does not discriminate against individuals based on their sexual orientation. For those who disagree with same-sex marriage, it is a step backward, away from a traditional foundation of civil society. Despite the opinions of each side, it looks as though the decision is here to stay. Governor Thomas Corbett has decided that he will not appeal the decision, as he does not expect the appeal to be successful.[29] Legislators who voted for the 1996 Marriage Laws claim to have changed their minds, saying they would vote differently today;[30] whether this is a genuine

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28 See Love v. Beshear, 989 F.Supp.2d 536 (W.D. Ky. 2014), Smithkline v. Abbott 740 F.3d 471 (9th Cir. 214), Bassett v. Snyder, 951 F. Supp. 2d 939 (E.D. Mich. 2013), and Robicheaux v. Caldwell 2 F. Supp.3d 910 (E.D. La. 2014).

29 McNees Wallace & Nurick LLC, *Whitewood v. Wolf Legalizes Same-Sex Marriage in Pennsylvania*, LexisNexis Legal Newsroom Constitutional Law and Civil Rights, June 28, 2014, http://www.lexisnexis.com/legalnewsroom/constitution/b/constitutional-civil-rights/archive/2014/06/18/whitewood-v-wolf-legalizes-same-sex-marriage-in-pennsylvania.aspx.

30 Associated Press, *Since Pennsylvania's gay marriage ban in 1996, minds have changed*, PennLive, July 13, 2013, http://www.pennlive.com/midstate/index.ssf/2013/07/since_pennsylvanias_gay_marria.html.

change or a reflection of a change in the opinions of the voters is irrelevant. As a whole, the culture surely seems to be shifting towards toleration and acceptance of same-sex marriage as a legitimate institution.

INSIDER TRADING:
REVISITING MANNE'S LACK OF HARMED PARTY AND ENTREPRENEURIAL COMPENSATION RATIONALES

Kyle Kreider*

ABSTRACT: *Insider trading is widely perceived as somehow harmful. However, the exact nature of that harm is often very hard to pin down, and in many cases no party is harmed when people who have inside information but no fiduciary duty to shareholders trade on material, nonpublic information. Due to the complicated problem of tracking harm, insider trading regulation and case law often rests on misapplied, convoluted, or inconsistent legal foundations, driven by a concern for information asymmetries among market participants. Furthermore, the harms that are generated by insider trading can be dealt with by private agreements, whether through corporate bylaws or contracts, including non-disclosure or non-use agreements. Finally, in some situations, it may be preferable to allow insider trading as a form of compensation for entrepreneurial activity, and insider trading may actually be socially beneficial.*

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I. INTRODUCTION

Insider trading occurs when a person uses material, non-public information to make a profit in a securities transaction, usually through the purchase or sale of stocks or options. This practice is generally accepted as a white collar crime, an abuse of the general public by the rich, privileged, corporate types of Wall Street. However, the exact nature of the abuse is not clear. The question of whether anyone is harmed by insider trading is in many cases not easily answered, and the reasoning used to apply the law is often convoluted. Although the driving force behind insider trading regulation seems to be a concern for information asymmetries and a need for "parity of information," this rationale has not found support in court decisions or common law principles. The judicial rejection of these rationales has forced regulators and courts to propose and approve rationales that require mental gymnastics to be grounded in the statute and common law. Henry G. Manne was one of the first to point out the problems with regulation of insider trading, and this essay will revisit and affirm two of his primary arguments in favor of relaxing the law in this area: insider trading does not clearly harm anybody and may, in fact, provide an efficient and useful compensation scheme to certain corporations.[1]

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1 Although Frank P. Smith explored a similar thesis in MANAGEMENT TRADING, STOK-MARKET PRICES AND PROFITS (Yale University Press 1941), it was Manne's work that brought the topic to the attention of legal academia, *see* HENRY G. MANNE, INSIDER TRADING AND THE STOCK MARKET (Free Press 1966). Manne was a pioneer in the Law and Economics movement, and he influenced legal practice both through his groundbreaking academic work and through his entrepreneurial approach to legal education. The Law and Economics Center he founded has been attended by federal judges and Supreme Court justices, and he served as Dean of the George Mason Law School from 1986 to 1997. Sadly, Henry G. Manne passed away recently on January 17, 2015. This author

II. BACKGROUND

General insider trading is not expressly forbidden in any legal statute. Most insider trading is prosecuted under is Rule 10b-5, an SEC regulation empowered by § 10(b) of the Securities Exchange Act of 1934.[2] Rule 10b-5 specifically targets manipulative or deceptive practices leading to securities fraud.[3] There is no straightforward argument. However, it is detailed that any person with inside information who does not manipulate or deceive the market, but merely keeps silent, commits securities fraud. Due to this hole in the application of Rule 10b-5 to insider trading, courts have upheld and struck down various lines of arguments, making the development of insider trading law similar to common law, as much of it is judge-made. Specifically, the two actionable harms are the breach of fiduciary responsibility by a corporate insider to the shareholders in whose interest he is supposed to be acting and the misappropriation of inside information by outsiders who

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will never forget the thrill he experienced after Manne sent him an encouraging email out of the blue after an earlier version of this essay was posted online for an undergraduate economics conference.

2 Stephen Bainbridge, *Insider Trading: An Overview*, SSRN 1 (2000). This essay will focus on Rule 10b-5, but insider trading around a tender offer is also subject to Rule 14e-3, the interpretation of which is less murky than that of Rule 10b-5.

3 Rule 10b-5 reads as follows: It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. 17 C.F.R. §240.10b-5 (2015).

deceive the source of the information. However, the application of these rationales leaves significant holes while breaking with traditional interpretations of fiduciary responsibilities.

Few questioned the illegality of insider trading until Manne's book, *Insider Trading and the Stock Market*, was published in 1966. Manne argued three main points in favor of allowing insider trading: it promotes market efficiency, nobody is actually harmed, and it provides an efficient method of compensation for entrepreneurial activity within the firm.[4] Manne's bold statements ignited a backlash by supporters of the law, but it also rejuvenated the scholarship of corporate law and legal theory.[5] All of Manne's supporting arguments have been dissected and challenged, but out of the three primary points, the most widely-accepted is the improved efficiency of the markets. Although they remain in disagreement on the *extent* that insider trading actually improves efficiency, critics do not usually focus their attention to this point. However, Manne's other two arguments are often challenged. If Manne is correct in that insider trading is a victimless crime, there is no good rationale for regulation and sacrificing efficiency. Furthermore, if Manne is right that insider trading can encourage entrepreneurial activity through well-aligned incentives, regulation goes beyond just hindering market efficiency to actually harming firms. For these reasons, Manne's subsequent two positions bear closer examination in light of developments since he first proposed them.

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4 Manne, *supra* note 1, 78-158.

5 Stephen Bainbridge, *Insider Trading: An Overview*, vii-viii.

Insider trading law has evolved since its origin. The first interpretation by the SEC in 1961, the "disclose or abstain" rule, required anyone with material, nonpublic information to either disclose it before trading or abstain from trading; if company directors could not disclose without breaking other responsibilities, then no trading could occur.[6] This rule was applied by the Second Circuit in *SEC v. Texas Gulf Sulphur Co.* in 1968, where officers and employees of Texas Gulf Sulphur Co. bought the company's stock when a mineral exploration returned positive results and released a misleading statement to quell rumors of the discovery before the news was made public.[7] However, in *Chiarella v. United States* in 1980, a case involving an employee of a financial printing company trading on information gleaned from handling documents relating to corporate takeover bids, and in *Dirks v. SEC* in 1983, a case involving a research analyst who was notified about fraudulent activity at a company and told clients about the fraud, the U.S. Supreme Court narrowed the limits of these responsibilities to those with a fiduciary duty to disclose.[8] In neither case was the defendant employed by the company that they were buying or selling stock in, nor did an insider breach a fiduciary duty to tip them of the inside information. The fiduciary

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6 *In re* Cady, Roberts and Co. 40 S.E.C. 907 (1961). In this case, a board member of Curtiss Wright Corporation who was also a partner at the brokerage firm, Cady, Roberts and Co., divulged the details of a pending dividend cut during a recess of the directors' meeting to a partner at his brokerage firm, who then sold and shorted shares of the company for several accounts before the decision was announced.

7 SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968).

8 Chiarella v. United States, 445 U.S. 222 (1980). *See also* Dirks v. SEC, 463 U.S. 646 (1983).

duty can be extended to outside parties and tippees, but the breach of fiduciary duty is still necessary to the prosecution. The misappropriation theory was then developed by the SEC to extend liability to those who did not have fiduciary duties to the shareholders on the other end of a trade, but did have duties to the source of the information. The U.S. Supreme Court first encountered this theory in *Carpenter v. U.S.* in 1987, a case where a *Wall Street Journal* reporter, whose columns were known to move the markets, would share their content with two co-conspirators and share in their profits.[9] The Second Circuit decided that the reporter misappropriated information that was the property of *Wall Street Journal*, and the Supreme Court affirmed that decision with a rare 4-4 tie, due to the retirement of Justice Powell.[10] The U.S. Supreme Court later upheld this theory in *U.S. v. O'Hagan* in 1997, a case where a partner at a law firm learned that the firm's client was planning to make a tender offer and misappropriated that information by buying stock options for the target company.[11] Then, in 2000, the SEC enacted Regulation FD (for "fair disclosure"), requiring corporations to release material information simultaneously to all the public through a press release.[12] Most recently, in *U.S. v. Newman*

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9 United States v. Carpenter, 791 F.2d 1024, 1026-27 (2d Cir. 1986), aff'd, 484 U.S. 19 (1987).

10 The appeal from the Second Circuit was originally denied certiorari, but Justice Powell wanted to accept the case to reject the misappropriation theory because it did not follow from *Chiarella*, but although he succeeded in convincing his colleagues to grant certiorari, he retired before the case was heard. *See* Adam C. Pritchard, *Justice Lewis F. Powell, Jr. and the Counterrevolution in the Federal Securities Laws*, 52.5 DUKE L.J. 841-949 (2003).

11 United States v. O'Hagan, 521 U.S. 642 (1997).

12 Exchange Act Rel. No. 43,154 (Aug. 15, 2000).

in 2014, the Second Circuit held that the tippee must know that the insider received a personal benefit for the tip in order to be convicted, continuing the trend of the courts restricting the government's pursuit of "remote tippees."[13] Thus, insider trading law, loosely based in statutory and common law, has changed significantly throughout the years.

The legality of insider trading is not just an ivory tower debate. The law is rather ill-defined and murky, yet the consequences of breaking the law are serious. Just ask Martha Stewart, who served time in prison for making false statements to investigators in an insider trading investigation, or more recently, Mark Cuban, who had to spend a small fortune defending himself against insider trading charges.[14] If no compelling argument exists pointing to the harm caused by insider trading, then people who have caused no harm are at risk of being convicted and having their reputations sullied. Furthermore, if compelling arguments point to societal benefits arising out of insider trading activity, then regulating insider trading has damaging consequences. In fact, the whole development of insider trading law may be a misguided attempt at legislating areas where the majority of common law tradition did not, and where no law is necessary today.

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13 United States v. Newman, Nos. 13-1837-cr, 13-1917-cr, slip op. at 18 (2d Cir. Dec. 10, 2014).

14 *Martha Stewart Convicted on All Four Counts*, FOX NEWS (2004), http://www.foxnews.com/story/2004/03/08/martha-stewart-convicted-on-all-four-counts/. See also Jana Pruet, *Billionaire Mark Cuban Cleared of Insider Trading; Blasts U.S. Government*, REUTERS (2013), http://www.reuters.com/article/2013/10/16/us-usa-sec-cuban-verdict-idUSBRE99F0ZM20131016/.

III. MAIN ARGUMENTS

Trading on inside information in securities markets does not explicitly harm anyone. Because of the impersonal and anonymous nature of securities markets, ascertaining who is on the other end of a trade involving inside information is impossible. The classic example is that of Trader A, who knows that a specific company will soon publish news of a development that increases the value of that company. Trader A buys stock in the market from Trader B at the current price, before the price rises on the news of the development. However, given the anonymity of the market, Trader A and Trader B do not know each other. Trader A did not deceive Trader B, but merely kept silent, and Trader B willingly, free of fraud or coercion, chose to sell the stock of the company.[15] The parity of information view expressed in the "disclose or abstain" view rests on the idea of silence as fraud. Yet, as McGee and Block point out in their 1989 article "Information, Privilege, Opportunity and Insider Trading," under no legal tradition is knowledge of an impending change in price and refusal to share this knowledge with the other party a fraudulent action.[16] The harm imposed on the seller, Trader B in this example, is simply a missed chance at capital gains from stock price appreciation, and cannot be legally pinned on Trader A. Trader B could just as readily have sold his stock to Trader X, another outsider, with the same resulting economic impact on Trader B. This case is no

15 Robert W. McGee and Walter E. Block, *Information, Privilege, Opportunity and Insider Trading*, 10.1 N. ILL. U. L. REV. 6, 2-35 (1989).

16 *Id.* 5-7.

different than anyone in any other speculative endeavor that misjudges the future price of a good and is not a basis for regulation.

While no harmful activity occurred in the above example, the situation changes slightly if Trader A is a director or manager of the company in question. In this case, because of the separation of ownership and management in corporations, the director is entrusted with the management of the company by the owners, the shareholders. In this situation, the argument goes, Trader A has a fiduciary duty to Trader B, a shareholder, to manage the company in Trader B's best interests, a duty that is breached when Trader A buys stock from Trader B on the basis of information gained through entrusted duty of managing the firm. The alleged fraud occurs through silence only because the insider has a duty to speak up. This is the fiduciary restriction that the U.S. Supreme Court imposed in the *Chiarella* and *Dirks* cases. Therefore, a trader with inside information, but no fiduciary duty to the stockholder, does not violate any rights of the stockholder on the other side of the trade, even if the stockholder becomes worse off when the inside information is made public.[17] The harm proposed by the fiduciary duty does not rely on the fact that the seller in the example is worse off but that the seller was made so by somebody in whom they had entrusted the management of their assets and was obligated to disclose the information.

Curiously enough, when the U.S. Supreme Court upheld the breach of fiduciary responsibility line of reasoning as a limit

17 Donald C. Langevoort, "*Insider Trading and the Fiduciary Principle: A Post-'Chiarella' Restatement.*" 70.1 CAL. L. REV. 18-24 (1982).

on SEC regulation, the common law referred to was actually the minority of common law in the United States, with only three states adopting it.[18] Common law in the majority of the states held that directors have a fiduciary responsibility to the corporation, but not to the shareholders themselves.[19] Furthermore, in the minority of states where the directors had a fiduciary responsibility to the shareholders, failure to disclose was only considered fraudulent in a face-to-face transaction where the outsider could prove reliance on the insider's silence in the transaction and only when the outsider had a pre-existing fiduciary relationship with the insider.[20] Clearly this doctrine would not apply to transactions on anonymous exchanges. The *Chiarella* decision not only used the minority common law doctrine instead of the majority doctrine, but it also failed to apply the doctrine faithfully. Therefore, although the U.S. Supreme Court restricted the abilities of the SEC to regulate insider trading, they actually did not restrict it as much as the common law upon which they based their reasoning would seem to have required. Hence, in a number of cases, it is still unclear whether the insider actually commits fraud by silence in an anonymous transaction.

This interpretation and application of minority common law and fiduciary duties has other complications. First, as Nagy points out in her 2009 article, "Insider Trading and the Gradual Demise of Fiduciary Principles," even the minority jurisdictions

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18 Manne, *supra* note 1, 17-20.

19 Nagy, Donna M, *Insider Trading and the Gradual Demise of Fiduciary Principles*. 94 Iowa L. Rev. 1337, 1315-1379 (2009).

20 *Id.* 1337-1338.

did not extend the fiduciary duties to all employees of the company or to temporary insiders, such as an outside law or accounting firm; it was only the officers and directors that owed a duty to the shareholders.[21] Today, however, employees and temporary insiders are considered to have fiduciary duties by extension. McGee and Block elaborate that fiduciary responsibilities "do not exist in a vacuum," but only apply "to those who have voluntarily taken them upon themselves."[22] Additionally, the misappropriation theory does not have a coherent basis under the fiduciary line of reasoning originally enunciated by the courts. Under the misappropriation theory, it is a fiduciary duty to the source of the information that is breached, not a fiduciary duty to the party on the other side of the trade. It is then quite a stretch to consider this transaction a fraudulent breach of an obligation to disclose where no such obligation existed, and many have commented on the incoherency of the law under these rationales.[23] While not explicitly stated as such, it seems that behind this assortment of complementary but not entirely consistent rationales, the parity of information view is still the dominant understanding of the law.[24] What remains is a situation where the driving theory is one that was struck down by the U.S. Supreme Court but reintroduced by workaround regulations, supposedly an extension of traditional legal concepts, while actually inconsistent with them.

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21 *Id.* 1337-1340.

22 McGee and Block, *supra* note 15, 30.

23 Saikrishna Prakash, *Our Dysfunctional Insider Trading Regime*, 99.6 COLUM. L. REV. 1491-1550 (1999). *See also* Nagy, 1378-1379.

24 Nagy, *supra* note 19, 12-16.

The outsiders are not the only parties that are supposedly harmed by insider trading; some have argued that the company itself is harmed. In a 1967 article, "Unsafe at Any Price: A Reply to Manne, Insider Trading and the Stock Market," Schotland outlines several different potential harms to the company due to insider trading: profits can be made by trading on negative news as well as positive, thus allowing insider trading would create an incentive to harm the company; there is an incentive to "create" information and manipulate markets; profits can be made by those who had no hand in creating the good news; focus on looking for insider trading opportunities could distract from day to day operations.[25] Manne anticipated these objections in his original book, but Schotland was not satisfied with the answers provided.

Nevertheless, these objections still fail to support the claim that companies are harmed by insider trading in a manner that requires Federal regulation. The first objection, profiting on negative news, and fourth objection, insider trading as a distraction, are still more properly a matter for corporate oversight as the managers responsible for bad news or who overlook their responsibilities can be fired. The second objection, the manipulation of markets with false information, is legitimate, but at its core it is not an objection to insider trading but general securities fraud, which is directly addressed by §10(b) of the Securities Exchange Act of 1934, requiring no confusing stretches of the imagination to be applied faithfully.[26] The third objection, profiting from insid-

25 Roy A. Schotland, *Unsafe at Any Price: A Reply to Manne, Insider Trading and the Stock Market*, 53.7 VA. L. REV. 1449-1454, 1425-1478 (1967).

