GROVE CITY COLLEGE

JOURNAL OF LAW & PUBLIC POLICY

ARTICLES

Volume 7 2016

GROVE CITY COLLEGE

JOURNAL OF LAW & PUBLIC POLICY

Volume 7 2016

CONTENTS

The *Grove City College Journal of Law & Public Policy* invites submissions of unsolicited manuscripts, which should conform to *The Bluebook: A Uniform System of Citation* (20th ed. 2015). Manuscripts should be submitted electronically in Microsoft Word™ format to LawJournal@gcc.edu.

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 20th edition of *The Bluebook*.

For additional information about the *Grove City College Journal of Law & Public Policy*, please email us at LawJournal@gcc.edu or visit us online at http://www2.gcc.edu/orgs/GCLawJournal/ or search for us at HeinOnline.

*The views expressed within these articles are those of the authors and do not necessarily reflect the policies or opinions of the *Journal*, its editors and staff, or Grove City College and its administration.

GROVE CITY COLLEGE

JOURNAL OF LAW & PUBLIC POLICY

2015-2016 Staff List

ELIJAH L. CORYELL '16
Editor-in-Chief

TRAVIS J. ROYER '16
CELESTE K. ANDERSON '18
Executive Articles Editors

CHRISTINE MIKHAEL '17
CASSANDRA E. RUMMEL '18
Executive Administrative Editors

JONATHAN R. NELSON '16
Executive Content Editor

ALLISON E. BIMBER '17
Executive Style Editor

SAMUEL S. ERK '16
Senior Editor

JOSIAH D. VEHRS '17
Junior Editor

KAREN L. POSTUPAC '19
CHRISTOPHER D. DEVAULT '18
Executive Production Editor

DAVID J. WEIX '16
Director of Marketing

ZECHARIAH J. VOELL '17 JOSHUA W. BARHAM '19 JOSIAH A. ADEN '19
ANDREW H. BRACKBILL '16 JOSHUA P. FRIED '17 IAN R. WORREL '17
KYLE T. JORSTAD '17 GRACE E. GARTMAN '19
Associate Content Editors

OLIVIA H. GREENE '17 LAURA E. MCAULIFFE '17 JENNIFER E. MONTAZZOLI '18
GRANT A. WISHARD '17 KEVIN D. KAUFMAN '18 THOMAS H. KUTZ '16
MICAH S. QUIGLEY '18 IAN N. JONES '18
Associate Style Editors

MELISSA C. LUEKEN '19 NATHANIEL D. S. MILLS '16 RIO A. ARIAS '19
JOSHUA T. DELK '17
Associate Citations Editors

FACULTY ADVISORS

PAUL J. MCNULTY, '80, J.D.
President of Grove City College

CALEB A. VERBOIS, PH.D.
Assistant Professor of Political Science, Grove City College

EDITORIAL BOARD

RECOGNITION OF DONORS TO THIS EDITION

The Center for Vision & Values

Grove City College Law Society

Office of Development

Office of the President

Joyce E. Brandon

Ronald W. Brandon ’64

Eric E. Brandt ’91

Jean M. Brandt

Laura (Koller ’11) Fryan

Raymond V. Fryan Jr. ’08

Bruce Gridley ’69

Jeffrey P. Hodgson

Brittany (Hayward ’11) Hoffman

Kevin A. Hoffman ’11

O. Alan Holsinger Jr. ’52

Laura A. Jenks ’91

Karen (Eckstrom ’75) Lackey

Robert L. Lackey ’74

Denise M. Marx ’00

Dr. Joanne F. McVay

Dr. William J. McVay

Adam V. Nowland ’07

Katie (Schroeder ’08) Nowland

Cheralyn (Boruvk ’02) Ranjan

Jagan N. Ranjan ’00

Dr. Clair A. Smith Jr. ’97

Meredith J. Smith

Gay Stewart

William C. Stewart ’61

1st Lt. James R.R. VanEerden ’12

Emily VanEerden

Denise (Weingartner ’77) Wade

James V. Wade ’77

The *Grove City College Journal of Law & Public Policy* is published annually and operates solely on readers’ donations. You may continue to receive the *Journal* at no cost; however, any monetary donation would be greatly appreciated. If at any point you no longer wish to receive the *Journal*, please contact the editors in order to be removed from our database. Address all written correspondence and mailed monetary donations to our business address: *Grove City College Journal of Law & Public Policy*, 100 Campus Drive, Grove City, Pennsylvania 16127.

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. 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

"Learning is like rowing upstream; not to advance is to drop back."
– Old Proverb

Ours is the generation described as the best-educated in history. But do we remember the purpose of our learning? As one commentator has observed, "We've got a brain dressed up with nowhere to go." The end of true scholarship and academy – the same end to which this publication was chartered – is the advancement of knowledge, the widening of wisdom, and above all the installation of truth into our hearts and minds. With this seventh edition of the *Grove City College Journal of Law & Public Policy*, it is my pleasure to invite you into such a learning dialogue.

Every conversation begins in the context of a tradition. This edition's staff is proud to have these ideas added to the young and burgeoning legacy wrought of our past contributors, serious professionals and high-achieving students, alike. In their spirited inquiry of issues both timely and timeless, I trust you will find the following pages to be guiding the shared national conversations. As with every edition of our undergraduate journal, this publication seeks nothing less than to set the example for a choice-worthy public character, one with a commitment to careful and scholarly engagement.

Indeed, despite our short history, a survey of past authors and mastheads reveals individuals who have since entered the most elite law schools, eminent businesses, and offices of government. They first honed their influence in these pages and now are molding the character of our leading institutions and the very destiny of our country. Is it surprising that we have come to view the *Journal*, nested within Grove City College and the rest of American higher education, to be an essential investment in the future?

As the Journal looks to its own future, it will do well to heed

Michelangelo when he said that "the greater danger … lies not in setting our aim too high and falling short; but in setting our aim too low, and achieving our mark." This year has observed a number of improvements to the *Journal's* sustainability and infrastructure, with developments to our production timeline, expansion of editing resources, and new skills-based investments in our student editorial staff. The *Journal* must continue to prioritize longevity, quality, and expansion of readership. The first lesson learned at the founding of this undergraduate journal must also be the guiding principle for its future expansion: Success is the child of audacity.

And yet, success, like a child, only matures with careful attention and discipline. The publication you hold in your hands has come to fruition only through the significant and innumerable efforts, repeated day-in-and-out, by our student editors and leadership. It has been an honor to work alongside such diligent examples. Special gratitude is extended to the professionals on our Editorial Board, the faculty, friends, and alumni of Grove City College, and to all who charitably sponsor this project – your support is simply indispensable to the Journal.*

But most importantly, reader, I thank you for your interest. It was for you that these words were written, pages were printed. On behalf of the *Grove City College Journal of Law & Public Policy* editorial staff, I encourage you to employ the ideas herein to the advancement of your learning. Join us as we row upstream, seeking knowledge, wisdom, and truth!

Elijah Coryell
Editor-in-Chief

* I must offer specific thanks to our adviser Dr. Caleb Verbois, and to Adam Nowland in the GCC Advancement Office. Without their advice and guidance, this edition could not have been possible.