26 See note 3.

er knowledge without contributing to the success of the company, is not enough to require Federal oversight by itself, but it is also more rightfully a matter of corporate oversight; if the firm wants to set forth restrictions on insider trading, it can tailor them to fit its objections. Ultimately, all of those who would abuse insider trading are liable to other forms of oversight: the employees and managers can be fired by their superiors, directors who drive down share prices are subject to replacement through takeover bids, and market manipulators engaging in fraud are still subject to federal oversight but not essentially due to insider trading.

As demonstrated previously, the misappropriation theory does not prove harm according to the fiduciary responsibility theory as it applies to those without fiduciary duties. Furthermore, the harms that are addressed by the misappropriation theory are best covered by other types of laws. The misappropriation theory is based on deception of, or disloyalty to, the source, where the misappropriator acquires inside information from a source and trades on it without informing the source of the intent to do so. However, if the source anticipates harm from the misappropriator's use of inside information, a contract could be entered into which stipulates non-use of the information, and the matter becomes one of contract law. Similarly, if the source is afraid the misappropriator will disseminate the information for personal gain, a confidentiality contract could provide a matter of legal recourse for the deceived source.

If the source is the employer of the misappropriator, as was the situation in both the *Carpenter* and *O'Hagan* cases, the

employment contract itself could stipulate the confidentiality and trading requirements regarding information that the employee could potentially use. Ironically, even though the misappropriation theory is based on the deception of the source, this argument is only available to the government in prosecuting insider trading.[27] Therefore, although the source is the harmed party under the misappropriation theory, it does not have access to private legal recourse itself.

Indeed, the theory behind the misappropriation theory, while ostensibly driven by fraud and deception of the source of the information, still seems to be primarily a matter of information asymmetry. If a misappropriator signs a confidentiality agreement but not a non-trade agreement, and without telling anybody trades on that information, there is no traceable harm. The source is not harmed, as no agreement was made regarding the use of the information, as long as it was kept confidential.[28] The stockholder on the other side of the trade was not harmed: no fraud was committed as the misappropriator had no fiduciary duty to disclose. That this misappropriator is still liable under the law hints at the underlying driving force: the harm is still that there was an information asymmetry, the parity of information line of reasoning inconsistent with traditional legal principles and rejected as rationales by

27 Patricia A. O'Hara and G. Robert Blakey, *Legal Aspects of Insider Trading*. ETHICS AND THE INVESTMENT INDUSTRY 101-120 (Rowman & Littlefield 1989).

28 In practice, most confidentiality agreements prohibit both disclosure and use for purposes not for the benefit of the company. Thus, the agreements already provide a legal recourse, although the discovery of the insider trading by a private party is much more difficult than by the SEC or the operator of the stock exchange.

the U.S. Supreme Court in *Chiarella* and *Dirks*.

In addition to arguing that insider trading was a "victimless crime," Manne also proposed that insider trading could be an effective and efficient way to compensate entrepreneurial activity within a firm. In essence, a firm's manager overseeing a development that increases the firm's value could be compensated by trading on that information before it is generally disclosed. Manne points to the multiple ways in which firms already add variable forms of compensation in addition to fixed salaries to encourage managers to seek to improve the firm's value. Stock options are quite common and rely on changes in stock price to provide feedback on the firm's behavior, benefitting managers when the stock price goes up. Stock options are not a perfect solution, however, as the benefits are still limited to the number of options, and many conditions and restrictions govern their use.[29] They are also not generally mobile or liquid, and the benefits are not concentrated on the managers who are contributing to and aware of the profitable developments.

However, with insider trading, certain benefits of stock options and other compensation schemes are realized naturally. An insider who is involved from the beginning on projects that will increase the firm's value will have an opportunity to buy stock in anticipation of a price increase. Many have pointed out that the benefits are not limited to those responsible, and as the information travels within the firm, others will also act on it.[30] However, that

29 Manne, *supra* note 1, 136-138.

30 Jennifer Moore, *What Is Really Unethical About Insider Trading?* 9.3 J. Bus. Ethics 179, 171-182 (1990). *See also* Schotland 1454.

objection is true to a greater extent with stock options, an already accepted form of compensation, where the managers do not even need to be abreast of the inside information to benefit. Carlton and Fischel, in their 1983 article "The Regulation of Insider Trading," have added support for legalized insider trading as compensation on the grounds that renegotiating contracts for managers is a costly process, but insider trading allows managers to essentially renegotiate their compensation to fit their anticipated contribution without the need for a renegotiated contract.[31] They also propose that insider trading helps upper-management analyze their managers on the basis of risk-taking tendencies and entrepreneurial ability. Company policies could also stipulate that only trading strategies that pay off when the stock appreciates are allowed, to address the concern over profiting from negative information.

Manne points out that insider trading would need to be disclosed, just like any other form of executive compensation. Disclosure of the company's specific insider trading policy before the fact, with disclosure of the gains realized from the actual trades after the fact, would be sufficient for all parties to recognize the rules of the game as well as the actual level of executive compensation.[32] Smaller firms especially, that do not have funds available for generous compensation, could embrace insider trading as compensation for the entrepreneurial activity of their managers. Furthermore, companies that think insider trading would be harm-

31 Dennis W. Carlton and Daniel R. Fischel, *The Regulation of Insider Trading*. 35.5 STAN. L. REV. 870-872, 857-895 (1983).

32 Henry G. Manne, *Insider Trading and the Law Professors*. 23 VAND. L. REV. 587 (1970).

ful to their ends could legally address breaches of contract in their company policy and employment contracts without recourse to a general ban on insider trading. If companies or investors demanded it, the stock exchanges could even offer an investigative audit service, similar to the investigations conducted now by the SEC, to alert companies to probable insider trading that might violate their contracts.[33]

IV. REBUTTALS OF OPPOSITION

When boiled down to its essence, the motivating force behind insider trading law and regulation is not a strictly legal concern for breaking fiduciary responsibilities or stealing information but the fact that some people are able to access important information that others are not. The original statute said nothing specifically about insider trading, and while there are traditional legal precedents for the fiduciary responsibility, their application to insider trading goes well beyond the common law principles themselves. The extension of insider trading liability to misappropriators also stretches well beyond what can be determined by

33 This proposal needs some defense. Corporate managers themselves may prove unlikely to demand strict enforcement on insider trading, as they are well-positioned to profit from it. In this case, the demand would have to be from shareholders, probably in the form of choosing to invest in companies with restrictive policies that are listed on the exchange that advertises and delivers on its promise to provide enforcement. If shareholders do not display a preference for the stock exchange that cracks down on insider trading, then the "fraud on the market" hypothesis that is concerned with a lack of trust driving away potential investors is perhaps inconsequential. If, however, shareholders do display a real concern with the fairness of the exchange, the companies that adopt insider trading restrictions and list on the exchange that will enforce them will see greater trading volume in their shares. In essence, the market can balance the need for fairness and potential harms with the potential benefits.

statute or common law. The theme behind all of these stretches and extensions is an attempt to break down "unfair" information asymmetries.

As McGee and Block theorize, this concern over equal access to information may stem from the neo-classical economic model of "perfect competition," where a starting assumption is that everyone has full and perfect information.[34] While such a model may have uses in an academic setting, it is an unrealistic expectation to impose on real world markets and certainly not one that regulation should seek to achieve. Another potential reason for the concern could stem from the "efficient market hypothesis," which states that the market incorporates all known information at any time. However, this hypothesis requires actors to be able to use their information to trade, and as long as corporations are allowed to keep some things secret, insider trading will only enhance market efficiency. If anything, the efficient market hypothesis should warn the small investors that far more information than they have access to is being factored into the price at any given moment. Additionally, McGee and Block also theorize that this concern for information asymmetries stems simply from an egalitarian, wealth-equalizing impulse of certain intellectuals. This theory would find support in the quote of a juror in Martha Stewart's case after her conviction: "Maybe it's a victory for the little guys who lose money in the market because of these kinds of transactions".[35]

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34 McGee and Block, *supra* note 15, 25-26.

35 *Martha Stewart Convicted on All Four Counts*, Fox News (2004), http://www.foxnews.com/story/2004/03/08/martha-stewart-convicted-on-all-four-

Finally, the concern may come from a moral sense that insider trading is just somehow wrong. People might not be able to explain why or how in a manner satisfactory to the courts, but they know it intuitively. Manne's response is that "it is not enough simply to say that insider trading is unfair. If it is unfair, it must be unfair to somebody."[36] Many different classifications of inside information and explanations of the unfairness have been proposed, even beyond those specifically enumerated by the SEC or the courts, but all are accompanied by their own problem points.[37] Nevertheless, regardless of where this concern for information parity stems from, it has already been explicitly denied by the U.S. Supreme Court as a proper basis for regulating insider trading. Information is not free, and gathering information is costly, a fact recognized but not properly assessed by the parity of information school of thought. Instead of creating parity by preventing anybody from using material, nonpublic information, small investors that are concerned about information asymmetry and are supposedly helped by regulation should instead be willing to pay a fee for access to helpful information, inside or not. Market analysts and financial journalists play an important role in disseminating information to investors, and investors have the option to subscribe to

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counts/. See also Jana Pruet, *Billionaire Mark Cuban Cleared of Insider Trading; Blasts U.S. Government*, REUTERS (2013), http://www.reuters.com/article/2013/10/16/us-usa-sec-cuban-verdict-idUSBRE99F0ZM20131016/.

36 Manne, *supra* note 1, 93.

37 Paula J. Dalley, *From Horse Trading to Insider Trading: The Historical Antecedents of the Insider Trading Debate*, 39.4 WM. & MARY L. REV. 1289-1353 (1998). *See also* Kim Lane Scheppele, *"It's Just Not Right": The Ethics of Insider Trading*, 56.3 LAW & CONTEMP. PROBS. 123-173 (1993). Scheppele provides an analysis based on contractarian ethics that focuses on equal *access* to information rather than equal information or breaches of fiduciary duties.

various sources to help make up for the disadvantage they have. Courts should consider it their realm to enforce private contracts and agreements and prosecutors could target actually fraudulent behavior. Most, if not all, of the dangers of insider trading could be addressed through private, corporate oversight and proper enforcements of contracts.

Of all of Manne's original arguments in favor of legalizing insider trading, the compensation argument has perhaps been the most aggressively challenged. Furthermore, Bainbridge sees this as the claim upon which Manne's argument primarily rested, although the force of the other claims is still significant.[38] In immediate response to Manne, Schotland pointed out that it is impossible to isolate the entrepreneurial component of any individual's contribution or prevent leakage of information to those with no apparent involvement.[39] Still, Manne has a valid argument that, in light of the difficulties outlined by Schotland, the matter could still be resolved by the firm setting its own policy. Critics have pointed out that the returns a manager can earn through insider trading are limited by the manager's wealth.[40] On the other hand, other critics comment that if outside financing is possible, the manager's wealth no longer restricts returns.[41] Although meant to show that the harm of insider trading can be magnified, it also contradicts the limits stemming from wealth.

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38 Bainbridge, *supra* note 5, 7.

39 Schotland, *supra* note 25, 1454.

40 Bainbridge, *supra* note 5, 9.

41 George W. Dent, *Why Legalized Insider Trading Would Be a Disaster*, 38 DEL. J. CORP. L. 247, 247-273 (2013).

Empirical studies can shed light on the matter but, unfortunately, are not definitive one way or the other. Givoly and Palmon's 1985 article "Insider Trading and the Exploitation of Inside Information: Some Empirical Evidence" found that insiders did indeed earn abnormal returns, but that these returns lasted well beyond the period following the disclosure of inside information.[42] This, incidentally, works against the compensation argument in terms of encouraging entrepreneurial behavior. It also works against the argument regulating insider trading at all, as the returns were not due to specific inside information but more general superior assessment of the firm.[43] On the contrary, Roulstone's 2003 article "The Relation Between Insider-Trading Restrictions and Executive Compensation" found that companies that allowed insider trading paid less in executive compensation than those that restricted insider trading.[44] This finding would suggest that insider trading is indeed an effective form of compensation.

Ultimately, many economists and legal theorists have proposed models and carried out empirical studies, but no general consensus has been reached. However, as there seem to be firms that could benefit from allowing insider trading, this issue could be left to individual companies to decide for themselves, as long as insider trading is properly disclosed as compensation, and associated fraud is still prosecuted.

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42 Dan Givoly and Dan Palmon, *Insider Trading and the Exploitation Of Inside Information: Some Empirical Evidence*. 58.1 J. Bus. 69-87 (1985).

43 *Id.* 85-86.

44 Darren T. Roulstone, *The Relation between Insider-Trading Restrictions and Executive Compensation*. 41.3 J. Acct. Research 525-551 (2003).

V. CONCLUSION

Although many changes in the insider trading law and the theories backing them have developed since he first wrote, Manne's arguments still hold up quite well. This essay did not address the argument of improved market efficiency, but it examined the lack of a harmed party in insider trading interactions and addressed the muddled and confused legal rationale used to justify regulation. The current law, as developed by the SEC and by judges in court decisions, extends well beyond the fiduciary responsibilities present in common law. The implicit theme in the collection of regulation is that of correcting information asymmetries, despite the *Chiarella* case which struck down the parity of information rationale. Additionally, this paper moved beyond the lack of harm to the potential benefit from allowing insider trading. Assuming the general lifting of insider trading regulations, firms could incorporate insider trading into their executive compensation plans to encourage entrepreneurial behavior and provide managers opportunities to change their compensation without the need for a costly renegotiation.

LEGISLATIVE TERM LIMITS:
FRIEND OR FOE?

Deanna Wallace*

ABSTRACT: *Beginning in the early 1990s a movement began in America to establish legislative term limits, which has so far resulted in 21 states passing some form of term limits. As the term limit movement turns its eye towards the implementation Congressional of term limits, it is important to look back at the effects these limits have had on state legislatures, and to determine whether they have been more effective or harmful to the legislative process. This article seeks to do just that, Part I will consider the background and history of federal and state term limits, including the legal challenges that have arisen as a result; Part II will look at the effects term limits have had on various governmental institutions and related parties, and Part III will conclude that term limits have, overall, damaged the political process of the Legislative Branch and that legislative term limits should not be instituted in the Congress of the United States of America.*

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ABC News radio broadcaster Paul Harvey once said, "Politicians are like diapers, they must be changed often, and for the same reason." Based on the same basic theory Mr. Harvey professes in his quote, there has been a movement over the past few decades in state legislatures to limit the number of terms a legislator can serve as an elected official. More recently, there has been multiple grassroots campaigns calling for the enactment of term limits on the Congressional level. Proponents of these term limits claim that they will make elected officials more accountable to the people who elected them and less likely to be influenced by special interests, that they will reduce corruption and partisan bickering, and that they will deter career politicians who are out of touch with their constituents from running for election. But have these benefits been seen in the states where term limits have been adopted?

The examination of term limits in states determines whether or not they have had a positive or negative effect on their respective legislatures. Part I of this paper will consider the background and history of federal and state term limits, including the legal challenges that have arisen as a result; Part II will look at the effects term limits have had on various governmental institutions and related parties. Part III concludes that term limits have, overall, damaged the political process of the Legislative Branch and that legislative term limits should not be instituted in the Congress of the United States of America.

PART I: LOOKING BACK AT LIMITS

A. HISTORICAL BACKGROUND OF TERM LIMITS

The roots of term limits can be traced back to the ancient democracy of Athens, where the five hundred members of the Athenian Assembly were mandated to serve only two year terms in order to assure that the interests of all Athenians were accurately represented.[1] Similarly, the Roman republic employed a system of elected magistrates that served one year terms and could not be reelected for ten years after serving.[2]

However, in the centuries between the demise of these civilizations and the rise of the United States, most governments were monarchies. In England, there was a representative branch of government in Parliament, but the hereditary nobility that made up the House of Lords was more powerful than the popularly elected House of Commons.[3] The members of the House of Commons were also not restricted to a number of terms, with many serving for several decades at a time.

It is in the struggle to find a balance between these two varying historical traditions to frame and explore the debate over term limits in America.. While America derives its laws from the Common Law of England, our governmental structure borrows heavily from the Athenians and Romans. It was with these differ-

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1 A.H.M. Jones, ATHENIAN DEMOCRACY 105 (Baltimore: John Hopkins University Press 1986).

2 Gordana Siljanovska-Davkova & Tanja Karakamisheva-Jovanovska, *Constitutional Aspects of the Limitation of Mandates* 4 JUSTINIANUS PRIMUS L. REV. 1, 4 (2007) *available at* http://www.law-review.mk/pdf/07/Gordana%20Siljanovska-Davkova,%20Tanja%20Karakamisheva-Jovanovska.pdf.

3 Ian Loveland, CONSTITUTIONAL LAW, ADMINISTRATIVE LAW, AND HUMAN RIGHTS 158 (5th ed. Oxford Univ. Press 2009).

ing traditions in mind that our Founding Fathers debated this very issue.

B. Federal Term Limits in America

1. Background

Most of the early discussion in regards to federal term limits focused not on the number of terms served, but rather the length of the individual terms. Early in the debate, Thomas Jefferson explained his feelings about federal terms:

> My reason for fixing them in office for a term of years rather than for life, was that they might have an idea that they were at a certain period to return into the mass of the people and become the governed instead of the governor which might still keep alive that regard to the public good that otherwise they might perhaps be induced by their independance [sic] to forget.[4]

But the discussion of terms and term limits did not end with these early debates, and has extended even into the present day. To see the history of this debate, we must venture all the way back to the beginning of our government's history.

Written in 1777, the original governing document of the United States of America, The Articles of Confederation, included in Article V the first American federal term limit: " no per-

4 Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), *in* 1 Papers of Thomas Jefferson, 1760-1776 503 (Julian P. Boyd ed., Princeton University Press 1950).

son shall be capable of being a delegate for more than three years in any term of six years..." These limits were strictly enforced, and in 1784, the Committee on Qualifications met to discharge those that had violated the proscribed limit from office.[5] However, three years later, the United States Constitution was written and contained no term limits on federal elected officials. Many have speculated on the reason behind this departure, but our Founding Fathers clearly chose not to carry these limits over to the new governmental structure. Perhaps the answer can be found in the Federalist Papers No. 62, which states:

The mutability in the public councils arising from a rapid succession of new members, however qualified they may be, points out, in the strongest manner, the necessity of some stable institution in the government. Every new election in the States is found to change one half of the representatives. From this change of men must proceed a change of opinions; and from a change of opinions, a change of measures. But a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success.[6]

The basic theory is that in order to govern effectively, members of the legislature needed to stay in office long enough to develop "a knowledge of the means by which that object [good government] can be best attained."[7]

In reaction to the Federalist arguments against term lim-

5 *Journals of the Continental Congress, 1774-1789*, ed. Worthington C. Ford et al. (Washington, D.C., 1904-37), 26:98-99 (1784).