FOREWORD

Dear Reader,

Welcome to Volume 8 of the *Grove City College Journal of Law and Public Policy*. As the new advisor to the Journal, and the pre-law advisor at GCC, I have the privilege of working with an excellent group of students who work hard to publish one of the few undergraduate peer-reviewed journals in the country.

In this edition, and going forward into future editions, I have encourage the editors to consider broadly the *Public Policy* side of the *Journal of Law and Public Policy*. As you read this edition's articles, you will see several articles that address the public policy side of a legal case, or focus almost exclusively on policy issues.

For example, the first essay deals with yet another free speech controversy, this time, on the seemingly innocuous yet actually quite knotty issue of personalized license plates in Texas, that has substantial policy implications. The second essay asks whether it is possible, within the legal framework of Roe and Casey, to create a public policy prohibition on sex-selective abortions, a practice that gives horrifying new meaning to the idea of a war on women. The third essay addresses the Takings Clause and the nature of economic freedom through the lens of Texas state regulations on craft breweries. The fourth essay distinguishes Justice Marshall's understanding of Judicial Review in *Marbury v Madison* with Justice Warren's understanding of Judicial Supremacy in *Cooper v Aaron*, and argues that the latter risks shifting the government from a republic to an oligarchy. The fifth essay is a timely piece on the importance of the Electoral College that suggests that opposition to the Electoral College on the theory that it is undemocratic misses the legitimate concerns of the Founders about the wisdom of absolute democracy and the importance of their insistence on federalism.

We hope you will enjoy reading these essays,

Caleb A. Verbois
Assistant Professor of Political Science
Grove City College

INTERNET NEUTRALITY AND THE FEDERAL COMMUNICATIONS COMMISSION

Kyle Jorstad '17

ABSTRACT: *The Internet has become so central in the lives of Americans that it is difficult to imagine information ever becoming less accessible than it is currently. Around the world, anyone with unrestricted access to the Internet has worlds of information available with just a few taps of a screen or keyboard. Recently, however, the freedom of the Internet has come under question. Prompted by instances of restricted Internet access by specific ISPs (Internet Service Providers, such as Comcast, Time Warner, and Verizon), the FCC (Federal Communications Commission) and President Obama have vocally proclaimed the need for regulation of the Internet to ensure it remains a free and open medium. Supporters of Internet Neutrality argue the necessity of ISP regulation to maintain universal access to Internet content. Critics claim government oversight will only further restrict the freedom of the Internet, ultimately causing worse harm than already done by ISPs. This article will seek to analyze the fundamental workings of Internet Neutrality guidelines and to critically analyze the potential function FCC Internet regulation will play in modern American society.*

* Kyle Jorstad is senior political science major at Grove City College with minors in Spanish, economics, and philosophy. In addition to being a content editor for the Law Journal, Kyle is the President of the campus Law Society, a member of the GCC Debate Team, and a contributing writer for the Cornwall Alliance. Passionate for writing and educational discourse, Kyle plans on enrolling in law school following graduation.

I. Introduction and Legal Foundations

New Internet neutrality regulations recently became active under the jurisdiction of the FCC, an independent US government agency tasked with the regulation of interstate communication channels. It is important to understand precisely what is meant by the phrase "Internet neutrality" ("net neutrality" for short). As a principle, Internet neutrality means that all Internet traffic is treated identically by ISPs. The new net neutrality regulations put in place by the FCC, effective June 12, 2015, contain several "bright line" rules which prohibit blocking, throttling, and paid prioritization.[1] "Blocking" occurs when providers restrict or prevent access to content or websites. ISPs engage in throttling when they intentionally slow or degrade Internet traffic on the basis of content or applications. Paid prioritization allows for paid fast-lanes whereby consumers may pay higher premiums for prioritized Internet access from ISPs. Notably, while new regulations prohibit these for legal Internet traffic, ISPs remain encouraged to actively block user access to illegal content. Regardless, net neutrality proponents argue that these regulations preserve an open Internet by preventing ISPs from controlling what content is available to whom through blocking, throttling, paid prioritization, and other control methods.

Efforts toward the maintenance of fair and open communication are neither new nor exclusive to the Internet.

1 Open Internet: Maintaining a Fast, Fair, and Open Internet, Fed. Comm. Commission (Oct. 29, 2015), https://www.fcc.gov/general/openinternet.

Within the Open Internet Order, which established the new 2015 Internet regulations, the FCC cites two sources of legal authority: Title II of the Communications Act of 1934, and Section 706 of the Telecommunications Act of 1996.[2] Title II pertains to how the FCC grants broadcast licenses–the terms of licenses, renewal processes, content restrictions, etc.[3] Title II additionally prohibits unreasonable discrimination in charges or services in connection with common carriers.[4] A common carrier is "a business or agency that is available to the public for transportation of persons, goods, or messages," such as telephone lines, airlines, public transportation, and even amusement parks in certain states.[5] This definition, though originally applied exclusively to the transportation of physical goods and persons, has now been expanded to include digital services. The recent reclassification, which allows the FCC to apply common carrier principles to the Internet, specifies:

> "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject

2 *Id*.

3 Communications Act of 1934, 47 U.S.C. § 307 (1982 & Supp. V 1987).

4 Communications Act of 1934, 47 U.S.C. § 202 (1982 & Supp. V 1987).

5 "Common Carrier," Merriam-Webster.com, 2015, http://www.merriam-webster.com/dictionary/common%20carrier.

> any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."[6]

Section 706 addresses the provision of advanced telecommunications capabilities for all Americans in a reasonable and timely fashion, granting the FCC authority to "take immediate action to accelerate deployment of capabilities and removal of barriers to infrastructure investment and by promoting competition in the telecommunications market."[7] The Open Internet Order has reclassified the Internet from an information service to a telecommunications service, placing it firmly under the jurisdiction of Title II and Section 706.

The question of regulating the Internet has existed virtually as long as the Internet itself. Net Neutrality regulation received a boost following a 2007 scandal arising when Comcast inhibited Internet traffic accessing BitTorrent, a forum for peer-to-peer file transfers. While uploads were permitted, Comcast prevented any attempt by users to download content. Comcast initially denied any such blockage, stating only that "Comcast does not block access to any applications, including BitTorrent," but later admitted to blocking user access to some content.[8] Although various legal authorities associated with Comcast suggested off the

6 Communications Act of 1934, 47 U.S.C. § 202 (a) (1982 & Supp. V 1987).
7 Telecommunications Act of 1996, 7 U.S.C. § 706, 153 et seq. (1996).
8 Peter Svensson, Comcast Blocks Some Internet Traffic, The Washington Post (Oct. 19, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/10/19/AR2007101900842.html.

record that the blockage was due to the website's tendency to distribute illegally pirated content, Comcast's official stance ultimately claimed the restrictions were to ensure Internet connections ran smoothly and to avoid excess bandwidth usage.