6 James Madison, *Federalist Papers No. 62*, Independent Journal, Feb. 27, 1788.

7 *Id.*

its, in the First Congress, Representative Thomas Tucker of South Carolina brought forth two proposals dealing with term limits.[8] The first proposal would limit members of the House of Representatives to three consecutive terms within an eight year period; the second would make the term for Senators one year, with a limit of five consecutive terms within a six year period. There is no evidence that either of these proposals received any support nor a vote.

Term limits were not seriously discussed again until the early 1940s, in reaction to Franklin D. Roosevelt breaking the tradition established by George Washington of not seeking more than two terms as President of the United States, and this eventually led to the adoption of the 22nd Amendment.[9] After this time period, Congress has introduced proposals seeking to establish federal term limits fairly regularly but to no avail.[10]

In 1985, a group of Republican House members formed the Committee on Limiting Terms (COLT), whose stated goal was to convene a limited Constitutional Convention for the purpose of establishing legislative term limits in Congress. However, the effort soon fizzled out and amounted to nothing.[11] Then, in 1988, the Republican Party adopted Term Limits as a plank in their national party platform, and it has remained a prominent issue

8 S. Rep. No. 104-158, at 2 (1995).

9 John David Rausch, Jr., *When a Popular Idea Meets Congress: The History of the Term Limit Debate in Congress*, 1 POL. BUREAUCRACY & JUST. 34, 36 (2009).

10 *Id.*

11 *Id.* at 40.

among Republican lawmakers.[12]

Despite these various efforts, overall the members of Congress have shown little support for limiting the number of terms they can serve as legislators. This makes sense to South Carolina Congressman Bob Inglis, who said, "Asking an incumbent member of Congress to vote for term limits is a bit like asking a chicken to vote for Colonel Sanders."[13]

1. Legal Issues

In 1992, the citizens of Arkansas adopted a term limit proposal, Amendment 73, to their State Constitution. Part of this amendment affected Congressional elections by placing term limits on those seeking to be elected to the U.S. House of Representatives (three terms) or the U.S. Senate (two terms). The amendment led to a case that went before the Supreme Court of the United States as *United States Term Limits v. Thornton*.[14] The Court struck down the section affecting Congressional elections, holding that determining the qualifications of Congressional representatives was exclusive and fixed by the Constitution. The majority indicated that part of this finding was based on the belief that, "Such a state-imposed restriction is contrary to the fundamental principle of our representative democracy, embodied in the Constitution, that the people should choose whom they please to gov-

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12 *Id.*

13 *Famous Quotes About Politicians, Congress, and Government*, ACTNOWUS.ORG, http://actnowus.org/famous%20quotes.html (Last visited Nov. 14, 2013).

14 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881, 1995 U.S. LEXIS 3487 (1995).

ern them."[15]

The Court also looked at the debates the Founding Fathers of our nation engaged in while determining the qualifications; many of the most well-known Fathers implied that there should be no qualifications beyond those listed by them in the Constitution.

These implications might lend support for those who disagree with term limits. For instance, the Court quotes Robert Livingston saying, "The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights."[16] They further quoted Alexander Hamilton at the New York Constitutional Convention, arguing against the delegates that: "The true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."

Based on these quotes and others, the Court reaffirmed their previous statement in *Powell v. McCormack,* "That the right of the electors to be represented by men of their own choice, was so essential for the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our constitution."[17]

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15 *Id.* at 783, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (internal quotation marks omitted).

16 *Id.* at 794, 115 S. Ct. 1842, 131 L. Ed. 2d 881.

17 Powell v. McCormack, 395 U.S. 486, 534, 89 S. Ct. 1944, 23 L. Ed. 2d 491, 1969 U.S. LEXIS 3103 (1969).

Thus, the essential lesson to be learned from this case is that the Supreme Court is unlikely to accept anything less than a Constitutional Amendment as sufficient to impose term limits on Congressional representatives.

C. State Term Limits in America

1. Background

In the early 1990s, some states began implementing legislative term limits. In total, 21 of the 50 states have passed legislative term limits in some form, but due to repeals and court cases, only 15 states currently have legislative term limits on their books[18]. This chart shows the term limits passed in the various states:

State	House Term Limit By Years	Senate Term Limit by Years
Arkansas[1]	6	8
Arizona	8	8
California	12 (consecutive)	12 (consecutive)
Colorado	8	8
Florida	8	8
idaho	Legislative Repeal in 2002	
Louisiana	12 (consecutive)	12 (consecutive)
Maine	8	8

18 "Term Limited States" (National Conference of State Legislatures, 2013) available at: http://www.ncsl.org/research/about-state-legislatures/chart-of-term-limits-states.aspx.

Massachusetts	Ruled Unconstitutional by State Supreme Court[2]	
Michigan	6	8
Missouri	8	8
Montana	8	8
Nebraska	n/a	8
Nevada	12	12
Ohio	8	8
Oklahoma	12 (consecutive)	12 (consecutive)
Oregon	Ruled Unconstitutional by State Supreme Court[3]	
South Dakota	8	8
Utah	Legislative Repeal in 2003	
Washington	Ruled Unconstitutional by State Supreme Court[4]	
Wyoming	Ruled Unconstitutional by State Supreme Court[5]	

As this chart demonstrates, there have been varied approaches to the idea of legislative term limits, with some states choosing to vary the limits by house, and some implementing lifetime bans, while others only limit the number of consecutive terms that can be served. As can be seen in the chart, some of these approaches have led to legal challenges.

II. Legal Challenges

Two states, idaho and Utah, legislatively repealed their term limits in the early 2000s, but four states, Massachusetts, Oregon, Washington, and Wyoming, had their statutes mandating

legislative term limits struck down as unconstitutional by their respective State Supreme Courts, and the reasoning in each of the cases followed similar themes and logic.

1. Massachusetts

In *League of Women Voters v. Secretary of the Commonwealth*, the Massachusetts Supreme Court struck down a statute imposing term limits on certain public officials, including legislators.[19] The decision, which held that the State Constitution was the exclusive authority for qualifications of elected officials, relied in part on the Supreme Court's decision in *United States Term Limits v. Thornton*, applying the same standard regarding the Massachusetts Constitution. The court indicated that if the people of Massachusetts wanted term limits, they would elect legislators that would pass a Constitutional Amendment dealing with state legislative term limits.[20]

2. Oregon

Oregon's term limit amendment to their State Constitution was challenged and struck down in the 2002 case, *Lehman v. Bradbury*.[21] In this instance, the constitutional issue was one of procedure and not merit, and the term limit amendment was struck down on a procedural technicality. However, it is worth noting that after this decision, Oregon did not subsequently pass a procedurally correct version of state legislative term limits.

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19 League of Women Voters, 425 Mass. 424, 681 N.E.2d 842.

20 *Id.* at 432, 681 N.E.2d 842.

21 Lehman, 333 Or. 231, 37 P.3d 989.

3. WASHINGTON

Washington voters approved a term limit initiative in 1992. In 1997, they were challenged in *Gerberding v. Munro*, and were struck down as unconstitutional under the Washington State Constitution.[22] The majority opinion uses the same theory as the Massachusetts Supreme Court, even quoting them, and found that the Washington State Constitution is the exclusive authority for establishing qualifications for state elected officials such as legislators.[23]

4. WYOMING

State legislative term limits were established in Wyoming by the voter initiative process in 1992 and were not challenged until 2004's *Cathcart v. Meyer*.[24] While the Wyoming Supreme Court acknowledged that the State Constitution recognized the right of the people to "alter, reform, or abolish" the government, they relied on the Supreme Court's logic in *Thornton* and held that this right did not extend to statutorily changing the constitutionally mandated qualifications for office.[25] In addition to citing *Thornton*, since Wyoming's term limits were the last to be challenged, the court also cites all three of the previously mentioned cases as prior persuasive precedent.

Term limits in other states have been accomplished by

22 Gerberding, 134 Wash. 2d 188, 949 P.2d 1366.

23 *Id.* at 201-11, 949 P.2d 1366.

24 Cathcart v. Meyer, 2004 WY 49, 88 P.3d 1050, No. 04-33, No. 04-32, No. 04-34, 2004 Wyo. LEXIS 62 (Wyo).

25 *Id.* at 67.

amendments to the respective state constitutions, and have therefore not been challenged. It follows to reason that any attempt to implement national term limits would have to be an amendment to the United States Constitution.

Part II: Effects on Effectiveness

If the various arguments utilized by supporters of term limits were to be aggregated, the unifying theme is that term limits would make legislatures more "effective." For the purposes of this paper, and based on the common themes presented in arguments on both sides of the debate, the following will be considered indicative of effective legislatures:

A. Diversity

B. Independence from Executive Influence

C. Independence from Lobbyist Influence

D. Experience and Leadership

E. Civility and Bipartisanship

F. Perception of Effectiveness by Public

Based on whether these qualities have increased since term limits were implemented the effectiveness of those legislatures can be evaluated, and by inference so can the effectiveness of the term limits. In 2005, The National Conference of State Legislatures commissioned reports by academics within six states with legislative term limits, looking at the various affects the limits may have had regarding these very issues. The studies looked at the following states: Arizona, Arkansas, California, Colorado, Maine, and Ohio.

A. DIVERSITY

One of the most common claims by proponents of legislative term limits is that they will result in a more diverse legislature, increasing the number of women and minorities, while introducing younger, "fresher" representatives into the political process. But in most of the states, these predictions have been reversed or merely haven't materialized to the degree claimed prior to the implementation of term limits.

In regards to minority representation, Arizona actually saw a decrease in African-American and Native American representatives.[26] There was a slight increase in Hispanic representatives, but it is hard to say whether this was caused by term limits or by demographic changes and redistricting. [27] Arkansas saw a three percent increase in minority representation, but again it is hard to pinpoint term limits as the cause.[28] California is the only state to see a dramatic increase in minority representatives, but this is generally credited to demographic changes and redistricting, supported by the fact that minorities gained higher percentages of congressional seats than state legislative seats. [29] Colorado's minority representation saw little change, with less than a three percent increase in minority representatives, which is too statisti-

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26 David R. Berman, EFFECTS OF LEGISLATIVE TERM LIMITS IN ARIZONA 2 (Nat'l Conference of State Legislatures 2005).

27 *Id.*

28 Art English & Brian Weberg, TERM LIMITS IN THE ARKANSAS GENERAL ASSEMBLY: A CITIZEN LEGISLATURE RESPONDS 18 (Nat'l Conference of State Legislatures 2005).

29 Bruce E. Cain & Thad Kousser, ADAPTING TO TERM LIMITS IN CALIFORNIA: RECENT EXPERIENCE AND NEW DIRECTIONS 16-8 (Nat'l Conference of State Legislatures 2005).

cally insignificant to support term limits as a factor.[30] Ohio saw a slight four percent increase in minority representation, but like other states, this is largely thought to be a result of redistricting, not term limits.[31]

Female representation largely followed the same path as minorities. Arizona saw fewer female representatives elected to the state legislature.[32] Arkansas did see a ten percent increase in the number of women elected, but could not establish causal link to term limits.[33] California also saw an increase, but likewise, this increase could not be definitively traced to term limits.[34] Colorado was already one of the national leaders for the number of women serving as state legislators prior to the implementation of term limits, and the gender makeup of the legislature remained stable after term limits took effect.[35] Maine and Ohio also maintained a stable level of female representation after term limits were implemented.[36]

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30 John A. Straayer & Jennie Drage Bowser, COLORADO'S LEGISLATIVE TERM LIMITS, 10 (Nat'l Conference of State Legislatures 2005).

31 Rick Farmer & Thomas H. Little, LEGISLATIVE POWER IN THE BUCKEYE STATE: THE REVENGE OF TERM LIMITS 3 (Nat'l Conference of State Legislatures 2005).

32 David R. Berman, EFFECTS OF LEGISLATIVE TERM LIMITS IN ARIZONA 2 (Nat'l Conference Of State Legislatures 2005).

33 Art English & Brian Weberg, TERM LIMITS IN THE ARKANSAS GENERAL ASSEMBLY: A CITIZEN LEGISLATURE RESPONDS 19 (Nat'l Conference of State Legislatures 2005).

34 Bruce E. Cain & Thad Kousser, ADAPTING TO TERM LIMITS IN CALIFORNIA: RECENT EXPERIENCES AND NEW DIRECTIONS 16 (Nat'l Conference of State Legislatures 2005).

35 John A. Straayer & Jennie Drage Bowser, COLORADO'S LEGISLATIVE TERM LIMITS 9 (Nat'l Conference of State Legislatures 2005).

36 Richard J. Powell & Rich Jones, FIRST IN THE NATION: TERM LIMITS AND THE MAINE LEGISLATURE 5 (Nat'l Conference of State Legislatures 2005); Rick

After term limits took effect, the average age of state legislators remained statistically unchanged from the prior averages in Arkansas, Colorado, and Ohio.[37] California saw a slight decrease, with the pre-term limit of 47 years falling to 42 after implementation.[38] Conversely, the average age in Maine actually increased by four years in the decade studied.[39]

There also does not appear to be any trend of an increase in primary challenges to incumbent legislators. While there are obviously more turnovers due to term limits, the studies uncovered some interesting facts that seem to contradict the theory that term limits increase competition and new ideas. For instance, in Arkansas, there was a significant increase in "familial incumbency", where the spouse, child, sibling, or other relative of a term limited legislator would succeed them in the seat.[40] Arkansas also saw a decrease in challenges to incumbents, with the main explanation being the knowledge that the seat would be forcefully

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Farmer & Thomas H. Little, LEGISLATIVE POWER IN THE BUCKEYE STATE: THE REVENGE OF TERM LIMITS, 4 (Nat'l Conference of State Legislatures 2005).

37 Art English & Brian Weberg, TERM LIMITS IN THE ARKANSAS GENERAL ASSEMBLY: A CITIZEN LEGISLATURE RESPONDS 17 (Nat'l Conference of State Legislatures 2005); John A. Straayer & Jennie Drage Bowser, COLORADO'S LEGISLATIVE TERM LIMITS 8 (Nat'l Conference of State Legislatures 2005); Rick Farmer & Thomas H. Little, LEGISLATIVE POWER IN THE BUCKEYE STATE: THE REVENGE OF TERM LIMITS 4 (Nat'l Conference of State Legislatures 2005).

38 Bruce E. Cain & Thad Kousser, ADAPTING TO TERM LIMITS IN CALIFORNIA: RECENT EXPERIENCES AND NEW DIRECTIONS 16 (Nat'l Conference of State Legislatures 2005).

39 Richard J. Powell & Rich Jones, FIRST IN THE NATION: TERM LIMITS AND THE MAINE LEGISLATURE 6 (Nat'l Conference of State Legislatures 2005).

40 Art English & Brian Weberg, TERM LIMITS IN THE ARKANSAS GENERAL ASSEMBLY: A CITIZEN LEGISLATURE RESPONDS 7 (Nat'l Conference of State Legislatures 2005).

vacated in a matter of years anyway.[41] This also seemed to be the case in Colorado and Maine.[42]

Overall, there exists a distinct lack of statistical evidence to support the theory that term limits encourage or lead to greater representation by minorities or women; nor does there seem to be support for it causing younger people to run for office, or for incumbents to be challenged more often.

B. Independence from Executive Influence

Claims have also been made that term limits would help decrease the influence outside forces, such as the Executive Branch, have on legislators. But despite some contradictory findings, every state studied with the exception of Ohio reported experiencing a shift in power that favored the Executive Branch of government over the Legislature. And while the Ohio study found most legislators felt the Governor had lost power, they also believed that their oversight of Executive Agencies had decreased significantly.[43]

In Arizona, legislators reported feeling they were being manipulated by the heads of Executive agencies, and most agreed that the post term limit Executive Branch had increased in power

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41 *Id.*

42 John A. Straayer & Jennie Drage Bowser, Colorado's Legislative Term Limits, 28 (Nat'l Conference of State Legislatures 2005); Richard J. Powell & Rich Jones, First In The Nation: Term Limits And The Maine Legislature 7 (Nat'l Conference of State Legislatures 2005).

43 Rick Farmer & Thomas H. Little, Legislative Power In The Buckeye State: The Revenge Of Term Limits 14 (Nat'l Conference of State Legislatures 2005).

and influence over the legislature.[44] This was echoed in the Arkansas study, where members felt that agency heads were using their lack of experience against them, and seemed to dismiss legislators as temporary road blocks to the Executive's legislative agenda.[45]

California legislators focused on the dramatic decrease in oversight of Executive agencies as the main balance shifter, remarking that term limits pushed them to try to accomplish more in less time in order to "make their mark".[46] Additionally, California legislators felt their lack of knowledge and experience left them with less room to negotiate with the Governor on the budget, which led to a 50 percent decrease in attempted budgetary amendments.[47] It is estimated that this has led to a loss of billions of dollars tied to legislative discretion since term limits were implemented.[48] There was also a steep decline in both the number of legislators requesting information from agencies to justify their proposed budgets, as well as in the number of audit reports to hold those agencies accountable for the way that budget was spent.[49]

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44 David R. Berman, EFFECTS OF LEGISLATIVE TERM LIMITS IN ARIZONA 2 (Nat'l Conference Of State Legislatures 2005).

45 Art English & Brian Weberg, TERM LIMITS IN THE ARKANSAS GENERAL ASSEMBLY: A CITIZEN LEGISLATURE RESPONDS 47 (Nat'l Conference of State Legislatures 2005).

46 Bruce E. Cain & Thad Kousser, ADAPTING TO TERM LIMITS IN CALIFORNIA: RECENT EXPERIENCES AND NEW DIRECTIONS 79 (Nat'l Conference of State Legislatures 2005).

47 *Id.* at 80.

48 Kousser, Thad, "TERM LIMITS, PROFESSIONALISM, AND LEGISLATIVE-EXECUTIVE CONFLICT: APPLYING A BARGAINING MODEL TO THE AMERICAN STATES," paper presented at the 2002 meetings of the American Political Science Association, Boston, Massachusetts, 2002c.

49 Bruce E. Cain & Thad Kousser, ADAPTING TO TERM LIMITS IN CALIFORNIA: RECENT EXPERIENCES AND NEW DIRECTIONS 87-9 (Nat'l Conference of State Legislatures 2005).

One anonymous legislator summed up the situation in California by postulating that "overall [term limits] ha[ve] weakened the legislature's ability to bargain with, and oversee the Executive Branch."[50] Maine legislators reported similar feelings regarding oversight ability due to both their inexperience and lack of time to accomplish legislative goals.[51]

Legislators in Colorado felt that the imposition of term limits gave the Governor and his staff experience and informational advantages that made it hard to reach mutually satisfactory agreements on important issues.[52] Collectively, 73 percent of Colorado's legislature felt that they had lost power to the Executive since the implementation of term limits.

Instead of making good on claims that legislatures would be less easily influenced by their respective Executive Branch, it seems that term limits put legislators on unequal footing in negotiations, and even distract them from their important oversight functions by forcing them to accomplish all their legislative goals in a few short terms.

C. Independence from Lobbyist Influence

The influence of lobbyists on legislators is demonized as the bane of good government, and term limits are hyped as a way to end the pernicious hold of so-called special interest groups. But in practice, it seems to have only confused the relationships

50 *Id.* at 95.

51 Richard J. Powell & Rich Jones, First In The Nation: Term Limits And The Maine Legislature 52-3 (Nat'l Conference of State Legislatures 2005).

52 John A. Straayer & Jennie Drage Bowser, Colorado's Legislative Term Limits 108 (Nat'l Conference of State Legislatures 2005).

between legislators and lobbyists; some lobbyists feel term limits have made their job more difficult, and there is evidence that they have reacted to the change by pushing the ethical limits of behavior in order to accomplish their goals.[53]

In contrast to the views of the lobbyists, most legislators reported that lobbyists were more influential in a post term limit legislature. In Arkansas, lobbyists responded to term limits by beginning to cultivate their relationships with future legislators during their campaigns by targeting and supporting potentially sympathetic candidates.[54] Term limits also had the result of turning many former legislators that had been forced out, into lobbyists themselves.[55] In light of these occurrences, it is perhaps unsurprising that nearly half of Arkansas' legislators believed lobbyists had gained influence since term limits took effect.[56] Maine and Ohio legislators both overwhelmingly reported feeling that lobbyists had greater power and influence post term limits.[57]

The most surprising, and perhaps worrying, statistic comes from California's legislature, where new members reported that as much as *90* percent of the bills they introduced were drafted and given to them by lobbyists.[58] Likewise, more than half

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53 *Id.* at 86.

54 Art English & Brian Weberg, TERM LIMITS IN THE ARKANSAS GENERAL ASSEMBLY: A CITIZEN LEGISLATURE RESPONDS 41 (Nat'l Conference of State Legislatures 2005).

55 *Id.* at 40.

56 *Id.* at 41.

57 Richard J. Powell & Rich Jones, FIRST IN THE NATION: TERM LIMITS AND THE MAINE LEGISLATURE 45 (Nat'l Conference of State Legislatures 2005); Rick Farmer & Thomas H. Little, LEGISLATIVE POWER IN THE BUCKEYE STATE: THE REVENGE OF TERM LIMITS 12 (Nat'l Conference of State Legislatures 2005).

58 Bruce E. Cain & Thad Kousser, ADAPTING TO TERM LIMITS IN CALIFORNIA:

of the Colorado legislators polled reported being likely to sponsor "special interest" legislation provided by lobbyist groups.[59] Contrary to their stated goal, it would appear that term limits have led inexperienced new legislators to increasingly rely on lobbyists for information and even for the bills themselves. Generally, it appears that the influence of lobbyists in the studied states has increased since the implementation of term limits.

D. Experience and Leadership

When discussing the influence outside groups had on them, many representatives indicated that their lack of experience contributed in a significant manner to their reliance on lobbyists, with many reporting that they felt overwhelmed by the issues they were faced with fixing as freshmen legislators.[60] It cannot be denied that a clear result of term limits is the loss of experienced legislators and leaders.

Part of the problem is that the average level of experience in general, and in specific in leadership roles, took a nosedive after

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Recent Experiences And New Directions 25 (Nat'l Conference of State Legislatures 2005).

59 John A. Straayer & Jennie Drage Bowser, Colorado's Legislative Term Limits 86 (Nat'l Conference of State Legislatures 2005).

60 David R. Berman, Effects Of Legislative Term Limits In Arizona 2 (Nat'l Conference Of State Legislatures 2005); Art English & Brian Weberg, Term Limits In The Arkansas General Assembly: A Citizen Legislature Responds 45 (Nat'l Conference of State Legislatures 2005); Bruce E. Cain & Thad Kousser, Adapting To Term Limits In California: Recent Experiences And New Directions 24-5 (Nat'l Conference of State Legislatures 2005); John A. Straayer & Jennie Drage Bowser, Colorado's Legislative Term Limits 57 (Nat'l Conference of State Legislatures 2005); Rick Farmer & Thomas H. Little, Legislative Power In The Buckeye State: The Revenge Of Term Limits 10 (Nat'l Conference of State Legislatures 2005).

term limits were implemented. The average length of experience in Arizona's legislature prior to term limits was eleven years, but by 2003, that number had fallen to a mere four years.[61] Due to term limits in Arkansas, the most experience a leader of a house can have is two terms of service.[62] Arkansas legislators reported that this led to lackluster leadership.[63] Since term limits went into effect, Colorado experienced a 40 percent decrease in legislative experience in the House, and a 14 percent decrease in the Senate.[64] More shockingly, the initial term limit purge in Colorado cost the legislature more than 136 years of experience from only nine members; their leadership role replacements had a combined experience of 60 years.[65]

Another common theme was the belief that the forced turnover and lack of stability in leadership caused leaders to lose power and influence, mostly based on a lack of respect compared to a leader who had earned power through seniority and a proven track-record of accomplishments. For example, 87 percent of legislators in Ohio felt the leadership roles were filled based primarily on fundraising ability instead of legislative merit. Arkansas legislators similarly felt that leadership was more about being

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61 David R. Berman, EFFECTS OF LEGISLATIVE TERM LIMITS IN ARIZONA 2 (Nat'l Conference Of State Legislatures 2005).

62 Art English & Brian Weberg, TERM LIMITS IN THE ARKANSAS GENERAL ASSEMBLY: A CITIZEN LEGISLATURE RESPONDS 41 (Nat'l Conference of State Legislatures 2005).

63 *Id.* at 34.

64 The Senate was able to maintain a higher average of experience because many term limited House members went on to serve in the Senate. *Id.* at 36.

65 *Id.* at 40.

competitive with one another than established merit.[66] Colorado's short term limits have essentially led legislators there to feel that leaders turn into lame ducks almost as soon as they are elected.[67]

Term limits have undeniably forced experienced legislators out of office in favor of inexperienced new comers, and they have left a leadership vacuum that in turn affects many other qualities needed to make a legislative body effective.

E. Civility and Bipartisanship

One of the problems stemming from the leadership vacuum is the apparent decline in civility and bipartisan spirit since term limits became effective in the studied states: each one of them agreed that term limits had changed the tone of their legislative body.[68] In addition to decreases in basic civility, legislators in Arkansas, Colorado and Ohio believe that their colleagues are less likely to consider compromises than previous legislatures.[69]

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66 Art English & Brian Weberg, Term Limits In The Arkansas General Assembly: A Citizen Legislature Responds 37 (Nat'l Conference of State Legislatures 2005).

67 John A. Straayer & Jennie Drage Bowser, Colorado's Legislative Term Limits 46 (Nat'l Conference of State Legislatures 2005).

68 Art English & Brian Weberg, Term Limits In The Arkansas General Assembly: A Citizen Legislature Responds 28 (Nat'l Conference of State Legislatures 2005); Bruce E. Cain & Thad Kousser, Adapting To Term Limits In California: Recent Experiences And New Directions 68 (Nat'l Conference of State Legislatures 2005); John A. Straayer & Jennie Drage Bowser, Colorado's Legislative Term Limits 19, 46-7, 57-8 (Nat'l Conference of State Legislatures 2005); Richard J. Powell & Rich Jones, First In The Nation: Term Limits And The Maine Legislature 38 (Nat'l Conference of State Legislatures 2005); Rick Farmer & Thomas H. Little, Legislative Power In The Buckeye State: The Revenge Of Term Limits 10-11 (Nat'l Conference of State Legislatures 2005).

69 Art English & Brian Weberg, Term Limits In The Arkansas General Assembly: A Citizen Legislature Responds 45 (Nat'l Conference of State

Anonymous quotes show the level of acrimony that has pervaded some of the bodies:

"They just blow off the speaker."[70]

"They fight, cuss, [and] depose each other."[71]

"Respect for the institution, [the] process, [and] each other, is down."[72]

"There is a lack of statesmanship."[73]

"It's immediate and constant competition."[74]

"New members do not know how to reach consensus and compromise."[75]

The lack of leadership because of term limits has created a level of rancor in these houses that clearly has an impact on their ability to effectively discharge their duties. As President Lincoln once said, "A house divided against itself cannot stand." Likewise, a legislature divided amongst themselves cannot govern.

F. Perception of Effectiveness by Public

The public perception of the effectiveness of term limits

Legislatures 2005); John A. Straayer & Jennie Drage Bowser, Colorado's Legislative Term Limits 47, 57 (Nat'l Conference of State Legislatures 2005); Richard J. Powell & Rich Jones, First In The Nation: Term Limits And The Maine Legislature 21 (Nat'l Conference of State Legislatures 2005); Rick Farmer & Thomas H. Little, Legislative Power In The Buckeye State: The Revenge Of Term Limits 10 (Nat'l Conference of State Legislatures 2005).

70 John A. Straayer & Jennie Drage Bowser, Colorado's Legislative Term Limits 49 (Nat'l Conference of State Legislatures 2005).

71 *Id.* at 52.

72 *Id.* at 23.

73 *Id.* at 26.

74 *Id.* at 48.

75 Richard J. Powell & Rich Jones, First In The Nation: Term Limits And The Maine Legislature 21 (Nat'l Conference of State Legislatures 2005).

is difficult to measure since polling was largely not conducted on term limits in hindsight.. But there are a few statistics that might help give an idea of how constituents feel about the results of term limits.

Most pertinently, Ohio residents were polled as part of the term limit study, and 85 percent of respondents thought the results of term limits had been mostly negative.[76] Over half of the respondents in the same poll believed that the current term limits in Ohio were too restrictive and should be expanded.[77]

The study of Arkansas' limits found that after term limits were enacted, constituents were less likely to know who their representative was, which made them feel less confident that they were being well represented.[78] The confidence of Maine voters in their legislators also decreased after term limits went into effect.[79]

While it is not possible to say definitively whether the people of states with legislative term limits consider their legislatures to be more or less effective than they were without term limits, the limited evidence we do have indicates that voters may not be as impressed with the reality of term limits as they were with the theory.

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76 Rick Farmer & Thomas H. Little, LEGISLATIVE POWER IN THE BUCKEYE STATE: THE REVENGE OF TERM LIMITS 18 (Nat'l Conference of State Legislatures 2005).

77 *Id.*

78 Art English & Brian Weberg, TERM LIMITS IN THE ARKANSAS GENERAL ASSEMBLY: A CITIZEN LEGISLATURE RESPONDS 10 (Nat'l Conference of State Legislatures 2005).

79 Richard J. Powell & Rich Jones, FIRST IN THE NATION: TERM LIMITS AND THE MAINE LEGISLATURE 14 (Nat'l Conference of State Legislatures 2005).

G. Conclusions

It is apparent, based on the evidence, that term limits have not lived up to the promises made by their supporters. Instead of increased diversity, there is stagnation; instead of less Executive influence, power has shifted to the Executive branch; instead of making legislators independent from Lobbyists, they are more relied upon than before; and instead of new ideas and a more effective, bipartisan process, the lack of experience and leadership has led to discord and bad governance. The experiment with term limits in the states studied has at best failed to match the hype, and at worst has failed miserably on all counts.

Part III: Terminating the Term Limit Experiment

While it is possible that a decade's worth of study is not enough to rule out the possibility that the issues facing states with term limits might improve with time, based on the multitude of evidence in Part II showing that state legislative term limits have had a negative effect on the effectiveness of their respective legislatures instead of the promised benefits, it is impossible to recommend that term limits be implemented in other states, and certainly not in the United States Congress.

The theory expressed by our Founding Fathers, that the people know who is best to represent them, seems to be supported by the problems that emerged when states decided to tell their citizens who they could and could not elect to represent them. After all, many of our nations' most beloved and respected leaders, such as Washington, Franklin, and Madison, served both their home

states and America with honor, integrity, and care for decades.

In conclusion, though further study and adjustment may change the effects legislative term limits have had on the effectiveness of the legislative process in the states that have adopted them, until proven otherwise, it would be bad policy to implement term limits in additional states or in the United States Congress.

CHRISTIAN LEGAL SOCIETY V. MARTINEZ

Kayla Murrish*

ABSTRACT: *Particularly on the American university campus, First Amendment rights to speech, religious expression, and association are integral to students' educational experiences. In 2010, these freedoms faced a significant setback when the Supreme Court ruled in favor of Hastings College of Law in* Christian Legal Society v. Martinez. *The Court dismissed students' appeal to their rights by treating the public university as a limited forum in which Hastings needed only to show that its policy was "reasonable" to pass constitutional muster. The Court claimed that Hastings' all-comers policy was "viewpoint neutral," yet it required the Christian Legal Society to accept leaders whose actions violated the group's statement of faith. Hastings did not enforce this policy equally but permitted other campus groups to choose their members selectively. While Hastings claimed to prevent discrimination on the basis of religion and sexual orientation, they unconstitutionally discriminated against not only Christian students but any students with minority viewpoints that administrators could consider unwelcome. The powerful all-comers policy, now sanctioned by the Supreme Court, has empowered universities to suppress speech, religion and expressive association rights and is deeply detrimental to the First Amendment freedoms of not only students, but members of any organization motivated by beliefs.*

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INTRODUCTION

One of the most unique features of the American experiment is the First Amendment, which guarantees freedoms that few other nations throughout history have enjoyed. Freedoms of speech, religion and association feature prominently as protections that not only guard individual expression rights but seek to create an open forum where the free exchange of ideas can prosper. In 2010, college students' First Amendment rights received a serious blow with the Supreme Court's decision in *Christian Legal Society v. Martinez*. The decision failed to uphold students' constitutional rights because the Court gave insufficient weight to First Amendment freedoms and overlooked the university's discriminatory application of their all-comers policy, granting universities increasing power to define student rights at whim.

FACTS

The case began with Hastings College of Law, part of the University of California public-school system, and their policy regarding Registered Student Organizations (RSOs). When a student group on campus is officially recognized as an RSO, the group is allowed to use school funds and facilities as well as Hastings' communication networks and official logo. Without this status, groups cannot meet on the law school premises, even with the school's special permission, which Hastings may revoke at any time. To become an RSO, each group must comply with Hastings' Nondiscrimination Policy, a clause echoing state law

that bars discrimination on the basis of several categories, including religion and sexual orientation. While this clause had been in place for two decades, it was not until the Christian Legal Society requested RSO status that Hastings mentioned the concept of an "all-comers" policy in June 2005. Hastings claimed their Nondiscrimination Policy should be interpreted as requiring that student organizations "allow any Hastings student to become a member and seek a leadership position in the organization."[1] Not only would groups need to accept members who fundamentally disagreed with their goals, but they would have to allow potentially hostile group members to become leaders who could change the group's mission entirely.

In 2004, a small group of Hastings students sought to establish a chapter of the Christian Legal Society (CLS) by becoming an RSO. This national organization, comprised of thousands of Christian law students and attorneys, contains in its bylaws a Statement of Faith that members must sign. The statement includes an affirmation of Scripture as the "inspired Word of God."[2] In 2004, the national organization incorporated another clause into its policy which stated that "unrepentant participation in or advocacy of a sexually immoral lifestyle" is inconsistent with the Statement of Faith's understanding of Scripture and would thus disqualify membership. CLS carefully defined "sexually immoral lifestyle" as "acts of sexual conduct outside of God's design for marriage between one man and one woman."[3] This definition is important

1 CLS v. Martinez, 561 U.S. 661, 711 (2010) (Alito, J., dissenting).

2 *Id.* at 708.

3 *Id.* at 708.

because it is not solely targeted at potential members with homosexual orientation; it clearly refers to conduct and practices which also include any forms of heterosexual activity outside the bounds of traditional marriage. Thus the policy's goal is not to exclude sexual minorities, but to uphold a Biblical view of sexual activity consistent with the organizations' Statement of Faith.

Hastings, however, responded by denying CLS's request for registration, making CLS "the only student group whose application for registration has ever been rejected."[4] CLS filed a complaint under 42 U.S.C.§ 1983, claiming that Hastings' all-comers policy violated CLS students' First Amendment rights to free speech, expressive association, and free exercise of religion. The District Court ruled for Hastings, arguing that the all-comers policy was viewpoint neutral and permissible due to the nature of public universities as a "limited forum" for speech and expression. The Ninth Circuit upheld this decision, and in a splintered 5-4 decision the Supreme Court also ruled for Hastings, with majority opinion by Justice Ruth Bader Ginsburg, concurrence by Justice John Paul Stevens, and dissent by Justice Samuel Alito.

LEGAL ISSUES & ANALYSIS

The first key legal issue which Justice Ginsburg's majority opinion fails to address constitutionally is CLS's appeal to their rights to speech and expressive association. Instead of giving weight to students' concerns over their rights, the Court rules that Hastings' restrictive policy is "reasonable" and therefore

4 *Id.* at 710.

constitutional. The Court addresses only the issue of "whether a public institution's conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution."[5] The Court refuses to discuss whether this all-comers policy violates the rights of American citizens, or whether Hastings' inconsistent interpretation and enforcement of their policy constitutes discrimination against the religious viewpoints of CLS members, who constitute a small minority on campus. Instead of directly addressing the all-comers policy's effect on First Amendment rights, the Court argues that public universities are a "limited forum" in which speech and expressive association can be limited "in light of the purpose served by the forum."[6]

However, the concept of a public university as a limited forum directly undermines the stated goals of academic institutions, such as fostering discourse and facilitating an atmosphere where diverse ideas and demographics can interact freely and prosper. As Justice Alito points out in his dissent, the Court had a dramatically different outlook in 1972 with *Healy v. James*, when it rejected the concept of a limited forum. Even though the Court allowed the university to reject Students for a Democratic Society because of their potentially violent measures, the powerful precedent of First Amendment rights on campus still played a much more significant role than the *Christian Legal Society v. Martinez* Court would acknowledge.[7] The Healy Court strongly opposed

5 *Id.* at 177.