Prior to the Open Internet Order, Comcast was entitled as an independent provider of a service to restrict user access to content, but only on the condition that consumers were aware of restrictions prior to purchasing the service. Because Comcast failed in this respect to inform users of any restrictions, in January of 2008 the FCC opened an investigation in response to a Public Knowledge and Free Press complaint.[9] Despite an initial order by the FCC directing Comcast to cease discrimination against BitTorrent traffic, the D.C. Circuit Court of Appeals ultimately ruled in favor of Verizon, rejecting the FCC's authority regarding Internet regulation. Citing a lack of "statutorily mandated responsibilities," the court found that despite several policy precedents established within Congress granting the FCC a wide berth for rulemaking, the FCC lacked an explicit legislative mandate granting them authority to regulate ISPs.[10] Notably, the court did not disagree with the necessity of net neutrality protections, instead holding that the FCC lacked the proper legal foundations. In doing so, the court

9 Ryan Paul, FCC to investigate Comcast BitTorrent blocking, arsTechnica (Jan 9, 2008), http://arstechnica.com/tech-policy/2008/01/fcc-to-investigate-comcast-bittorrent-blocking.

10 Comcast Corporation v. Fed. Comm. Commission & USFG, (D. C. Cir. 2010).

opened the door for and recognized the constitutionality of the regulations only recently instituted by the FCC.

II. The Open Internet Order: Present Litigation and Challenges

Not surprisingly, immediately following the FCCs Open Internet Order, numerous major broadband trade associations, such as CTIA and NCTA, as well as various smaller cable providers represented through the American Cable Association, filed lawsuits against the FCC. Numerous other interest groups and organizations, such as Netflix, the Open Technology Institute, and Vimeo, have filed in support of the FCC and Internet regulation.

Oral arguments were heard in December 2015 in the D.C. Circuit, in which various challenges were brought against the FCC regarding the legality of the present restrictions.[11] Broadband providers asserted that ISPs do not fundamentally act as common carriers in terms of the services provided.[12] This definition will largely depend on the degree to which the court determines individual ISPs exert control over the private communication methods of Internet users, the fundamental element of a common carrier being control over communication capabilities. As the FCC's

11 Brent Kendall, Appeals Court to Hear Arguments over FCC's Net-Neutrality Rules, Wall Street Journal (Aug. 3, 2015), http://www.wsj.com/articles/appeals-court-to-hear-arguments-over-fccs-net-neutrality-rules-1438640757.

12 Jonathan Keim, Recapping the Net Neutrality Oral Arguments, National Review (Dec. 6, 2015), http://www.nationalreview.com/bench-memos/428102/recapping-net-neutrality-oral-arguments-jonathan-keim.

regulations are strongly dependent on the classification of ISPs as common carriers, this argument could seriously undermine the foundations of net neutrality laws. The court was additionally concerned with procedural objections to the net neutrality order, questioning whether the FCC gave sufficient notice to ISPs and broadband providers regarding new policies.

Despite past losses to ISPs such as Verizon, the FCC is "confident the FCC's new Open Internet rules will be upheld by the courts, ensuring enforceable protections for consumers and innovators online."[13] Additionally, the court denied the petitioners' request for a stay of the FCC Open Internet rules, meaning the regulations remain effective, pending a court ruling. Despite this refusal, the court's grant of an expedited briefing process demonstrates the particular magnitude of the issue, necessitating quicker resolution for constitutional treatment of data and the Internet.

III. Pursuit of the Open Internet

As mentioned earlier, the ultimate pursuit of net neutrality legislation is the preservation of an "open Internet." The report issued by the FCC in March of 2015 instituting the new regulations begins, "In the Matter of Protecting and Promoting the Open Internet."[14] Even the

13 Brooks Boliek, FCC Net Neutrality Rules Hit with New Telecom Lawsuits, Politico (April 14, 2015), http://www.politico.com/story/2015/04/net-neutrality-lawsuit-ctia-116957.

14 *Report and Order on Remand, Declaratory Ruling, and Order,* 3 U.S.C. § 290, 126 (2015).

President's November 2014 message on net neutrality urged the FCC to "implement the strongest possible rules to protect net neutrality." He asserted that the "open Internet is essential to the American economy, and increasingly to our very way of life."[15] The question which reasonably follows from this understanding is whether Internet regulation can realistically achieve an open Internet. The FCC defines an open Internet as meaning "consumers can go where they want, when they want."[16] While relatively congruous to the general understanding, this definition fails to identify the present problem. In addition, there is a lack of evidence to justify internet regulations because prior to net neutrality, the vast majority of Internet consumers did not find themselves restricted in their travels over the Web. Furthermore, this definition omits any allusion to a tangible standard by which Internet openness might be evaluated.

Therefore, for the purposes of this analysis, an open internet shall be defined as *where policies such as equal treatment of data and free web standards allow those on the Internet to easily communicate and conduct business without interference from third parties*. This definition not only identifies the source of present grievances (interference from a third party in the form of ISPs), but specifies several elements necessary for the existence of an open Internet (equal treatment of data and free web standards). Conversely,

15 Net Neutrality: President Obama's Plan for a Free and Open Internet, White House, https://www.whitehouse.gov/net-neutrality.

16 Open Internet: Maintaining a Fast, Fair, and Open Internet, FCC, https://www.fcc.gov/openinternet.

a closed Internet may be defined as *where established third parties favor certain uses, and may institute restricted access to specific content or platforms, the degradation of particular services, and the explicit filtering of content*. Based upon this definition, it is clear that Comcast's control of content violates the standard of an open Internet. The FCC argues that regulation will correct this problem and result in an open Internet.

IV. Historical Critique of the FCC

Despite claims by ISPs that the broad and subjective regulations pose a greater threat to Internet openness than before, it is unclear whether this is indeed the case. Under Title II, the conduct of ISPs is required to be "just and reasonable."[17] As argued by Eve Nguyen with the Michigan Telecommunications and Technology Law Review, this wording grants the FCC seemingly insubstantial boundaries on what constitutes unreasonable behavior.[18] The FCC Open Internet Order itself states the following:

The unjust and unreasonable standards in sections 201 and 202 afford the Commission significant discretion to distinguish acceptable behavior from behavior that violates the Act. Indeed, the very terms "unjust" and "unreasonable" are broad, inviting the Commission to undertake the kind

17 Telecommunications Act of 1996, 7 U.S.C. § 706, 153 et seq. (1996).

18 Eve Nguyen, The Danger of "Just & Reasonable" Net Neutrality Rules: The Potential Toothlessness of the FCC's New Rules, Michigan Telecommunications and Technology Law Review (April 15, 2015), http://mttlr.org/2015/04/15/the-danger-of-just-reasonable-net-neutrality-rules-the-potential-toothlessness-of-the-fccs-new-rules.

of line-drawing that is necessary to differentiate just and reasonable behavior on the one hand from unjust and unreasonable behavior on the other.[19]

The D.C. Circuit has supported this interpretation, stating "the Commission gives the standards meaning by defining practices that run afoul of carriers' obligations, either by rulemaking or by case-by-case adjudication."[20] Nguyen notes that the effectiveness of the new rules therefore ultimately resides in the FCC's willingness to define and to declare specific practices illegal.

Historically, the FCC has proven more than willing to aggressively harness such grants of power as exemplified in its implementation of the Fairness Doctrine of 1949 (though the Fairness Doctrine existed in practice through the Federal Radio Commission as early as 1929).[21] The Fairness Doctrine required holders of broadcast licenses to present issues of public importance in manners which were, in the Commission's view, "honest, equitable and balanced," thus greatly curbing freedom of speech. Broadcasters who proffered political viewpoints or opinions were required to provide equal coverage of opposing viewpoints or risk

---

19 *Report and Order on Remand, Declaratory Ruling, and Order,* 3 U.S.C. § 290, 126 (2015).