6 CLS v. Martinez, 561 U.S. 661, 711 (2010) (citing Rosenberger v. Rector and Visitors of Univ. of VA, *515 U.S. 819, 829 (1995)).*

7 Healy v. James, 408 U.S. 169 (1972).

the proposition that "First Amendment protections should apply with less force on college campuses than in the community at large."[8] Instead, the free exchange of ideas that characterizes American society should thrive at public universities in order to enhance the educational experience due to constitutional protections. Particularly in law school, where most students come in their mid-twenties to learn the art of legal discourse and engage in a competitive professional career, students do not need to be protected from opposing viewpoints or unwelcome religious views as if the campus were a kindergarten classroom. Justice Anthony Kennedy acknowledges this in his concurrence, mentioning that "a vibrant dialogue is not possible if students wall themselves off from opposing points of view."[9] However, the Court argues that as long as the school does not prohibit certain beliefs or intend to discriminate against CLS through its policy, it is justified in limiting speech and association. In effect, the Court treats the campus as a limited forum where certain minority voices can be silenced.

The Court's adoption of a limited-forum analysis in *Christian Legal Society v. Martinez* is significant because it allows the Court to use a weak standard of "reasonableness" to evaluate the College's policy instead of the strict scrutiny standard traditionally applied when freedom of speech or Fourteenth Amendment rights are at stake. The Court borrows its "reasonableness" standard from *Rosenberger v. Rector and Visitors of Univ. of VA*, a 1994 case on campus speech in publishing. However, Justice

8 *Id.* at 180.

9 CLS v. Martinez 561 U.S at 705 (Kennedy, J., concurring).

Ginsburg overlooks the precedent set by the rest of the Rosenberger case, in which the Court ruled that a university may not withhold funding from a student publication due to its religious outlook.

The second legal issue regards the Court's claim that the all-comers policy is "viewpoint neutral" and therefore not a violation of the free expression of religion guaranteed by the First Amendment. The Court dismisses the students' claim of religious freedom by arguing that Hastings did not single out CLS for inferior treatment purely due to its religious status, and thus the students' rights were not violated. The Court mentions the precedent set in *Widmar v. Vincent*, a 1981 case in which a university was prevented from discriminating against a religious group that wanted to meet on campus. However, this was an Establishment Clause case, while the issue at hand in *Christian Legal Society v. Martinez* is the free exercise of religion, a clause that the Court has made stronger efforts to protect.[10] Furthermore, the Court should have followed the precedent set in Widmar and protected the religious students in CLS from being singled out for "disadvantageous treatment."[11]

One of the Court's arguments to justify the dismissal of these free exercise claims is that CLS was discriminating against students with homosexual orientation therefore Hastings needed to protect a minority from being excluded. However, CLS makes

10 For example, the Court in *Wisconsin v. Yoder* made it clear that Amish parents' free exercise of religion would be inhibited by a compulsory public school attendance policy, and thus the Amish received protection by the Court.

11 CLS v. Martinez, 561 U.S. at 684.

clear that it is not excluding members or leaders on the basis of sexual orientation, but "on the basis of a conjunction of conduct and the belief that the conduct is not wrong."[12] These distinctions between orientation, conduct, and belief are nuanced and lie at the heart of religious practice. For the Court, an intentionally non-religious entity, to dictate the interaction of these concepts in such a complex area is essentially judicial supremacy. This approach also demonstrates a fundamental misunderstanding of the nature of fervently-held religious beliefs; the Court even implies that CLS is "cloak[ing] prohibited status exclusion in belief-based garb."[13] Justice Ginsburg acknowledges that this religious question is too nuanced for Hastings to decide, yet the Court presumes to decide it definitively in a manner that significantly limits students' rights of religious expression and threatens the ability for any group to have a Statement of Faith and hold their leaders to it. Furthermore, the fact that Gays and Lesbians for Individual Liberty submitted a brief supporting CLS's arguments lends credence to the argument that this is a First Amendment issue, not a gay rights issue.

The Court continues to justify Hastings' discrimination toward CLS by arguing that the law school enforces its all-comers policy equally to apply to all groups. However, as Justice Alito demonstrates, this is simply not the case. In fact, Hastings' inconsistent enforcement of their policy reveals that the policy was not viewpoint neutral, but instead targeted CLS because of its members' use of their Statement of Faith. Out of 60 campus

12 Brief for Petitioner at 35-36, CLS v. Martinez, 561 U.S. at 690.

13 CLS v. Martinez, 561 U.S. at 684.

groups and in all its history, Hastings has only denied RSO status to one group –the Christian Legal Society. Other groups, such as Silenced Right, limit their voting members to students committed to the pro-life message, and La Raza accepts only students "of Raza background."[14] These groups have never encountered an all-comers policy. While Hastings argues that its all-comers policy had been in place for twenty years and CLS just happened to violate it in 2004, Justice Alito demonstrates that no Hastings administrator ever mentioned an all-comers policy until they had denied CLS's initial recognition request. Instead, Hastings' initial claim was that CLS violated their Nondiscrimination Policy. Since Hastings had never before used this policy to coerce a group into accepting all comers as both members and leaders, Hastings' inconsistent application of the policy constitutes discrimination against CLS. As Justice Alito explains, Hastings' Nondiscrimination Policy is a standard clause that applies to every member of the law school, such as human resources staff, administration and faculty, yet their actions have not been subjected to the concept of an all-comers policy. Only those qualified for leadership and aligned with the mission of the school are considered for employment, as with any educational institution. Thus Hastings' claim that their Nondiscrimination Policy mandates CLS's acceptance of all comers as both voting members and leaders is inconsistent with previous applications and constitutes a new policy, one the school invented in order to exclude CLS's unwelcome beliefs.

The Court's final argument to justify Hastings' rejection

14 *Id.* at 713 (Alito, J., dissenting).

of CLS is that the effects of being denied RSO status were not detrimental enough to merit complaint. Justice Ginsburg views the RSO status as a subsidy or benefit that some groups gain, not a necessary element to a group's survival and growth. However, the denial of recognized status is a penalty that affected CLS substantially; the group survived with only seven members, and the fact that they were able to plan a few off-campus events for students does not justify discrimination against this group. The inability to use campus meeting rooms, advertise through campus channels, and receive funding for special events significantly impacted CLS's ability to reach students. Even if the loss of RSO status had not affected CLS materially, Justice Alito argues, "this Court does not customarily brush aside a claim of unlawful discrimination with the observation that the effects of the discrimination were really not so bad. We have never before taken the view that a little viewpoint discrimination is acceptable."[15]

CONCLUSION

Since the Court's decision in 2010, dozens of similar cases have emerged at private and public universities nationwide. The powerful tool of an all-comers policy, now sanctioned by the Supreme Court, has given universities license to suppress the speech, religion and expressive association rights of groups such as Intervarsity, Cru, and Catholic fellowships. Vanderbilt University and the University of Buffalo have prohibited groups from requiring their leaders to identify as Christian. In September

15 *Id.* at 717-8.

2014, the California State University system officially unrecognized Intervarsity from its 23 campuses, costing each chapter up to $20,000.[16] To be consistent, schools would have to require a sorority to accept men and force the College Democrats to allow a Republican president to be elected. However, most all-comers policies exempt Greek groups and allow honor societies and athletic groups to discriminate based on intelligence and gender. Religious groups are asking for a similar exemption to protect their sincere beliefs, and some schools, including University of Michigan and Ohio State University, have granted these exemptions. However, nothing prevents a school administration from violating students' First Amendment rights by modifying or withdrawing the exemption at any time. The issue centers on the source of these rights themselves, whether they belong inherently to students in a free society, or are granted at whim by university administrators.

The Court's decision in *Christian Legal Society v. Martinez* is deeply detrimental to the First Amendment rights of not only students, but members of any organization motivated by beliefs. The Court also limited students' freedoms of speech and expressive association by treating the public university as a limited forum, despite the *Healy* precedent of campus rights. Furthermore, the Court incorrectly applied precedent in *Rosenberger* so that the law school only had to show that its policy was "reasonable," instead of the strict scrutiny standard traditionally used

16 Charles C. Haynes, *Religious voices under attack at colleges*, Livingston Daily, Oct. 2, 2014, http://www.livingstondaily.com/story/opinion/columnists/2014/10/02/charles-c-haynes-religious-voices-attack-colleges/16620365/.

for First Amendment violations. Hastings' inconsistent application of their Nondiscrimination Policy demonstrated that it was not viewpoint neutral, and CLS's loss of recognized status caused significant harm to the group's ability to thrive on campus. While Hastings claimed to be preventing discrimination on the basis of religion and sexual orientation, their unconstitutional tactics constituted discrimination against not only Christian student leaders, but any student with a minority viewpoint that could be considered "unwelcome" by administrators' evolving definitions. One of America's defining features, the free exchange of ideas has always challenged and encouraged students to learn enthusiastically, embrace complexity and appreciate diversity. For the Supreme Court to sanction the silencing of these voices and beliefs is an injustice that should not be ignored.

THE MYTH OF JANUS:
FREE MARKETS, FUSIONISM, AND THE REPUBLICAN PARTY

Caleb Wolanek*

ABSTRACT *The Republican Party is experiencing inner turmoil. Under "Fusionism," Conservatives (those who focus on society and virtue) and Libertarians (those who emphasize the individual and freedom) both occupy the party. Though the two camps commonly oppose or promote the same policies—especially economic policies—their rationales are quite different. This essay outlines these two free market economic theories and then analyzes how current Republican Party leaders defend free markets, ultimately concluding that the GOP has adopted an identifiably Libertarian stance. Finally, this essay argues that the triumph of Libertarianism was inevitable given Fusionism's structure, thus providing avenues for future research.*

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Chapter I: Introduction

The relationship between Conservatives and Libertarians is, at best, tenuous. However, since this tension originates at the theoretical level and often results in similar policy recommendations (or, more frequently, oppositions to the same policies), it is not always visible to the naked eye. Those on the outside of the conflict (such as Reform Liberals), and even the oblivious insider, may conclude that Conservatives and Libertarians share the same fundamental commitment to free-market economics (viz. limited to no government interference) and that one school is merely a more radical version of the other. According to this false belief, Conservatives and Libertarians only exercise substantial differences in political philosophy when it comes to social issues. (This often leads to cries that Conservatives are "intellectually dishonest" for pursuing free-markets on one hand and social regulation on the other.) However, even though mutual opposition to "big government" Reform Liberal economic policies frequently brings the two groups together, it is a union formed by a common enemy, not common ground. This essay will demonstrate how Conservatives and Libertarians differ significantly in their justifications for free-market economic policies, thus beginning to describe the depth and breadth of separation between the two camps.

However, before we begin to examine the two schools of economic thought, it will be helpful to identify our two groups more precisely. (Just who are the Libertarians and the Conservatives, anyway?) In *The Conservative Intellectual Movement in America Since 1945*, George H. Nash argues that both Libertari-

anism and Conservatism as we know them emerged in the wake of the Great Depression and the Second World War.[1] Those two events dramatically increased the scope of governmental control, particularly in economic matters. Millions of men either were or had been employed by the government over the course of a decade (either in uniform or in a government work program). Moreover, the government had assumed control of numerous factories and plants in the name of the war effort. The mutual fear among Conservatives and Libertarians was that this control would not cease upon the Third Reich's defeat.[2]

The reactions to this government expansion were swift yet initially small, and they help the reader differentiate the two groups. As Nash writes, the Libertarian reaction began in full-force via two Austrians: Friedrich A. Hayek and Ludwig von Mises. In 1944, Hayek's infamous book *The Road to Serfdom* took America by storm (for example, *Reader's Digest* distributed 600,000 copies of a condensed edition), sparking fierce debates about the role of the government in the economy. Also in 1944, Nash writes, two of Mises' books, *Bureaucracy* and *Omnipotent Government*, presented similar, albeit more radical arguments.[3]

Hayek and Mises did not spark the Libertarian movement—there had been Libertarians prior to 1944. However, these had not been effectively mobilized in opposition to increasing government intervention in the economy. In fact, as Nash records,

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1 George H. Nash, THE CONSERVATIVE INTELLECTUAL MOVEMENT SINCE 1945 1 (13th ed. 2006).

2 *Id.* 1-2.

3 *Id.* 44.

early Libertarians, like Albert J. Nock (who wrote *Our Enemy, The State*) and Frank Chodorov (Nock's disciple), had not been hoping for a Libertarian revolution but for a "remnant"—that is, a few scattered individuals dedicated to the cause of freedom and to opposing the seemingly ever-expanding state.[4] Hayek and Mises provided a critical stimulus to this remnant. Thus, slowly but surely, as World War II ended and the Cold War began, more individuals began to identify with the Libertarian ideal.

The cause of this growth is not fully understood, though Nash argues one factor was the collective tenacity of Libertarians. Another possible element (the one I find most compelling) was the demonstrated failure of Soviet and British collectivism and the fact that the New Deal policies of the Great Depression had not been completely accepted in America.[5] In this situation, Libertarians were able to preach a one-word message: freedom. Specifically, they argued for substantial (sometimes absolute) freedom from government intervention and coercion (with government only allowed to enforce a general ban against "harm"). Gradually, this message grew louder and more widespread.

Conservatives, writes Nash, received a similarly slow start in the years following the Great Depression and Second World War. When Richard M. Weaver first published *Ideas Have Consequences* in 1948, traditional Conservatism was in a precarious position. In his and others' view, positivism and materialism had wreaked havoc upon society, and Weaver traced these cancers

4 *Id.* 18.

5 *Id.* 46-48.

to William of Occam's denial that there is a truth "higher than, and independent of, man," leading to nominalism.[6] While Weaver alone did not initiate the Conservative movement, he eloquently demonstrated that for Conservatives, recovering society was inextricably linked with the recovery of transcendent truth. United on this mission so clearly described by Weaver, Conservative thinkers proceeded to defend and/or rediscover the "Great Tradition" of Conservative thought.[7] There had been a history of Conservatism in Europe, but the desire was for an American tradition as well. The hope held that recovering this tradition could lend credibility to the Conservative movement and re-establish belief in the existence of immutable truth and virtue.[8] While substantial disagreements about the nature of this truth were present ("Weaver wrote of universals, [Leo] Strauss of natural right, and [John] Hallowell of natural law…"[9]), the unifying theme of transcendent truth nevertheless remained.

This Conservative "Great Tradition" arguably found its clearest and most succinct articulation in Russell Kirk's *The Conservative Mind*, published in 1953. There, Kirk traced the history of Conservative thought from Edmund Burke to George Santayana (though the book was later extended to end with T.S. Eliot), thus providing twentieth-century Conservatives with a strong heritage from both sides of the Atlantic. Throughout this family tree, according to Kirk, six main tenants of Conservative belief could

6 Richard M. Weaver, IDEAS HAVE CONSEQUENCES 3 (1948, 2013).

7 Nash, *supra* note 1 at 83.

8 *Id.*

9 *Id.* 83.

be identified: the existence of transcendent truth; non-egalitarianism, non-uniformity, and non-utilitarianism; the existence of an aristocracy; protection of private property; a high role of custom and convention; and caution against change.[10]

One should notice that in this description of Conservative thought, "freedom" is not elevated to a superior status. Instead, Conservatism considers freedom alongside other concerns, such as justice and order. Conservatives, then, are not as focused on individualism and laissez-faire economics as their Libertarian acquaintances. Indeed, Kirk himself wrote that "a conservative order is not the creation of the free entrepreneur,"[11] that the Conservative "has no intention of converting this human society of ours into an efficient machine for efficient machine operators, dominated by master mechanics,"[12] and that "true conservatism... rises at the antipodes from individualism. Individualism is social atomism; conservatism is community of spirit."[13] To borrow Isaiah Berlin's classic phraseology, while Libertarianism attempts to take a purely "negative freedom" approach,[14] Conservatism includes an aspect of "positive liberty" designed to steer individuals towards virtue and social order.[15]

Clearly, then, Conservatives and Libertarians have two

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10 Russell Kirk, THE CONSERVATIVE MIND: FROM BURKE TO ELIOT 8-9 (7th ed. 1953, 1985).

11 Nash, *supra* note 1 at 34. *See also* Russell Kirk, *The American Conservative Character* 8 GA. REV. 249 (1954).

12 Russell Kirk, A PROGRAM FOR CONSERVATIVES, 19 (1954).

13 Kirk, THE CONSERVATIVE MIND *supra* note 12 at 242.

14 Isaiah Berlin, *Four Essays on Liberty* , in LIBERALISM AND ITS CRITICS 15 (Michael J. Sandel ed., 1984).

15 *Id.* 15, 23.

different objectives as evidenced by their different reactions to post-World War II conditions. For some time, their substantial differences could have threatened their mutual opposition to collectivism. However, united by opposition to Communism and led by Frank S. Meyer, Conservatives and Libertarians cautiously joined hands in the 1960s. Meyer's so-called "Fusionism" held that "the duty of men is to seek virtue; but...men cannot in actuality do so unless they are free from the constraint of the physical coercion of an unlimited state."[16] Thus, in the name of Fusionism, Conservatives and Libertarians are often united, typically under the flag of the Republican Party, in pursuit of freedom as the highest *political* end—with an eye given to the importance of virtue. Fusionism requires neither camp to abandon its convictions, attempting instead to find common ground upon which to defeat a common enemy. However, this union has never fully solidified, and several scholars, despite the protests of those like George Nash,[17] have argued that it is either untenable or crumbling.[18]

The disintegration of Fusionism provides the context for this essay. As indicated above, this essay will compare and contrast the economic theories of both Libertarians and Conservatives, arguing that the two camps differ substantially at a theoretical level. Additionally, it will present evidence that the Republican Party has shifted towards a more Libertarian position, thus

16 Frank S. Meyer, *The Twisted Tree of Liberty*, NAT. REV., Jan. 16, 1962, in FREEDOM AND VIRTUE: THE CONSERVATIVE/LIBERTARIAN DEBATE, 17 (George W. Carey ed., 1998).