20 *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance et al*., WT Docket No. 98-100, GN Docket No. 94-33, MSD-92-14, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, para. 15 (1998).

21 Donald P. Mullally, *The Fairness Doctrine: Benefits and Costs,* The Public Opinion Quarterly, Winter, 1969-1970, at 577.

losing their license.[22] Issues of "public importance" were not limited to political campaigns; the FCC just as often required broadcasters to publicize events related to specific communities, such as the construction of a new school facility.[23] Further, the FCC was tasked with content-based regulation of TV and radio. This approach was upheld by the Supreme Court, which stated that the FCC could restrain radio and TV broadcasters on a content-neutral basis. However, the FCC was then allowed the discretion of deciding what constituted content-neutral. Through this open interpretation, the FCC was able to fine or even revoke the licenses of radio and TV stations it felt were not "fair and balanced" in their political views, resulting in many broadcasters avoiding politics entirely.[24]

Requiring fair coverage was ultimately viewed by many as a stifling of freedom of speech. Public outcry was one of the preeminent factors which led to the elimination of the Fairness Doctrine in 1987 by the FCC itself, following doubts as to its legitimacy and effectiveness. Requiring broadcasters to avoid expressing opinions was found to result in complete avoidance of discussing issues of public importance for fear of incurring penalties under the Fairness Doctrine.[25] Yet despite the loss of the Fairness Doctrine, the FCC never truly lost the desire to enforce fairness of

22 *Id*. at 579.

23 Kathleen Anne Ruane, Cong. Research Serv., R40009, Fairness Doctrine: History and Constitutional Issues (2011).

24 *Id.* at 3.

25 *Id*. at 6.

coverage in the media. In April of 2013, the FCC initiated a study titled the "Multi-Market Study of Critical Information Needs," tasked with conducting a media census to determine media coverage relative to eight "Critical Information Needs" (CINs), which included politics, the environment, and economic opportunity.[26] As stated by acting Chairwoman Mignon Clyburn, "The research design we announce today is an important next step in understanding what those needs are…and what barriers exist in our media ecologies in providing and accessing this information."[27]

The study raised the concern that the FCC sought a back door to the Fairness Doctrine's reinstatement. Eve Reed, a Federal Court Litigator challenging net neutrality standards, argued "the questions that the researchers will be asking suggest a renewed interest on the part of the FCC in the inner workings of station and newspaper editorial decision-making."[28] FCC Commissioner Ajit Pai argued against the study as well, stating, "I continue to believe that this study should be halted [because] the government should neither enter the newsroom nor define what 'critical information' journalists should be covering."[29] Due to

26 Eve K. Reed, FCC Releases Research Design for "Critical Information Needs" Study, Wiley (May 27, 2013), http://www.wileyonmedia.com/2013/05/fcc-releases-research-design-for-critical-information-needs-study-to-be-used-in-quadrennial-review-and-market-barrier-section-257-proceedings.

27 FCC, Statement by Acting Chairwoman Mignon Clyburn on the Release by the Office of Comm. Bus. Opportunities of the Res. Design for the Multi-Market Study, (2013), https://www.fcc.gov/document/acting-chairwoman-clyburn-ocbos-critical-needs-research-design.

28 Reed, *supra* note 26.

29 John Eggerton, FCC's Pai: Critical Needs Study Should Still Be Halted, Business of Television: Broadcasting and Cable (2014), http://www.

doubts from litigators such as Reed and Pai, coupled with backlash from media outlets protesting what were deemed inappropriate questions of journalists and the potential for government content regulation, the Multi-Market Study was suspended by the FCC in February of 2014 and to date has not been resumed.[30]

The historical initiative demonstrated by the FCC to self-define the scope of their mandate, revealed through their interpretation of "content neutral" and the extensive application of the Fairness Doctrine, lends credence to concerns regarding the FCC's newfound jurisdiction over the Internet realm. If allowed to once again define the scope of its mandate, the FCC is quite capable of amending the applications of "just and reasonable" to again pursue an agenda of subjective fairness. As the courts have upheld the right of the FCC to establish their own boundaries, it is likely the near future will yield answers regarding the FCC's willingness to broadly define their scope of power.

If the FCC cannot be trusted to regulate the Internet responsibly, then what alternatives remain? Opponents of net neutrality argue in favor of the free market. The restriction of content access by certain ISPs will only result in other providers entering the market without similar restrictions. ISPs which follow Comcast's example and fail to disclose to consumers restrictions of content access should certainly

broadcastingcable.com/news/washington/fccs-pai-critical-needs-study-should-still-be-halted/129316.

30 FCC, Statement on Critical Information Needs Study, (2014) https://apps.fcc.gov/edocs_public/attachmatch/DOC-325852A1.pdf.

be held accountable by consumers who ultimately control the market. If consumers become dissatisfied with service barriers, then market competition will give rise to better, preferred services. Regulation with price controls will ultimately serve only to entrench current providers, establishing a form of monopoly in which new entrants cannot hope to compete with established providers who can afford to charge lower premiums for identical service. However, free market proponents advocate that control over the Internet by numerous ISPs, and therefore by consumers themselves, is preferable to a five member commission with a history of curtailing freedom of speech through mentalities such as the Fairness Doctrine and content-neutrality.

VI. The FCC: Justifying Internet Neutrality

Despite vocal opposition from ISPs and the two Republican members of the FCC, there has also been significant public support in favor of net neutrality regulations. John Oliver explained in detail net neutrality and its significance on the "Last Week Tonight" show. As a result, the comment section of the FCC website crashed as thousands of comments poured in supporting the regulation of ISPs.[31] The Sunlight Foundation, a nonpartisan, nonprofit organization advocating for open government, processed 800,959 comments and determined that "less than 1 percent

31 Soraya Nadia McDonald, John Oliver's Net Neutrality Rant May Have Caused FCC Site Crash, Washington Post (June 4, 2014) http://www.washingtonpost.com/news/morning-mix/wp/2014/06/04/john-olivers-net-neutrality-rant-may-have-caused-fcc-site-crash.

of comments were clearly opposed to net neutrality," demonstrating overwhelming public support.[32]

Efforts for revision of the regulatory system restraining ISP actions are not confined to the FCC; there have also been motions within Congress to pass bills which would achieve similar effects. Representative Doris Matsui and Senator Patrick Leahy, both Democrats, proposed the Online Competition and Consumer Choice Act, a bicameral act of legislature which, if passed, would require the FCC to implement policies preventing paid prioritization and a two-tiered Internet system.[33] These efforts reflect a genuine desire to prevent telecom giants such as Comcast from solidifying their control into absolute monopolies.

Further, despite claims by ISPs that they are well within their rights to define the services they provide, such restrictions are a violation of what is now considered, by many, a human right. In 2011, the United Nations released a report declaring Internet access a human right, proclaiming any restrictions therein a violation of international law. The report "underscores the unique and transformative nature of the Internet not only to enable individuals to exercise their right to freedom of speech, but also a range of other human rights. Moreover, it promotes the progress of society as a

32 Andrew Pendleton and Bob Lannon, What can we learn from 800,000 public comments on the FCC's net neutrality plan?, Sunlight Foundation (Sept. 9, 2014), http://sunlightfoundation.com/blog/2014/09/02/what-can-we-learn-from-800000-public-comments-on-the-fccs-net-neutrality-plan/#change.