17 Nash, *Supra* note 1 at 581.

18 See Brent L. Bozell, *Freedom or Virtue*, NAT. REV., Sept. 1, 1962, in FREEDOM AND VIRTUE: THE CONSERVATIVE/LIBERTARIAN DEBATE, 21-34 (George W. Carey ed., 1998). Also, Daniel McCarthy, *The Failure of Fusionism*, AMER. CONSERV., Jan 29, 2007.

indicating a decline in Fusionism's strength. Finally, it will argue that the structure of Fusionism, given the nature of Conservatism and Libertarianism, makes its breakup (and the subsequent rise of Libertarianism) inevitable.

Of course, the previous paragraphs do not provide an adequate basis for this discussion, and therefore we must examine more closely the central tenants of each camp as they relate to economic theory. Therefore, Chapters II and III describe the Conservative and Libertarian economic theories, respectively. Chapter IV will briefly highlight several of the differences between the two schools by means of a controversial public policy example. Chapter V will then apply the lessons learned from the previous three chapters to the Republican Party, thus demonstrating that the GOP has adopted an identifiably Libertarian theory of economics. Chapter VI will conclude this essay by discussing the inevitability of Libertarianism's rise and identifying several applications of this essay. We turn first to the Conservatives.

Chapter II: Conservative Economic Thought

Describing the central tenants of Conservative economic thought is a daunting task. This is because Conservatives, while they strongly desire to improve society, believe (to a certain extent) the first step forward must actually be a step back, undoing the mistakes of the past and building the political, economic, and social orders afresh. This is not to say Conservatives are opposed to all elements of the status quo or that they seek to create anything revolutionary. (Indeed, opposition to revolution is a badge

of honor for the true Conservative.) However, Conservatives seek to rebuild society upon a solid foundation of truth and tradition, and getting to this point requires a reversal of the present course. Since Conservatives precede their advocacy of a positive agenda with the espousal of a negative one, they are frequently known more for what they oppose than what they support. This tends to obscure the Conservative's blueprint for society.

Nevertheless, several guiding principles can be discerned from key Conservative thinkers. The first we will discuss is Richard Weaver, who offers a unique critique of modern economic thought. Secondly, we will analyze Russell Kirk and his views on economics, several of which have been hinted at above.

A. Richard Weaver

In 1948, while teaching at the University of Chicago, Richard M. Weaver (1910 – 1953) published *Ideas Have Consequences*.[19] According to Robert Nisbet, this book "launched the renaissance of philosophical conservatism in [America]."[20] While *Ideas Have Consequences* is not expressly about economics, its broad scope allows it to speak to modern economic thought.

Weaver traces the woes of modern society to one fundamental problem: the denial of transcendent truth. He argues that modern society has rejected the mind in favor of the body, the intellect in favor of the senses. Thus, modernity believes that only that which can be seen, felt, or heard can be considered reality..

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19 Roger Kimball, forward to Weaver, Ideas Have Consequences, xi.

20 Weaver, *supra* note 6 at back cover.

Since reality is considered as being only physical, there is an inevitable focus on nature and on measurement. Even mankind is seen as only being an object of nature. Thus, any "imperfections" are natural and not the product of an inherent sin nature—man is believed to be fundamentally good.[21] Additionally, since motivations for human action are necessarily products of nature (again, since the modern paradigm will not allow them to originate anywhere else), applying Darwin's lesson of "survival of the fittest" reduces man to "the wealth-seeking-and-consuming animal" of only economic concerns.[22]

Within this broad argument, Weaver criticizes both capitalism and communism and maintains that modern economic materialism is actual egotistical. The core of his position has two faces, yet each is of the same coin.

First, modern industrialization focuses on immediate gain without thought or care for the reasons for laboring. ("The workers are likely not to know what they are producing, and the managers are likely not to care."[23]) Whereas the ancient philosophers were concerned with the nature and order of things, modern "specialists" have replaced the transcendent with the material. "Having lost hold upon organic reality," they hope that "salvation lies in what can be objectively verified."[24] This results in a fragmented worldview that denies the transcendent and is thus fascinated with relatively small matters in life. *This* is why individuals

21 *Id.* 3-4.
22 *Id.* 6.
23 *Id.* 58.
24 *Id.* 53.

labor without knowing why. Industrialization and the Division of Labor have created tasks "so minute that it is impossible for the individual to grasp the ethical implications of his tasks."[25] Though Weaver is not criticizing the Division of Labor *per se*, he is noting that the material focus of industrialization has obscured the vision "of what the good life demands." Under hyper-industrialization caused by materialism, labor becomes meaningless, and the individual has been "maneuvered into a position in which he is not permitted to be a whole man."[26]

Second, instead of working for excellence and focusing on quality (which would provide for true meaning in labor), modernity labors to obtain money and concentrates on the quantity of production. Weaver argues that before the great denial of absolute truth, the focus of labor was excellence. There was a sense of inherent responsibility to the community and to rational employment.[27] However, as modern man believes he is only a product of economic forces, he becomes self-seeking and competitive. He thinks of his rights, but not of his responsibilities, and therefore everything is about wealth-maximization.[28] Therefore, "men are applauded for looking to their own interest first."[29] Though men attempt to convince themselves they are everyone's equal, they still attempt to better themselves at the expense of others.[30] This betrays society's materialistic focus.

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25 *Id.* 58.
26 *Id.* 61.
27 *Id.* 67.
28 *Id.* 64.
29 *Id.* 68.
30 *Id.* 70.

What, then, does Weaver propose as a solution? If egotism creates a war of all against all and replaces rationality with a giant tug-of-war, Weaver intends to quell the conflict and reintroduce rational ends to the market. In brief, he seeks to restore transcendence to both the market and to labor.

He would do this first by rethinking the nature of labor, reverting it back to its original status of a divine ordinance and not merely a source of material gratification. Through this shift, workers would come to enjoy their work since the institution would not be an arbitrary contrivance.[31] In addition, the material quality of labor would increase since one's connection to "rational employment" in fulfillment of divinely ordained obligations would lead to an interest in "perfect execution."[32] If everyone labored in the manner and position divinely ordained for him and for the appropriate goals, society would labor rationally and be able to rationally appropriate the rewards of such labor based on their value.

Based on the above narrative, Weaver could appear opposed to any freedom, instead favoring religiously motivated state control. However, Weaver is neither a Socialist nor an advocate of bureaucratic control: he solidly rebukes redistributionist movements as an attempt to "get something without submitting to the discipline of work,"[33] and his contempt for bureaucratic "specialists" has already been seen. Instead, he believes in a divinely ordained world in which everyone and everything has a purpose, leading individuals to the task of discovering this purpose and

31 *Id.* 70.

32 *Id.* 67.

33 *Id.* 115.

laboring accordingly (with the help of philosophy and society).

To this end, governments must protect and restore the institution of private property. Private property appropriately shows the connection between rights and responsibility in a way that allows one to do what he ought ("a range of volition through which one can be a complete person"), a concept rejected by both capitalism and communism.[34] Private property also allows for virtue apart from state control.[35] And, it both allows for and requires thrift (which governments ought to respect by limiting inflation).[36]

Weaver's solution and reasoning can be easily demonstrated by means of a short example. If a man lives in a cabin on a farmstead, he is confronted with the necessity of hard work devoid of rabid materialism. He is not primarily interested in the size of his cabin or the depth his well, but rather with the freshness of his water and the ability of his roof to keep him dry. Yes, this man is free, but he is also obligated to perform certain duties (such as planting crops or chopping wood) and uphold certain responsibilities (such as helping his neighbor harvest wheat or ensuring his livestock do not trample his neighbor's field). Thus, private property, in this sense, can help a man understand the fullness of life by demonstrating the true natures of work, virtue, and freedom.

While this "lone man on the range" is a dramatic example, it does demonstrate Weaver's dramatic difference from modern economic rhetoric. Rather than viewing economic freedom as being the end of man, free-market economics should become the

34 *Id.* 121.

35 *Id.* 124-125.

36 *Id.* 126-127.

servant of man and his destiny as a full human being. As a result, freedom must be accompanied with rights and must not be used simply to improve one's material situation.[37] Therefore, Weaver clearly shows the anti-materialist nature of Conservative economic thought. Instead of material possessions being the chief end of economics, private property and free-market economics (limited by concern responsibilities, rationality, and the rights of others[38]) are means by which man can achieve his divinely ordained role. Next we turn to Russell Kirk's philosophy.

B. Russell Kirk

First published in 1953, *The Conservative Mind* represents a seminal work in Conservative political thought. It both defines and provides an extensive intellectual heritage for Conservatism.

Most broadly, *The Conservative Mind* indicates the society-level focus of Conservative economic thought. This attribute provides the overall context for a discussion of Kirk's philosophy. Whereas Libertarians focus on the individual, Kirk emphasizes the community. Kirk writes that excessive individualism is a fear of all Conservatives since (as Alexis de Tocqueville famously made clear) that condition easily lends itself to dramatic government intervention in society. Though it may promise freedom, the initial anarchy of a modern revolution will quickly lead to total servitude.[39] Thus, a major goal of Conservatives is "the recovery of

37 *Id.* 131.
38 *Id.* 111.
39 *Id.* 467.

true community, local energies and cooperation" since "free community is the alternative to compulsive collectivism."[40] (Emphasis added.)

Given Libertarian emphasis on autonomy, as well as collectivism's faulty belief that it pursues true community, further explanation of Kirk's point is necessary. Quoting Robert A. Nisbet's *The Quest for Community* at-length, Kirk writes:

> The family, religious association, and local community—these, the conservatives insisted…are the indispensable supports of belief and conduct. Release man from the contexts of community and you get not freedom and rights but intolerable aloneness and subjection to demoniac fears and passions.[41]

Stated more negatively, "Rousseau and his disciples," by freeing men "from family, church, town, class, [and] guild," created a gaping hole in the collective soul of humanity.[42] This continues to provide a ready environment for collectivism and totalitarianism.

Kirk thus wants to avoid two extremes, one of them resulting from the other. Destruction of social bonds through liberal (including libertarian) rhetoric creates an atomized culture, and this, as de Tocqueville warned, leads to a totalitarian one. Excessive individualism is thus an evil to be avoided as it precedes excessive state control. Thus, when Kirk calls for true, free

40 *Id.* 473.

41 *Id.* 483. Quoting Robert A. Nisbet, THE QUEST FOR COMMUNITY (1953).

42 Kirk, THE CONSERVATIVE MIND, 488.

communities of individuals, "free" largely refers to the community, not to the individuals therein. This theory does not entirely eliminate freedom for the individual, but it bases an individual's freedom in the community, thus allowing for local control over individual actions. Nor does this allow for collectivism—indeed, there is no need for collectivism since there are independent communities taking care of their own. Therefore, Kirk makes economic policy the servant of the community and not the tool of individualism. Out of this broad principle flow three additional tenants of Conservative economic thought.

First, opposition to absolute liberty and pure democracy are implicit in the community emphasis of Conservatism. Should individuals be allowed to do *anything* they desire, community bonds will quickly dissolve. Thus, Kirk condemns total democracy along with unlimited government, citing men like John Adams, Thomas Macaulay, and Henry Maine, among others. While there should be liberty, it must be liberty ordered under the law. And while there must government, it too ought to be limited. As John Adams wrote, government must be "one of laws, not of men."[43] Adams knew man was both weak and ignorant and that "only religious faith, stable institutions, and candid recognition of [man's] own failings can withhold man from the spiritual destruction that lurks at the back of [his] appetites."[44] Thus, political liberty can never be absolute. It requires a "framework of institutions" and political structures to protect it—in other words, a republic.[45]

43 *Id.* 72.

44 *Id.* 90.

45 *Id.* 100.

This republic should be designed to respect liberty (as Kirk paraphrased Adams, "the great prerequisite for just government…is recognition of local rights and interests and diversities"[46]) and to restrain power and passion.

Second, there is a fierce opposition to materialism. While modernity is obsessed with pure economic utility, Kirk maintains that a Utilitarian view of the world is woefully inadequate as a political philosophy. While Conservatives *do* seek social and individual well-being, they do so in the broadest sense. Paraphrasing Burke, Kirk writes that "utility, properly understood, is a high view of general and permanent interests." Thus, the goal is not mere material accumulation. Rather, acquisitiveness must be subjugated to the transcendently true. Allowing economic interests to reign supreme and unchallenged will tend to, as de Tocqueville would have argued, "undermine the social structure which makes material accumulation possible," creating moral decay and societal dissolution.[47]

Third, and finally, *The Conservative Mind* condemns economic leveling designed to make all men equal. Nearly every Conservative from Burke to Eliot has recognized that absolute liberty is wholly incompatible with absolute equality. Thus, Conservatism accommodates a significant level of inequality, particularly economic inequality. (Note, however, that Conservatives are among the strongest defenders of moral and legal equality. Despite opposing attempts to *make* men equal, they will *treat*

46 *Id.* 104.

47 *Id.* 211.

men equally before the law.) As W. H. Mallock argued in the late nineteenth and early twentieth centuries, differences in ability will lead to inequalities in wealth. Yet, he viewed these differences as providing an incentive for further innovation and growth.[48] Therefore, private property and individual initiative is preserved in the Conservative framework as it allows individuals to exercise differences in ability and preserve liberty apart from government.[49]

As is clear from the preceding pages, Kirk's emphasis is on the community, not the individual. Attempts to destroy societal order, whether through abstract liberty, materialism, or pure democracy, must be opposed. Man needs society and order to flourish, and "the ideas of infinite material progress, perfectibility, and alteration for novelty's sake" are "hostile to the traditional order."[50] Economics must bow to this traditional order, not the other way around.

C. Summary of Conservative Economic Thought

Through the analysis of Weaver, Kirk, and others, two broad themes have emerged. First, the Conservative justification for free market economics is not abstract liberty. Rather it is practical concerns grounded in respect for both individuals and society. While Conservatives are not pragmatists in the Utilitarian sense of the word, they tend to support the free market because it practically advances their fundamental, unchanging principles.

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48 *Id.* 404.

49 *Id.* 9.

50 *Id.* 240.

Conservatives base their theory in a deep understanding of human nature, particularly the fallibility and finitude of man,[51] and in the recognition that market systems have a remarkable capacity for wealth creation. Conservatives recognize that no lone individual can comprehend all the intricacies of every commercial transaction, that humans are prone to error (and, more importantly, to sin), and that government interference tends to distort and monopolize the market, therefore limiting wealth creation. Therefore, Conservatives favor a system in which individuals (as they are generally the best source of knowledge about which needs and wants to fulfill and how to go about fulfilling them) are permitted to make most economic decisions for themselves.

Secondly, Conservatives are not afraid to limit the market via government action. The market is merely one of several tools to be utilized in pursuit of larger social goals. This broad focus on society as a whole thus maintains that if market operations conflict with an important societal goal, one should have no qualms about imposing regulations. While these regulations are to be balanced against an incredibly strong interest in liberty—no Conservative wishes to live under soul-crushing Communism, in which the individual is treated not as a man but as a mere cog in a machine—concerns about peace, order, justice, and (broadly speaking) morality must also be considered While this leads to substantial freedom in economic transactions, it also serves to

51 Interim Dean William Brewbaker of the University of Alabama School of Law helped refine my definition of Conservative economic thought, providing me with the "fallibility and finitude" framework. See William S. Brewbaker III, *Theory, Identity, Vocation: Three Models of Christian Legal Scholarship*, 39 Seton Hall L. Rev. 17, 22 (2009).

limit the market, recognizing that "economic self-interest is ridiculously inadequate to hold an economic system together."[52]

Having discussed Conservative economic thought in-depth, we now turn to Libertarian economic thought.

Chapter III: Libertarian Economic Thought

For many readers, the preceding chapter may have conveyed a novel concept. Purebred Conservatives are a rarity, and where they do surface, their rhetoric can lack popular appeal in our modern, freedom-focused culture. This has the tendency to suppress Conservative discourse, and perhaps this partially explains why many individuals errantly believe that Conservatism and Libertarianism share the same tradition and that one camp is merely an extreme version of the other. The previous chapter helped to dismantle that belief, and this chapter will continue in the same manner. We begin by analyzing a Libertarian response to Conservatism as seen in Friedrich A. Hayek's essay "Why I Am Not a Conservative." Then, we will examine the Libertarian philosophy of economics using Hayek's *The Road to Serfdom* and Murray N. Rothbard's *The Ethics of Liberty* as our touchstone works.

A. Libertarian Criticisms of Conservatism

In 1960, Friedrich A. Hayek (1899 – 1992) published *The Constitution of Liberty*. While the book itself is influential, what is of concern to us currently is Hayek's postscript essay entitled

52 Russell Kirk, A Program for Conservatives, *supra* note 12.

"Why I Am Not a Conservative." There, he details no less than eight criticisms of Conservatism, arguing that libertarianism "differs as much from true conservatism as from socialism."[53] (I must note that Hayek only uses the word "libertarian" once in his essay, preferring to describe his philosophy as a "liberal" one. But, for the reader's ease, I will replace Hayek's use of "liberal" with "libertarian" where the two are synonymous.[54])

First, and most importantly, Hayek argues that Conservatives have "a timid distrust of the new as such" and prefer to fully understand the consequences of any change before agreeing to it.[55] In contrast, Libertarians put full trust in the market and its ability to make what changes and improvements are necessary. Therefore, Libertarians do not fear, or even distrust, change. Second, Conservatives fail to understand the true nature of the market as an incomprehensible machine. They are not willing to simply follow the market but instead are committed to certain principles and to the desire to maintain order. To achieve this, they require impossible knowledge about the market before taking any action. However, Libertarians acknowledge their lack of knowledge about the market and thus do not try to control it.[56] Third, Conservatives are too committed to certain principles, foreclosing the possibility of compromise with other viewpoints. Stated differently, Conservatives attempt to force their beliefs on others. Libertarians believe in allowing those with different beliefs to follow

53 *Id.* 398.
54 *Id.* 408.
55 *Id.* 400.
56 *Id.* 400-401.

their own convictions, and thus the Libertarian commitment is to a free society, not a certain set of moral or religious convictions.[57] Fourth, Conservatives relies heavily on authority to maintain order in society. Libertarians distrust authority.[58] Fifth, Conservatives believe the natural aristocracy should be allowed to lead society. Libertarians question this aristocracy.[59] Sixth, Conservatives distrust democracy, believing that the majority vote can too easily be wrong. Libertarians, on the other hand, fear unlimited power. Though such power *could* emerge in a democracy, it is most likely to be limited in a democratic society.[60] Seventh, Conservatives (since, like Burke, they tend to resist change) tend to be against internationalization and often favor nationalist policies. This is seen to "provide the bridge from conservatism to collectivism" since "to think in terms of 'our' industry or resource is only a short step away from [collectivism]."[61] In contrast, Libertarians are open to internationalization as yet another form of freedom. Finally, Conservatives, according to Hayek, are not willing "to face [our] ignorance and to admit how little we know" without resorting to claims about a "supernatural source of knowledge."[62] Thus, just as socialism claims perfect knowledge about redistribution, the Conservative resorts to "mysticism."[63] The Libertarian simply embraces his ignorance and keeps his spiritual beliefs to

57 *Id.* 401-402.
58 *Id.*
59 *Id.* 402-403.
60 *Id.* 403.
61 *Id.* 405.
62 *Id.* 406.
63 *Id.* 406.

himself without trying to incorporate it into policy.[64]

This critique reveals the degree of separation between the Conservative and Libertarian camps. While Conservatives would obviously not agree with Hayek's contentions, Hayek does raise questions about the power of the market, the comprehensibility of the market, the human condition, the role of authority, the appropriate attitude towards change, and the role (and even the possibility) of religious and moral truth in society. Several of these issues will be addressed further as we begin to discuss Hayek's economic philosophy in *The Road to Serfdom*.