33 Press Release, Doris Matsui, U.S. Representative, Senator Leahy and Congresswoman Matsui Reintroduce Landmark Net Neutrality Legislation (Jan. 7, 2015), https://matsui.house.gov/press-releases/senator-leahy-and-congresswoman-matsui-reintroduce-landmark-net-neutrality-legislation.

whole."[34] In the absence of FCC regulations, ISPs remain free to take advantage of consumers for a service modern digital society has rendered essential.

Comcast blocking BitTorrent is only one of many examples of ISP actions restraining users. In 2011 Verizon blocked GoogleWallet as well as PayPal's phone fingerprinting authorization app because it was developing its own payment option in cooperation with AT&T and T-Mobile. Verizon also blocked tethering, which turns phones into mobile hotspots, and charged extra for the service phones are built to perform. Although this was halted by the FCC in 2012, AT&T continues to restrict this ability to specific plans. For a time, AT&T also blocked video chatting apps because of their high data usage. Various ISPs, such as Comcast, throttled specific websites and content to harm their competition or decrease bandwidth usage.[35] While the FCC cannot prevent data caps for phones, FCC Chairman Tom Wheeler's stance on net neutrality would prevent these abuses by ISPs.

Additionally, many argue that policies akin to the Fairness Doctrine are actually beneficial and necessary, especially in a society where the media is pervasively split down partisan lines. Under Reagan, the Fairness Doctrine was attacked as a violation of freedom of speech due to

34 *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/HRC/17/27 (May 16, 2011).

35 Jose Pagliery, 4 Bad Things Internet Companies Can't do Anymore -- If the FCC Gets Its Way, CNN: Money, (Oct 29, 2015), http://money.cnn.com/2015/02/05/technology/fcc-net-neutrality-cases/ (29 October 2015).

the degree of editorial control it afforded government. In fact, the U.S. Supreme Court ruled to the contrary in *Red Lion Broadcasting Co. v. FCC* of 1969, when it upheld the Fairness Doctrine. The Court held:

> A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a…frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others…. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.[36]

By this stance, it is reasonable for the government to require opposing views to be expressed, granted all opinions are allowed. Therefore, there are not only numerous practical arguments urging Internet neutrality, but also various constitutional and legal precedents justifying FCC regulatory control of ISPs.

VII. Conclusions

Given the history of the FCC and governments' tendency towards the accumulation of regulatory authority, the FCC may pose a significantly greater 'clear and present danger' with regards to the establishment of a closed Internet as compared to an unregulated system of internet provision. Keep in mind that, according to the definition of an open

36 Red Lion Broad. Co. v. FCC 395 U.S. 367, 388-389 (1969).

Internet adopted earlier, the government is just as capable of third party interference as ISPs. In fact, the FCC wields even greater potential control over Internet content to the extent that an individual ISP can only control the content it provides to its consumers; it can control neither content provided by competing ISPs, nor how many consumers opt to subscribe to its content. Where ISPs exercise only a limited sphere of Internet influence, the FCC maintains an absolute sphere of influence through the power to mandate ISPs to either provide or restrict any content it sees fit. ISP control is further diversified among the various ISPs, resulting in incongruous controls over content, if any. The FCC centralizes all control into five commissioners' hands, allowing for greater potential universal restrictions of Internet access.

On the other hand, the absence of regulation foreshadows the denial of what has come to be regarded as a basic human right essential for success and engagement within society. A rejection of FCC authority would result in the continuation of inconsistent and biased data policies which not only harm the individual, but also establish the right of service providers to arbitrarily limit their services and thereby force consumers to pay extra to receive quality service, practices which fundamentally undermine pursuits of social justice. Especially in light of other common carriers deemed essential enough to merit government regulation, such as public transportation and telephone services, there is both significant legal precedent and practical support for

regulation of the Internet. Notably, historical attacks on the FCC itself are merely arguments against the enforcing entity rather than objections to the policy, leaving open the option for alternative regulatory bodies to monitor the Internet. Without the ability to broadly reinterpret their mandate, the FCC as an enforcing body could prove effective at maintaining a level and legal playing field for all ISPs.

Regardless of which side of the issue one falls, the ongoing Internet Neutrality debate is one which holds enormous ramifications not only for ISPs, but also for every individual utilizing the Internet. Though current litigation regarding the Open Internet Order may not represent the final stages of the developing regulation of the Internet, it signifies our struggle for the pursuit of freedom of speech inherent in American society since our founding.

SOCIAL MEANING:
MAKING SENSE OF THE COURT'S ESTABLISHMENT CLAUSE DOCTRINE REGARDING PUBLIC DISPLAYS

Rachel S. Landsman

ABSTRACT: *In recent years, the Supreme Court has decided several cases involving public displays of religious symbols and the Establishment Clause of the First Amendment. In some of these cases, the Court has allowed public displays of religious symbols to stand; in others, the Court has ruled that such displays violated the Establishment Clause. The Court's rulings in these cases have created a body of law that contains many contradictions. In their book Religious Freedom and the Constitution, Princeton University President, Christopher Eisgruber, and former Dean of the University of Texas School of Law, Lawrence Sager, suggested that the answer to the problems presented by public displays of religious symbols is to examine the "social meaning" of those symbols. In this paper, I discuss Eisgruber and Sager's concept of "social meaning" and how it fits in with the Court's precedents in this area of law.*

---

* Rachel S. Landsman received a Bachelor of Arts from Rice University in May 2016 with majors in History and Theatre and a minor in Politics, Law, and Social Thought. Rachel now works as a research associate at a law firm in Washington, DC. This paper was written for "The Legal Framework of Religious Tolerance," a course co-taught in Rice's Political Science Department by Lawrence Sager and Rice University President David Leebron.

The Supreme Court has heard many cases regarding the Establishment Clause of the First Amendment, and some of these cases have specifically challenged government displays of religious symbols and accused these displays of constituting a state establishment of religion. Since 1935, the Court has heard challenges to government displays of religious symbols while seated under a government-sponsored frieze displaying the Hebrew text of the law God handed down to Moses. The irony here is not lost on the Court, which has recognized the complexity of its own Establishment Clause doctrine, and has sought to create clear rules for government-sponsored religious displays.

In this article, I will examine four cases: each case addresses the public display of religious symbols, and each display was challenged on Establishment Clause grounds. In *Lynch v. Donnelly,* the Court allowed the inclusion of a crèche in a government-supported Christmas display. In *Allegheny v. ACLU,* the Court ruled that a crèche inside the Allegheny courthouse was unconstitutional under the Establishment Clause, but in the same case ruled that a menorah outside the courthouse was constitutionally permissible. In *McCreary County v. ACLU,* the Court decided that McCreary County's display of the Ten Commandments in its courthouse was unconstitutional, but in *Van Orden v. Perry,* the Court allowed Texas to maintain a representation of the Ten Commandments on the grounds of its state capitol building.

These four cases, when viewed together, seem confusing at best and completely irreconcilable at worst.

The Supreme Court has not been able to create a single enforceable "rule" when it comes to public displays and the Establishment Clause. In his dissent in *McCreary County v. ACLU,* Justice Scalia criticized the inconsistencies in these types of cases, observing that the majority opinion in *McCreary County* "forthrightly…admits that it does not rest upon consistently applied principle. In a revealing footnote…the Court acknowledges that the 'Establishment Clause doctrine' it purports to be applying 'lacks the comfort of categorical absolutes."[1]

In their opinions in these cases, the justices have recognized the inconsistencies their decisions have created and have attempted to justify them. In *Lynch,* Chief Justice Burger claimed "the Establishment Clause like the Due Process Clause is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause…was not to write a statute."[2] But statutory interpretation often fluctuates because statutes themselves are modified, while the words of the Establishment Clause have remained consistent since they were written. Interpretation of the Establishment Clause has fluctuated so dramatically that Justice Thomas noted, "the very 'flexibility' of this Court's Establishment Clause precedent leaves it incapable of consistent application."[3] With his deciding vote in *Van Orden,* Justice Breyer

1 McCreary County v. ACLU, 545 U.S. 844, 891 (2005).
2 Lynch v. Donnelly, 465 U.S. 668, 678 (1984).
3 Van Orden v. Perry, 545 U.S. 677, 697 (2005).

relied "less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves."[4]

Given the confusion and the overall irreconcilability of precedent in Establishment Clause cases regarding public displays, one might conclude that no tests or criteria exist to help the justices determine a display's constitutionality. However, this is not the case: the Court has merely declined to apply the tests it has created to resolve Establishment Clause disputes, while simultaneously taking care not to overrule these precedents. In *Lemon,* Justice Burger wrote that "In the absence of precisely stated constitutional prohibitions, we must draw lines," and he did so by crafting the following test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[5]

Through its opinions in *Lynch, Allegheny, McCreary County,* and *Van Orden*, the Supreme Court has come up with new ways to evaluate displays of religious symbols. These include evaluating whether a display endorses religion, whether a display is neutral towards religion, whether a display has a secular purpose, and whether a reasonable observer would perceive a display as constituting an establishment of religion. In their book, *Religious Freedom*

4 *Id.* at 703-704.

5 Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

and the Constitution, Christopher Eisgruber, President of Princeton University, and Lawrence Sager, former Dean of the University of Texas School of Law, advocate interpreting cases involving displays of religious symbols in terms of "social meaning," defined as "the meaning that a competent participant in the society in question would see in that event or expression."[6] Through the concept of social meaning, it is possible to reconcile some of the contradictions found in the Court's rulings on public displays. As Eisgruber and Sager note, "the proper question [to ask in these cases] is 'What is the meaning of the display?' as opposed to 'What is the meaning of the object that is being displayed?'"[7]

The concept of social meaning is most closely related to the Court's concept of a "reasonable observer," whom the Court in *McCreary* describes as "an objective observer, acquainted with the text, legislative history, and implementation of the statute."[8] But in the cases of public displays of religious symbols, the court has found reasons to dispute the idea that imagining a "reasonable observer" is an adequate way to discover whether or not the government's action constitutes a state establishment of religion.

The Court's most convincing objection to the "reasonable observer" standard was the fact that it is nearly impossible to isolate a "reasonable observer" from the community surrounding him and the history of the public

6 Christopher L. Eisgruber & Lawrence G. Sager, Religious Freedom and the Constitution 127 (Harvard UP eds., 2007).

7 *Id.* at 131.

8 McCreary County v. ACLU, 545 U.S. 844, 862 (2005).

display in question. It is also difficult for attorneys and judges to theorize what a "reasonable observer" does or does not know. The justices and the attorneys on either side delve deep into the cases and, through their research, develop extensive knowledge about the meaning of the symbols involved and the history of the community in which the display exists. To then isolate the knowledge of a "reasonable observer" and draw conclusions through extrapolation is a process that is sure to produce inconsistencies. Furthermore, in examining precedent, it is evident that the justices cannot seem to agree what a "reasonable observer" would or would not know. As Eisgruber and Sager note, "certain practices [have] a disparaging effect that [is] 'real,' and not reducible…to the personal perceptions of [individual reasonable] observers."[9]

Eisgruber and Sager suggest that applying a test of social meaning would produce more consistent outcomes in these cases. If a competent participant of the society would understand the display to constitute a state establishment of religion, using social meaning as a guide, the display is unconstitutional. This differs in an important way from the reasonable observer standard: the reasonable observer test focuses on the symbols themselves. The social meaning standard, however, focuses on the meaning of the display as a whole, combining the context provided by the Court's various tests such as secular purpose and neutrality.

In the cases here, a standard of social meaning might provide coherence in a realm that is currently plagued by

9 Eisgruber & Sager, supra note 6, at 127.

inconsistencies. For example, in *Allegheny,* the majority opinion goes into great detail on the history of the menorah, using the detailed historical explanation to justify the Court's decision to uphold the display as constitutional. But, in a concurring opinion, Justice Kennedy pointed out the many problems presented by delving so deeply into the history of the menorah as a symbol:

> Before studying these cases, I had not known the full history of the menorah, and I suspect the same was true of my colleagues. More important, this history was, and is, likely unknown to the vast majority of people of all faiths who saw the symbol displayed in Pittsburgh. Even if the majority is quite right about the history of the menorah, it hardly follows that this same history informed the observers' view of the symbol and the reason for its presence.[10]

If the Court were to take the same display and apply to it the concept of social meaning, it would not be necessary for the Court to examine the long history of the menorah as a symbol and, as Justice Kennedy says, "sit as a national theology board," examining and, for the purpose of the law, deciding the meaning of religious symbols.[11]

The Court has also received criticism for its inconsistency in applying the endorsement test to crèche displays. In *Lynch,* the Court described endorsement as a

10 Allegheny v. ACLU, 492 U.S. 573, 678 (1989).
11 *Id*.

governmental action that "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[12] In *Lynch,* examining a public display of a crèche, the Court ruled that the "display of the crèche is no more an…endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums."[13] In *Allegheny,* however, the Court called the display of a crèche in a government building unconstitutional.

In the case of endorsement, the Court must examine whether the government's action has advanced one religion over another, or advanced religion over non-religion. In applying the endorsement test in her concurring opinion in *Lynch*, Justice O'Connor actually took into account factors that look more like a test of social meaning. She wrote that

> the display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion…Government celebration of the holiday, which is extremely common, generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood.[14]

12 Lynch v. Donnelly, 465 U.S. 668, 688 (1984).
13 *Id.* at 683.
14 *Id.* at 668, 683.

By examining the meaning of the display as a whole, instead of the particular symbol in question, and seeking to understand the context of the display in the community, Justice O'Connor concluded that the government had not endorsed religion, or that the "social meaning" of the display was not one that endorses Christianity. As demonstrated in Justice O'Connor's analysis, an application of the endorsement test can be aided by an examination of a display's social meaning.

In *McCreary,* the Court put a lot of emphasis on the idea of "secular purpose," another concept derived from the test in *Lemon*. In cases of public displays, the government cannot sponsor a display with the purpose of advancing religion. But in the case of *McCreary,* the government altered its display twice after its original creation. For the first two displays, the purpose was clearly to advance religion. In the third display, as a result of advice from their lawyers, McCreary County was able to claim they had the secular purpose of exhibiting the foundations of American law. On the surface, the third display seemingly adhered to their supposed secular purpose. However, the Court and the community were both aware of the purpose that had driven the creation of the first two displays, and the third display seemed a desperate last attempt at posting a religious document on the walls of a government building.