B. Friedrich A. Hayek

In the *The Road to Serfdom* Hayek writes that we are on a march towards totalitarianism via collectivism. He admits that central control of the economy is well intentioned, but he also notes that it necessarily requires the supplementation of individual desires and efforts for national ones (since otherwise the plan would fail).[65] Yet, this government control is not limited to the economic realm; it affects everything in society by affecting which choices can be made in the market. Through this, all other actions are in some way constrained.[66] This ability to affect an individual's position in society quickly makes power the most prized commodity in the market. A power-grab inevitably ensues, both leaving the most ruthless at the top (since they are most willing to commandeer society at any cost) and removing limits on

64 *Id.* 406-507.

65 Friedrich A. Hayek, The Road to Serfdom 85 (1944).

66 *Id.* 126-127, 133.

the exercise of power.[67] Thus, political and personal freedoms, according to Hayek, are inextricably linked with economic freedom, and the rejection of the latter will lead to the disintegration of the former.[68]

One of Hayek's arguments in favor of a libertarian position is centered on the uncontrollable and incomprehensible nature of the market due to its size. Since no one person can understand the complexity of the market, no one can effectively manage such a system.[69] Any attempt at control can only hope to succeed through coercion, yet even this could lead to economic decline and/or artificial success (such as inflation).[70] Despite the compelling nature of this point, Hayek's argument about the *inevitability* of totalitarianism resulting from collectivism is not complete without two other crucial concepts: the lack of a complete ethical code and the requirement of government neutrality. Yes, government control of the economy destroys the liberty to engage in certain activities, but *why* is this undesirable? (After all, Communists *intend* to destroy such liberty, yet they believe they are acting in society's best interest.) Hayek's answer is that any such control is arbitrary, not neutral, and therefore wrong. This is because there is no valid standard by which to circumvent the free choice of the individual:

> To direct all of our activities according to a single plan presupposes . . . the existence of a complete ethical code in which all the different human values are allotted

67 *Id.* 138.
68 *Id.* 67.
69 *Id.* 95-96.
70 *Id.* 214.

> their due place. . . . *The essential point for us is that no such complete ethical code exists.* The attempt to direct all economic activity according to a single plan would raise innumerable questions to which the answer could be provided only by a moral rule, but to which existing morals have no answer and where there exists no agreed view on what ought to be done.[71] (Emphasis added.)

After stating that each individual is the best determiner of his own needs, Hayek writes that the "recognition of the individual as the ultimate judge of his ends, the belief that as far as possible his own views ought to govern his actions...forms the essence of the individualist position."[72]

In other words, Hayek states that government ought not to direct the economy because the market is not fully understandable or controllable, even through scientific means,[73] and because any attempt to make decisions about who gets what will be arbitrary. Therefore, governments, in keeping with the liberal tradition of the English-speaking world, should behave neutrally and allow individuals to govern their own activities. Society must submit to the order of the market, not attempt to control it.[74]

However, Hayek does not argue for complete withdrawal of government from society. Instead, he calls for the "Rule of Law," which is essentially a principle of neutrality. It allows government to make generally applicable laws but none that apply to specific groups or individuals. This is to prevent the government

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71 *Id.* 101. (Emphasis added).
72 *Id.* 102.
73 *Id.* 202.
74 *Id.* 211-212.

from favoring any one class of citizens over another,[75] foreclosing redistributionist tendencies while maintaining societal order. Hayek concedes that securing a "uniform minimum" standard of living is fully consistent with a developed society,[76] as is "the state's rendering assistance to the victims of such 'acts of God' as earthquakes and floods."[77] Yet, such assistance should not attempt to guarantee income to those who are not competitive in the marketplace as it would destroy the liberty of society by attempting to create a right to a certain style of life.[78] Such generalized aid presumably meets Hayek's requirement of neutrality.

Thus, Hayek essentially argues that as individuals reject a freedom-centric society in exchange for centralized control of the economy, government must inevitably suppress certain individual choices. This will necessarily be done arbitrarily since there is no standard by which to make such decisions. As a result, the Rule of Law, and thus its central principle of neutrality, will be violated. In opposition, neutrality and individual freedom must reign.

C. Murray N. Rothbard

As a brief conversation with many, if not most, present-day free-market advocates will indicate, Hayek's philosophy continues through the present day. However, there exists a flaw, or rather an inconsistency, in his argument that has been rejected. The intuitive reader might have noticed that Hayek allows for

75 *Id.* 115-119.
76 *Id.* 215, 148.
77 *Id.* 148.
78 *Id.* 149.

government policies, including economic ones. He limits these policies by stating that they must not intentionally favor any one group over another, as long as they are "neutral" and therefore not easily susceptible to coercion. However, the developments in modern political philosophy have shown that there is no such thing as neutrality. Every law, no matter how broad and generally applicable, is designed to promote, permit, or prevent *something*. That we need such a law to begin with implies that *someone* will otherwise commit (or not commit) the act. Thus, every law imposes some view of right and wrong on a would-be actor, thus coercing him or her. Since Hayek admits there is no way to determine the moral or ethical value of an action as only the individual can perform such a task, even those laws that Hayek allows are, under his own philosophy, arbitrary.

Murray N. Rothbard (1926 – 1995) understood this point well. As an anarchist-libertarian, Rothbard believed the state itself was immoral, and he made this point clearly in his book *The Ethics of Liberty*, published in 1982. There, he criticizes Hayek's (and others') willingness to allow *any* government control. He writes:

> The absurdity of relying on general, universal ("equally applicable"), predictable rules as a criterion, or as a defense, for individual liberty, has never been more starkly revealed. For this means that, e.g., if there is a general governmental rule that every person shall be enslaved one year out of every three, then such universal slavery is not at all "coercive." *In what sense, then, are Hayekian general rules superior or more libertarian*

> *than any conceivable case of rule by arbitrary whim?* [79]
> (Emphasis added.)

In some aspects, Rothbard sees Hayek's definition as being too broad. For example, Hayek argues that there is "peaceful" coercion (in which it is coercive to refuse to make an exchange),[80] and by expanding the boundaries of what is coercion, certain forms and degrees of coercion are permitted while others are not. This leads to a larger role for government since it must make these arbitrary decisions.[81] Thus, Rothbard vehemently rejects Hayek's expansion of the term.

However, in other areas, such as in relation to government, Rothbard believes Hayek's conception of coercion is far too narrow. Hayek allows for innumerable forms of government imposition on the private individual so long as these regulations are "neutral" and clearly articulated. Though Hayek wants to prevent the arbitrary imposition of government and to allow individuals to make their own decisions, Rothbard shows that Hayek's position is inconsistent as it allows "neutral" government imposition on an individual's choices.

However, as much as Rothbard criticized Hayek, the two also share many common traits. In many respects, Rothbard takes Hayekian individualism to a more comprehensive level, and Rothbard's position is actually quite simple: First, the human mind is

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79 *Id.* 226. (Original emphases removed. Emphasis here is mine).

80 *Id.* 220.

81 *Id.* 223-224.

capable of discerning "natural law" through reason alone—that is, without the assistance of faith. Reason is the only true source of "objective" order, and anything other than the rule of right reason is arbitrary.[82] This naturally makes the individual, not society, the focus of political philosophy.[83] (Note that Rothbard's use of "objective order" refers to that which is "determined by the natural law of man's being." That is, by reason.[84] Thus, it is objective only as far as the individual is concerned—it is not invented out of thin air but rather led by reason. However, Rothbard is not referring to a transcendent order since that would require a universal standard. To require that "true" reason is of a particular breed would be to deny Rothbard's claim of neutrality. Thus, Rothbard is as subjective as Hayek.)

Second, in the tradition of John Locke, because one has a natural right to the works of his hands (as a result of his natural ownership of his person), un-owned property becomes owned when one mixes his or her labor with natural resources.[85] By combining these two principles, Rothbard concludes that "it is a man's right to do whatever he wishes with his person; it is his right not to be molested or interfered with by violence from exercising that right."[86] Stated differently, "100% self-ownership for every man is the only viable political ethic for mankind."[87] By the same principle applied in the reverse, one has a right to be free from "aggres-

82 *Id.* 11.
83 *Id.* 3-19.
84 *Id.* 11.
85 *Id.* 21-24. The scope of this essay does not permit analysis of Locke's claim.
86 *Id.* 24.
87 *Id.* 46.

sive violence" in which "one man invades the property of another without the victim's consent."[88] It is permissible, then, to protect oneself from aggressive violence if the use of defensive violence is proportionate to the encroachment,[89] does not harm others,[90] and is only exerted in defense of rightfully-owned property (that is, property resulting from production or valid exchange).[91] These limitations keep one from trespassing onto another's property.

However, such protection against encroachment cannot come from the state. Rather, it must come from the aggrieved party or his duly authorized representative. In this respect, the applications of Rothbard's principles to governments are strikingly consistent. He argues that the state, since it uses armed force (both the military and the police) and the courts to enforce its will, is inherently coercive. The state invades the inviolable property of another without consent, rejecting voluntary preferences in favor of some government agent's arbitrary determination.[92] Moreover, this coercion is impossible to restrain since there is no motive for the government to restrain itself. Indeed, there exists an economic reason to *expand* the sphere of coercion.[93] Therefore, under the principles previously elucidated, the State cannot morally exist since it would hypocritically violate the very laws it was claiming to uphold and, more importantly, trespass on the rights of individ-

88 *Id.* 45. (Emphases removed).
89 *Id.* 82.
90 *Id.* 79.
91 *Id.* 54.
92 *Id.* 164-168.
93 *Id.* 176.

uals to be secure in their "persons, houses, papers, and effects."[94] Thus, Rothbard avoids the logical inconsistency found in Hayek's argument by virtue of precluding the very existence of government.

D. SUMMARY

Nevertheless, Rothbard and Hayek, ignoring the above discrepancies over the nature of coercion and the role of government, do form a coherent theory. First, and most importantly, both are primarily individualistic, placing market authority in the individual since there is seen to be no other way to appropriately allocate resources in the economy. Hayek expresses this common inability to control or comprehend the market by arguing that there is no common standard by which to redistribute society's wealth and resources. Rothbard states the same principle by a different route when he claims that the proper allocation of resources is determined by individual reasoning—a process that is inherently solitary. Thus, both assert the primacy and inviolability of individual choice in economic and even political affairs.

Second, both adhere to the liberal tradition by advocating that government must be strictly neutral. Though they disagree over whether it is possible for the government to actually be neutral, they at least agree on the validity of the principle. Thus, any government imposition of preferences is improper, and this severely limits the scope of permissible regulations or even eliminates them altogether. In short, no policy can attempt to favor one

94 *Id.* 179. Quoting from U.S. CONST. AMEND. IV.

group over another.

We have therefore seen the differences between conservative and libertarian economic philosophies. One views free-market economics as a tool, the other as the *only* moral way to approach economics. One believes humans need government regulation, but the other rejects such as impermissibly coercive and arbitrary. In short, one focuses on society and social groups, the other on the individual.

Chapter IV: Applications to the Republican Party

We have seen the Conservatives' societal focus and emphasis on virtue. We have also seen the Libertarians' fervent defense of individual freedom and morally motivated abhorrence of government coercion. Yet, despite their differences, since the 1960s these two groups have been unified by Fusionism. "Fusionism," or the attempted unification of the Conservative and Libertarian camps into a single force, agrees it is "the duty of men… to seek virtue." However, it also maintains "men cannot in actuality do so unless they are free from the constraint of the physical coercion of an unlimited state."[95] In other words, the Fusionist principle stresses the importance, even the necessity, of virtue, but it also requires that such virtue operate in an open area of freedom.

The first chapter stated that the breakup of Fusionism provided the context for this essay. We will analyze that phenomenon here, thus examining how the Republican Party has begun to steadily adopt a Libertarian agenda and has deemphasized both

95 Frank S. Meyer, *The Twisted Tree of Liberty*, Nat. Rev., in Freedom and Virtue: The Conservative/Libertarian Debate, 17.

virtue and a society-level focus.

Anecdotes help to demonstrate this claim. For example, numerous signs and placards at "Tea Party" rallies express Libertarian rhetoric. (A simple Google search will provide dozens of examples.) More tellingly, United States Representative and former Republican Vice Presidential nominee Paul Ryan has been noted for his strong admiration of anarchist-libertarian novelist Ayn Rand. Though he has more recently tried to distance himself from this fact, *The New Yorker* quotes Ryan's 2005 speech to an Ayn Rand group known as the Atlas Society: "The reason I got involved in public service, by and large, if I had to credit one thinker, one person, it would be Ayn Rand. And the fight we are in here, make no mistake about it, is a fight of individualism versus collectivism."[96]

In addition, statistical data demonstrates this claim. According to a September 2013 report by FreedomWorks (a grassroots organization that supports "individual liberty and constitutional government"[97]), some "forty percent of Republicans are *most* interested in promoting 'individual freedom through lower taxes and reducing the size and scope of government' versus twenty-seven percent 'traditional values' or eighteen percent 'strong national defense.'"[98] (Emphasis added.) This demonstrates the emphasis placed on Libertarian over Conservative concerns. In the same survey, sixty-eight percent of Republican voters were

96 Jane Mayer, *Ayn Rand Joins the Ticket*, NEW YORKER, Aug. 11, 2012, http://www.newyorker.com/news/news-desk/ayn-rand-joins-the-ticket.

97 FreedomWorks, *The Role of Government*, 3 (2013), http://online-campaigns.s3.amazonaws.com/docs/pollingreport.pdf.

98 *Id.* 11. (Emphasis added).

found to "agree with the 'libertarian view' that 'individuals should be free to do as they like as long as they don't hurt others, and that the government should keep out of people's day-to-day lives.'"[99] Forty-one percent can be "fairly identified as 'libertarian' based on their fiscally conservative, but socially moderate to liberal answers to questions on polls." And, twenty-six percent "*self-identify* as 'libertarian' or 'lean libertarian.'"[100] (Emphasis added.) On this basis, FreedomWorks concluded that "libertarian values within the Republican Party and the American voter population at-large are at the highest level in a decade."[101]

However, these snapshots are not enough to demonstrate Libertarianism's rise. Thus, we will examine the writings of two key players in the Republican Party structure: Dr. Rand Paul, current United States Senator and likely contender for the Republican nomination for President in 2016; and Jim DeMint, former United States Senator and current President of the Heritage Foundation.

A. Rand Paul and the Tea Party

Dr. Rand Paul (1963 –) is the son of former Congressman and Libertarian Party candidate for President, Ron Paul. The younger Paul was elected in 2010 as the junior United States Senator from Kentucky, and in 2011, he published (along with co-writer Jack Hunter) *The Tea Party Goes to Washington*.[102]

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99 *Id.* 12.

100 *Id.* (Emphasis added).

101 Jacqueline Bodnar, *FreedomWorks Poll Finds Big-Tent Libertarian Values at the Highest Level in a Decade*, FreedomWorks (Sept. 11, 2013), http://www.freedomworks.org/content/freedomworks-poll-finds-big-tent-libertarian-values-highest-level-decade.

102 Rand Paul, The Tea Party Goes to Washington, (2011).

Paul rode into the Senate by promoting an alternative to both big-government Liberals and big-government 'RINOs' (Republicans-in-name-only). His philosophy draws "a new dividing line between those who want to limit government and those who want it to be unlimited"[103] in an attempt to return government to its 'original,' 'Constitutional,' limited role of protecting individuals against aggression. It rejects government welfare and budget deficits, seeing them as antithetical to personal liberty:

> The purpose of government is to protect our liberties. Government is not supposed to coddle us or take care of our every need, one generation to the next, cradle to grave. To the extent that we have allowed this to happen—through welfare, entitlements, the nanny state…[we must return] to a more limited, Constitutional government.[104]

Thus, employing rhetoric of 'Constitutional government,' the Paul is primarily motivated the size and scope of the government, especially seen in the size and source of the national debt.[105] Instead of permitting government to expand its reach, Paul and those who support him wish to slash government power and spending. They measure Conservatism based on a person's conception of the ideal size of government. For further illustration of this, note Paul's admiring quotation of Barry Goldwater's hypothetical candidate:

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103 Paul, THE TEA PARTY, xii.

104 *Id.* xiii.

105 *Id.* 10.

> I have little interest in streamlining government or in making it more efficient, for *I mean to reduce its size*. I do not undertake to promote welfare, for *I propose to extend freedom*. My aim is not to pass laws, but to repeal them.... And if I should be later attacked for neglecting my constituents' 'interests,' I shall reply that I was informed their main interest is liberty and that in that cause I am doing the very best I can.[106] (Emphasis added.)

The individualism present in Rand Paul's politics is obvious. By drastically shrinking government, Paul intends to make America rely not on government but on "hard work, individual responsibility, families and neighbors taking care of one another, and honest competition in the marketplace."[107] While this could initially sound Conservative, not Libertarian, Paul immediately states that "most of [these virtues] are always hampered and rarely helped by government involvement."[108] The implication is clear: if government hampers the performance of individual virtue, then it ought not to interfere with virtues at all but rather allow individuals to be free from coercion. This individualist trend is further exemplified elsewhere: Paul cites himself as once having rhetorically asked a crowd, "do we believe in the individual or do we believe in the state?"[109] He also writes, "my political philosophy...