The justices struggled to justify their declaration that the third display was unconstitutional. McCreary County asked the court to consider only the third display, which

was the one they could claim had a secular purpose. But, in doing so, the Court argued that it could not ignore "perfectly probative evidence" and neither could the members of the community who had seen the controversy that surrounded the first two displays. The Court noted that "reasonable observers have reasonable memories, and…precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'"[15]

In this statement, the Court expanded the definition of the reasonable observer to include an idea like Eisgruber and Sager's concept of "social meaning"—not only does the reasonable observer respond to the religious symbols but also to the context of the display. In this opinion, the reasonable observer becomes the "competent participant of society," who has observed all three displays and understands that the government's true purpose is merely veiled in the third display in order to avoid a verdict of unconstitutionality.

In the context of *McCreary,* the Court addressed the idea of government neutrality towards religion as the best way to avoid a state establishment of religion. The Court stated that "the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion."[16] But, in his dissent in *McCreary,* Justice Scalia pointed out that "the Court… cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without

15 McCreary County v. ACLU, 545 U.S. 883, 866 (2005).
16 *Id*. at 883, 875.

losing all that sustains it."[17]

Considering the fact that government sponsored displays have been upheld and still stand, complete neutrality is perhaps not likely or possible. But in the context of social meaning, it is possible for the government to maintain these displays as long as competent participants in the society continue to understand the government as neutral. Such was the case in *Van Orden,* in which the Ten Commandments were allowed to remain on the grounds of the state capitol building in Texas. In *Van Orden*, the Court noted that "a governmental display of an obviously religious text cannot be squared with neutrality, except in a setting that plausibly indicates that the statement is not placed in view with a predominant purpose on the part of government either to adopt the religious message or urge its acceptance by others."[18]

The decision in *Van Orden* most closely relates to the presence of the Ten Commandments in the Supreme Court itself. Eisgruber and Sager note that "The Supreme Court frieze depicts Moses…[and might] be regarded and appreciated as an artwork rather than an expression of religious sentiment."[19] In *Van Orden,* Justice Breyer justified his vote to allow the Ten Commandments to remain by referring to context. He noted that "in certain contexts, a display of the tablets of the Ten Commandments can convey…a secular moral message…[or] a historical

17 *Id*. at 892-893.
18 Van Orden v. Perry, 545 U.S. 677, 737 (2005).
19 Eisgruber & Sager, *supra* note 6 at 143.

message…a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation."[20] Justice Breyer continued to examine the circumstances surrounding the display, concluding that its value outside the sphere of religion made it constitutionally permissible. He also noted that the monument had stood uncontested for forty years and had not created any sort of divisiveness in the community; he has been subsequently criticized for allowing the issue of divisiveness to affect his ultimate conclusion. But in the context of social meaning, Justice Breyer considered that the monument had stood and been appreciated for forty years in a non-religious manner, and that the social meaning of the monument was not one of religious establishment.

By applying the idea of social meaning to these precedents, it is possible to reconcile some of the inconsistencies that exist in Establishment Clause doctrine regarding public displays. By expanding the "reasonable observer" test to include the observer's comprehension of context and participation in society, one can create a "competent participant" who better represents the community's response to a public display. If one considers neutrality in the terms of social meaning, the government would not need to completely avoid religious symbols, but would rather need to avoid displays that, as a whole, appear not to be neutral. And, by taking into account the context of public displays and the history that surrounds them, the Court could more consistently interpret whether the social meaning

20 Van Orden v. Perry, 545 U.S. 677, 701 (2005).

of a display is one that constitutes a state endorsement of religion.

Though applying the concept of social meaning to the Court's existing Establishment Clause doctrine allows some of the Court's inconsistencies regarding public displays to be reconciled, several problems remain unresolved. Social meaning is an abstract idea, similar to the ideas of endorsement and reasonable observers, in that it has the potential to be interpreted differently by different judges. Though it may provide a more consistent answer than the previous tests, it still "lacks the comfort of categorical absolutes."[21] It may not be possible to craft a specific, mechanical test that can be applied to every Establishment Clause case, but in the area of public displays and religious symbols, Eisgruber and Sager's concept of social meaning provides one method to make sense of the Court's disparate rulings.

21 McCreary County v. ACLU, 545 U.S. 844, 891 (2005).

THE SUBSTANCE OF SUBSTANTIVE DUE PROCESS

Ian Jones '18

Abstract: *Due process is arguably the most elusive concept in constitutional law. Justices have invoked it to protect a wide range of activities, but the Supreme Court has never specified where the boundaries of due process lie. In Obergefell v. Hodges, the Court held that the due process clause included a right to homosexual marriage, irrevocably making it a legal discussion rather than a policy discussion. Thus, instead of discussing whether legalizing homosexual marriage is good policy, one must examine whether Justice Kennedy's expansive interpretation of the 14th Amendment's Due Process Clause is legitimate. Justice Kennedy's opinion contains defenses for the majority's decision, but most are rooted in policy rather than the Constitution. The majority opinion follows in the tradition Dred Scott v. Sandford, Lochner v. New York, and others, who had a political goal, and accomplished it by disguising a policy decision as constitutional interpretation.*

---

* Ian Jones is a junior political science major at Grove City College. He enjoys writing on business law and constitutional law. In addition to writing for the *Journal of Law and Public Policy*, he serves as Vice President of the Grove City College Law Society and is the volunteer coordinator for Life Advocates. He would like to thank Dr. Caleb Verbois for his help and support throughout the writing and editing process.

In the past decade, few—if any—American political debates have been as contentious and divisive as the debate over same-sex marriage. In 2003, Massachusetts became the first state to recognize same-sex marriage when the Supreme Judicial Court of Massachusetts ruled in *Goodridge v. Department of Public Health* (2003). From 2003 to 2015, eleven states had passed legislation in support of same-sex marriage, while others passed legislation to explicitly define marriage as being between one man and one woman.[1] The citizens of each state could decide whether their state would recognize same-sex marriage or not. These debates abruptly became immaterial following the Supreme Court ruling in *Obergefell v. Hodges* (2015).[2] Given the role of *stare decisis* in constitutional law, it is unlikely that same-sex marriage will again be discussed as a purely policy issue; for better or for worse, it is now a matter of constitutional law. As noted in the dissents in *Obergefell v. Hodges*, one can critique either the conclusion of the case, its methodology, or both.[3] While the conclusion is debatable, the methodology is obviously suspect. What the majority styled as constitutional interpretation was a divergence from precedent and an aspirational attempt to legislate from the bench, taking a power reserved to the states.

When examining *Obergefell v. Hodges*, it is

1 Goodridge v. Department of Public Health, 440 Mass. 309 (2003); Obergefell v. Hodges, No. 14-556, (U.S. June 26, 2015) (Scalia J., dissenting); *Id.* (Kennedy, J., majority opinion).