106 *Id.* 110-111. Paul then notes, "Goldwater's words are a near perfect explanation of constitutional conservatism and the Tea Party might have this passage as its charter..." (pg. 111).

107 *Id.* 128.

108 *Id.* 128.

109 *Id.* 4.

values the importance of the individual over the collective."[110]

Therefore, when it comes to free markets, the Paul-Tea Party principle is clear. Failing businesses must be allowed to fail and prosperous businesses must be allowed to prosper:

> With freedom comes responsibility and sometimes individuals don't always make the right choices. When they don't they pay the price, learn their lesson and move on, better educated, situated and solvent. *The same is true of free markets.*[111] (Emphasis added.)

Instead of 'bailing out' failing companies, manipulating the money supply, and restricting what individuals can and cannot do with their business—all of which hinder the free market, and some of which Paul identifies as the cause of our present crisis—Paul wants government to respect the ability of individuals to run their business without interference.

This is evidently Libertarian. The individualistic narrative, the emphasis on personal freedom, and the belief that the fundamental purpose of government is simply to prevent coercion are all clearly reminiscent of Hayek. This is no surprise since Paul cites *The Road to Serfdom* as one of his favorite works.[112] Even where Paul identifies the need for virtue, he does so in a way that only limits government, not demonstrates its necessity. That is, he states that virtue requires small government for virtue to flourish,

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110 *Id.* 19.

111 *Id.* 176.

112 *Id.* 34-35. He also cites Ludwig von Mises, Murray Rothbard, and Ayn Rand.

but he fails to provide active government protection of such virtue.

Moreover, this is indicative of much of Tea Party Republicans as a whole. As David Kirby and Emily Ekins wrote for the Cato Institute in 2012, at least half of the Tea Party is "functionally Libertarian."[113] Even though the Tea Party contains some traditional Conservatives, "most Tea Partiers have remained focused on fiscal, not social issues."[114] The Tea Party began as a Libertarian reaction to increasing government involvement in the economy (especially seen in the TARP Bailouts of 2008), and the anger surrounding these issues led to the adoption of Libertarian "anti-tax, anti-big government" positions.[115] Indeed, Kirby and Ekins write in their conclusion that "the Tea Party would not be possible but for a deep cultural resonance of the Libertarian themes of suspicion of power, limited government, hard work, and personal responsibility."[116]

I am not alone in naming Paul as a Libertarian; multiple other sources have done so, such as the *National Journal*,[117] *The*

113 David Kirby and Emily Ekins, *Libertarian Roots of the Tea Party*. CATO Institute Policy Analysis. No. 705. (Aug. 6, 2012).

114 *Id.* 5.

115 Id. 28. Quoting Nate Silver. *Are the Republicans Going Galt?* FIVETHIRTYEIGHT Blog (Apr. 21, 2009), http://fivethirtyeight.com/features/are-republicans-going-galt/.

116 *Id.* 40-41.

117 Alex Roarty, *Can Rand Paul Bring Libertarians Into the GOP?*, NATIONAL JOURNAL (Mar. 23, 2013). http://www.nationaljournal.com/magazine/can-rand-paul-bring-libertarians-into-the-gop-20130321.

Washington Post,[118] *Wired*,[119] *RealClearPolitics*,[120] and *NPR*,[121] just to name a few. Even Paul himself does not entirely shy away from the term. Though he would prefer the designation "Constitutional Conservative," Paul admits that he has "many libertarian points of view."[122]

However, using Paul as an indication of Libertarianism's rise is perhaps too easy. After all, he is frequently cited as that movement's poster child. Nevertheless, Paul is not alone; even those who are usually seen as being Conservative actually fall into using Libertarianism justifications of free market principles. Former Senator Jim DeMint is a perfect example of this.

B. Jim DeMint

In 1998, Jim DeMint (1951 –) was elected by South Carolinians to his first term in Congress. Then a United States Representative, in 2004 he became the junior United States Senator for

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118 Chris Cillizza, *Libertarianism is in vogue. Again.* Washington Post (Jun. 9, 2013), http://www.washingtonpost.com/politics/libertarianism-is-in-vogue--again/2013/06/09/ab8ede42-d108-11e2-a73e-826d299ff459_story.html. *Also see* Chris Cillizza & Aaron Blake, *Rand Paul and the rise of the libertarian Republican*, Washington Post (Jun. 10, 2013), http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/10/rand-paul-and-the-rise-of-the-libertarian-republican/.

119 Spencer Ackerman, *Senator Rand Paul Talks Tech, Civil Liberties, and Keeping the Government Out of Your Email.* Wired (May 30, 2013), http://www.wired.com/2013/05/rand-paul-interview/.

120 Ben Domenech, *The Libertarian Populist Agenda*, RealClearPolitics (June 5, 2013), http://www.realclearpolitics.com/articles/2013/06/05/the_libertarian_populist_agenda_118694.html

121 *Amid Struggle For 'Soul' Of GOP, Libertarians Take Limelight*, NPR. (Aug. 17, 2013), http://www.npr.org/blogs/itsallpolitics/2013/08/17/212960237/amid-struggle-for-soul-of-gop-libertarians-take-limelight.

122 Rand Paul, *Rand Paul, libertarian? Not quite.*, USA Today (Aug. 9, 2010), http://usatoday30.usatoday.com/news/opinion/forum/2010-08-10-column10_ST2_N.htm?AID=10709313&PID=6154686&SID=i89vlhxnm90002cl014ak.

the same state. In 2013, he left office to become the President of the Heritage Foundation, a widely recognized bastion of Conservative social and economic thought.[123] Thus, DeMint is widely considered a leading conservative in the Republican Party. In 2009, while still serving in the Senate, he published a book entitled *Saving Freedom: We Can Stop America's Slide into Socialism.*[124] Like Paul's book, *Saving Freedom* describes both DeMint's journey into politics as well as his political philosophy.

DeMint begins *Saving Freedom* with strong Conservative principles, stating that freedom begins with values like "faith, character, hard work, personal responsibility, self-reliance, discipline, competition, charity, fairness, and achievement."[125] He repudiates socialism because it attempts to "replace the charitable work and community service of private citizens, families, churches, private charities, and mutual aid societies"[126] with government control, leading to the abrogation of responsibility (and with it the need for virtue). He even states that a strong society is an important part of freedom since it provides necessary limits. Thus, he would allow government policies to promote strong societies and family structures, such as laws protecting traditional marriage or religious freedom.[127]

However, despite this initially positive treatment of vir-

123 Heritage Foundation, *About Jim DeMint*, http://www.heritage.org/about/staff/d/jim-demint.

124 Jim DeMint, SAVING FREEDOM: WE CAN STOP AMERICA'S SLIDE INTO SOCIALISM (2009).

125 *Id.* 3.

126 *Id.* 31.

127 *Id.* 62.

tue, DeMint moves into a Hayekian position that premises the individual over society:

> *The pursuit of freedom is focused on the individual.* There can be no freedom unless individuals have the capabilities, including skills and values, to live independently and succeed in a free society. *There can be no freedom unless a society recognizes the rights of individuals to make choices and take actions based on their own values.* A third requirement for a free society is that individuals must be constrained from taking actions that violate the freedoms of others.[128] (Emphasis added.)

Again, DeMint does not completely jettison virtue. However, he places it solely in the realm of the individual. While government is needed, it is there only to enforce "neutral" laws of non-aggression and provide merely general protections for virtue. In addition, it must itself be limited in order to prevent its encroachment on individual liberty. These points require further elaboration.

First, DeMint makes virtue an individual pursuit. Essentially, the individual, not society as a whole, must be virtuous, and force cannot be used to ensure virtue's reign. While DeMint supports religion and civic education, he relies on the private adoption of virtue. ("Accountability to God creates the morality, virtue, self-control, and personal responsibility that make people governable without overt external control."[129]) Government can

128 *Id.* 64.

129 *Id.* 146.

be *guided* by morality, but it cannot itself *impose* religion.[130]

Second, Government must be limited to protect individual freedom. For DeMint, "the greatest danger of socialism is [that] it diminishes the importance and responsibility of the individual."[131] This is because "all initiative, creativity, entrepreneurship, productivity, faith, love, and charity begin at the individual level."[132] In contrast to socialism, good government must protect the individual and his liberty. Referencing Frederic Bastiat's *The Law*, DeMint states that "the basis for legitimate government and law" is self-defense.[133] Thus, good law protects private property against encroachment; bad law is essentially legalized plunder. Government ought then to be neutral and not aid particular groups. (And, dependency on government removes the need for virtue.[134]) Moreover, (not to over emphasis this point) it ought to allow persons to be virtuous, not attempt to force them to be good: "The law must attempt to stop the bad, but it cannot use the force of government to do good without diminishing freedom and justice."[135] Any attempt to require virtue will be ineffective.

The Hayekian Libertarianism embedded within this justification for government involvement in society, including in the market, is evident. Though DeMint depends on virtues for a smooth-functioning economy, he makes individual freedom the center of his political philosophy. Thus, he relies on virtues yet abdicates

130 *Id.* 147.
131 *Id.* 43.
132 *Id.* 43.
133 *Id.* 180.
134 *Id.* 200.
135 *Id.* 186.

responsibility to ensure their existence and even undercuts the ability to governmentally-instill these virtues should society as a whole fail to do so. Virtue becomes a 'ceiling' on government involvement, but it does not create a 'floor' of minimally necessary government. What matters is individual choice, and the monstrous government DeMint perceives is seen as being antithetical to this ideal. This is classic Libertarianism.

C. Summary

Libertarianism in the Republican Party is not new—it has been present well before Fusionism emerged in the 1960s. However, only recently has it emerged as a serious force within the party. While true Conservatism perhaps never enjoyed the strength or prominence it desired (it was often sacrificed for political expediency), Libertarianism is well on its way to a seat at the head of the table. Even where Libertarianism is not explicitly named, it has permeated political thought, especially in economic affairs. It removes virtue from government and makes it purely individual. The emphasis is on freedom and rights, not duty and responsibility. I hope to have demonstrated these facts

However, I wish to offer one final thought: this rise of Libertarianism was inevitable given the structure of Fusionism. As much as the two camps may "need each other" (as notable scholar Robert P. George and Congressman Paul Ryan have argued),[136] any attempt to join them à la Frank S. Meyer will ulti-

136 Robert P. George, *No Mere Marriage of Convenience: The Unity of Economic and Social Conservatism*, First Things (Nov. 2012), http://www.firstthings.com/web-exclusives/2012/11/no-mere-marriage-of-convenience-the-unity-of-economic-

mately fail. As the attentive reader might have guessed, this is due to the relationships between virtue, liberty, and government. Though Fusionism claims to support virtue, it actually only states the importance of it and makes its adoption an individual choice. We examine this in the next (and final) chapter of this essay.

Chapter V: Conclusion

This essay has traversed several centuries of economic thought, including works from both sides of the Atlantic. Through this, we have learned that Conservatism and Libertarianism are not synonymous (or even existing on the same plane) but rather are two distinct philosophies. Although in terms of specific policies they often advocate or oppose the same things (such as lower taxes or government takeovers of industries, respectively), these are not due to core ideological similarities. We have also learned that Conservatism and Libertarianism have been united under a program of Fusionism since the 1960s in an attempt to merge the disparate emphases on virtue and society on one hand and individualism and freedom on the other.

Many have argued, led by Frank S. Meyer (1909 – 1972), that this union is essential in maintaining a common opposition against collectivism. Put simply, the argument goes as follows: Conservatives emphasize both virtue and community, at least the former of which is a noble goal. Indeed, virtue is necessary to prevent the freedom emphasized by Libertarians from descending

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and-social-conservatism. Note that George, and even Ryan, only reference "social-issue conservatives." However, as we have defined Conservatism, such an added distinction is practically unimportant.

into licentiousness.[137] (On this point, I agree with Meyer and the Fusionists *in toto*.) However, Myer continues that virtue can only be virtuous if it is freely chosen—it cannot be coerced.[138] Thus, while a moral order is needed in order for people to know right from wrong, individuals must be free in the socio-political order to choose either good or evil.[139] Conservatism and Libertarianism must be made co-dependent in a sense, though not in identical realms of human life.[140]

Thus, by assuming the individualist focus of Libertarianism and the almost-communitarian focus of Conservatism could be *merged* into a Janus-like union (rather than one being grafted into the other), the two have been packed into one. However, while this union might be necessary in the sense of being important, it not necessary in the sense of being inevitable. Instead, Fusionism's demise is that which is inevitable. Just as two-faced Janus was a myth, so too is Fusionist Conservatism.

Meyer conceived of Conservatives as focused on tradition and fearful of reason and Libertarians as focused on reason and freedom while being fearful of tradition and authority. He continued that Conservatives rightfully reject the Utopian notions of liberty yet have done so too drastically by promoting authoritarian systems. Libertarians rightfully reject this authoritarianism, but with it, they reject the importance of virtue. Thus, through this polarization, Libertarians have forgotten that "in the *moral* realm

137 Frank S. Meyer, In Defense of Freedom: A Conservative Credo 69-70 (1962).

138 *Id.* 50.

139 *Id.* 68-69.

140 See generally Meyer, In Defense of Freedom: A Conservative Credo. Meyer makes similar points in all of his works cited in this essay.

freedom is only a means whereby men can pursue their proper end, which is virtue" (thus rejecting all kinds of authority, moral and otherwise).[141] Yet, Conservatives have ignored that "in the *political* realm freedom is the primary end" (thus rejecting freedom, political or otherwise).[142]

For Meyer, this dichotomy is not irreconcilable. Instead, a these two branches can form a "dialectic"[143] that recognizes "the complementary interdependence of freedom and virtue, of the individual person and political order."[144] The appropriate system combines the best of both systems:

> A good society is only possible when both these conditions are met: when the social and political order guarantees a state of affairs in which men can freely choose; and when the intellectual and moral leaders, the 'creative minority,' have the understanding and imagination to maintain the prestige of tradition and reason, and thus to sustain the intellectual and moral order throughout society.[145]

This requires "guaranteeing freedom" politically "so that men may uncoercedly [*Sic.*] pursue virtue."[146] Thus, while virtue's importance is recognized, it is made, at best, a secondary concern in political matters. In this way, Fusionism "unites" the Conser-

141 *Id.* 15. (Emphasis in original).

142 *Id.* (Emphasis in original).

143 *Id.* 9.

144 *Id.* 9.

145 Meyer, *supra* note 137 at 69.

146 Meyer, *Freedom, Tradition, Conservatism*, in IN DEFENSE OF FREEDOM 17 (1960).

vatives (who are allowed to keep their focus on virtue) and the Libertarians (who are allowed to claim freedom as the ultimate political goal).

However, Meyer relies on two key assumptions in this argument. First, he fallaciously assumes that political matters can be decided without virtue and based on freedom alone. In other words, he assumes that governments can engage in neutral decision-making—a line of thought that has long since been proved incorrect. Second, and more importantly, he relies far too heavily on existing community mores in allowing freedom to be the ultimate concern of politics. While he acknowledges—nay, laments—that classical liberalism has lived "on the inherited moral capital of centuries of Christendom" long after it had severed the roots of those doctrines,[147] he makes no provision for virtue's renewal. While he encourages virtue's dominance in the hearts of men, he places freedom at the center of political life and merely *hopes* that men will be virtuous. This is the ultimate problem of Fusionism. By making freedom the ultimate political end, all other concerns are relegated to the private sector. However, there one must rely on individual acceptance of various mores in order to preserve a stable society.

It is Fusionism's structure that leads Murray Rothbard to claim Meyer as a Libertarian. According to Rothbard, though Meyer incorrectly stereotypes the Libertarians' view on social issues (Meyer calls them libertines, which Rothbard denies), Libertarianism is ultimately just a political doctrine that is unconcerned

147 *Id.* 15.

with private morality—an individualist position that Meyer would agree with.[148] Therefore, Rothbard writes about the failure of the Fusionist position regarding freedom and virtue: "There is nothing synthesizing about the 'fusionist' position…it is libertarian, period."[149] And again, "fusionism is a 'myth'…an organizing principle to hold two very disparate wings of a political movement together and to get them to act in a unified way. Intellectually, the concept must be judged a failure."[150]

Nevertheless, Meyer's argument has been repeated for decades. We saw this in the last chapter when Rand Paul and Jim DeMint both stressed the importance of virtue while simultaneously stating that freedom must be made the ultimate political concern. When such arguments are made, it furthers the rise of the Libertarian argument and continues to undercut virtue and the ability to revive such virtue through political means.

Therefore, the structure of Fusionism predicts the rise of Libertarianism. Though Fusionism's structure is intended to be a neutral, equal-opportunity position for the two camps, it inherently premises Libertarianism over Conservatism by emphasizing the role of the individual and reducing the importance of government. This can be seen in current free-market rhetoric. No longer is society the primary concern; the sole concern is about the individual and how much wealth he or she can collect and maintain. Government is expected to fully recuse itself from moral concerns, and

148 Murray N. Rothbard, Freedom and Virtue, in Freedom and Vitue: The Conservative/Libertarian Debate, 141-144, 147 (George W. Carey ed.,98).

149 *Id.* 139.

150 *Id.* 159.

regulations on the economy are seen as fundamentally immoral (with those who seek to impose them being demonized). This only furthers the progression towards Libertarianism.

As individualism continues to cut the roots of virtue, the effects of Libertarianism will become more pronounced. As "freedom" is taken to its logical end, the damage done to society will underscore the need for the Conservative position. While some form of unity between Libertarianism and Conservatism can likely be maintained on policy matters, it must be recognized that a philosophical union is impossible. Only if one side abandons its core convictions can such a fusion occur—but then, it will cease to be a Fusionist position.

This essay does not foreclose the possibility that Conservatism can take notice of the Libertarian emphasis on freedom and ensure that Conservatism does not become too rigid. Perhaps if this tactic is adopted, Conservatism can maintain its core convictions while dispelling in part the notion that it is authoritarian, stiff, and wholly incompatible with present notions of liberty. While Conservatism can never (and should not) fully reach the level of freedom afforded by Libertarianism, it can adjust its rhetoric to emphasize its balanced nature. However, exploring the depths of this position is too broad a topic for this essay—perhaps it is a source of further scholarship.