2 Obergefell v. Hodges, No. 14-556, (U.S. June 26, 2015) (Kennedy, J., majority opinion).

3 *Id.* (Scalia, J., dissenting); *Id.* (Roberts, C.J., dissenting).

important to note that a critique of the decision is not necessarily contingent on a specific stance on the subject of gay marriage rights. One can believe that something ought to be legalized, but was not legalized constitutionally, just as one can believe that a policy should not have been implemented, but nonetheless believe its implementation was constitutional. As justices on both sides of the decision note in their opinions, there are compelling policy arguments for both sides. Nonetheless, the justices each purport to ground their arguments in constitutional analysis, rather than in policy. The primary provision of the Constitution evoked by Justice Kennedy in his majority opinion was the Fourteenth Amendment, specifically the Due Process Clause and the Equal Protection Clause.[4] According to Justice Kennedy, the Fourteenth Amendment and the guarantees of liberty found elsewhere in the Constitution "require a State to license a marriage between two people of the same sex… and recognize a same-sex marriage licensed and performed in a State which does grant that right."[5] One may, as Justice Scalia does, argue against Justice Kennedy's interpretive model, while being indifferent to gay marriage as a public policy issue.[6]

To understand the arguments made by the justices in their opinions in *Obergefell v. Hodges*, it is important to understand the history of due process, especially the interpretations of the Fourteenth Amendment. One can

4 *Id.* (Kennedy, J., majority opinion).
5 *Id.* at 3.
6 *Id.* at 1-9 (Scalia A., dissenting).

observe the first hints of an expansive interpretation of due process in one of the most infamous Supreme Court cases, *Dred Scott v. Sandford* (1857).[7] Dred Scott, a slave of John Emerson, accompanied his master from the slave state of Missouri to Illinois, a free state, and later returned to Missouri.[8] Scott argued that, because he had travelled to a state where slavery was prohibited, he was now a free man. Although the case concerned slavery, it was also framed as a property rights case: did Emerson have an absolute right to his property, regardless of his location in the United States? The Court held that Emerson did. In his majority opinion, Chief Justice Roger Taney expounded on his interpretation of the Fifth Amendment's Due Process clause:

> The rights of property are united with the rights of person, and placed on the same ground by the Fifth Amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.[9]

Taney intimated a substantive element of due process which

7 *Id.* at 1-29 (Roberts, C.J., dissenting).

8 *Scott v. Sandford, in* The Oxford Companion to the Supreme Court of the United States, 888 (Kermit L. Hall ed., 2nd ed. 2005).

9 Dred Scott v. Sandford, 60 U.S. 393 (1857).

protected liberty and property from arbitrary legislative restrictions.[10] Most of the contemporaneous criticism of the decision centered on Taney's view of black people as property, while the substantive interpretation of due process remained mostly uncontested.[11] Shortly after being handed down, the decision was overturned by the Thirteenth and Fourteenth Amendments.

The Fourteenth Amendment was ratified in 1868 to help enforce the Thirteenth Amendment, which banned slavery nationwide.[12] The first section of the Fourteenth Amendment states:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[13]

The Fifth Amendment's Due Process Clause was applicable to violations by the federal government, but not to violations by the states. To prevent states from restricting the rights of newly freed slaves, the authors of the Fourteenth Amendment added a Due Process Clause which was applicable to the states, protecting life, liberty and property.[14] The other

10 Justin Buckley Dyer, Slavery, Abortion, and the Politics of Constitutional Meaning 304 (2013).
11 *Id*.,at 24-26.
12 U.S. Const. art. XIII.
13 U.S. Const. art. XIV, § 1.
14 *Id.*; *Fourteenth Amendment, in* The Oxford Companion to the Supreme

distinctive clause in the amendment is the Equal Protection Clause, which provides that states must protect all people within their jurisdictions equally. These two clauses were cited as the primary constitutional basis for the majority decision in *Obergefell v. Hodges*.[15] How did the Fourteenth Amendment shift from primarily guaranteeing the rights of former slaves to containing a right to same-sex marriage?

In his *Obergefell v. Hodges* dissent, Justice Roberts noted that while *Dred Scott*'s holding was overturned by Thirteenth, Fourteenth, and Fifteenth Amendments, "Its approach to the Due Process Clause reappeared … in a series of early 20th century cases."[16] One of the most important—and controversial—of these cases is *Lochner v. New York* (1905), which reinforced and expanded the substantive interpretation of Due Process and ushered in a new era of activist Supreme Court rulings, known as the "Lochner Era."[17] Joseph Lochner owned a bakery in the state of New York, whose legislature had passed a law limiting (among other things) the total hours that bakers could work each week.[18] Lochner was indicted twice for an employee surpassing the weekly limit of 60 hours.[19] Lochner appealed, and the Supreme Court ruled New York's law unconstitutional. Justice Rufus Peckham wrote in his majority opinion, "[The

Court of the United States, 359 (Kermit L. Hall ed., 2nd ed. 2005).

15 Obergefell v. Hodges, No. 14-556, 19 (U.S. June 26, 2015) (Kennedy, J., majority opinion).

16 *Id.* at 12 (Roberts, C.J., dissenting).

17 Dyer, *supra* note 10, at 43.

18 *Lochner v. New York, in* The Oxford Companion to the Supreme Court of the United States, 588 (Kermit L. Hall ed., 2nd ed. 2005).

19 *Id.*

question at hand] is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract."[20] The Court held that the right of contract was a substantive right, protected by the Fourteenth Amendment, which could not be restricted by the law—even though the New York legislature followed proper procedure in passing the law.[21]

The effect of the Lochner ruling was sweeping: over the following thirty years, conservative Supreme Court majorities consistently struck down economic regulations. Liberal justices, especially Oliver Wendell Holmes, wrote scathing dissents which criticized the majority for using the guise of constitutional interpretation to advance preferred policies. In one such dissent, Holmes wrote, "I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical…"[22] Nonetheless, the Court was clear; economic legislation that violated rights which were substantive in the court's view would be struck down.[23] By the mid-1930s, a frustrated Franklin Delano Roosevelt

20 Lochner v. New York 198 U.S. 45, 57 (1905).
21 *Id,.*generally.
22 *Id.* at 75 (Holmes C.J.., dissenting).
23 *Id.,* generally; *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

was threatening to expand the Court by adding progressive justices, in hopes of preventing the Court from continuing to strike down New Deal legislation.

Before Roosevelt could carry out his threat, the court changed its view of due process. In 1937, Justice Owen Roberts abruptly switched his position in the landmark decision, *West Coast Hotel Co. v. Parrish* (1937). In *West Coast Hotel Co. v. Parrish*, the plaintiff, Elsie Parrish, filed suit for the difference in wages between what she had been paid and the state minimum wage.[24] The court ruled in her favor, holding that state legislation superseded the individual freedom of contract and overturning *Lochner v. New York*, *Adkins v. Children's Hospital* (1923), and many other precedents from the Lochner Era. In his majority opinion, Chief Justice Charles Hughes wrote:

> "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law… the Constitution does not recognize an absolute and uncontrollable liberty… Though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."[25]

The Court denied the broad substantive right to contract and hinted at a more deferential attitude in the area of economic policy. Thereafter, the Court assumed the

24 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

25 *Id.* at 398.

rationality of economic regulations, and seldom interfered with legislation.[26] Although economic due process had died, the concept of substantive due process soon reappeared in a different area.

A year later in *United States v. Carolene Products Co.* (1938), Justice Harlan Stone attempted to set forth a systematic framework to determine which cases the Court would address. In an initially obscure footnote to his majority opinion that is now known simply as "Footnote Four," Justice Stone wrote:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth… legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation… [and] statutes directed at particular… minorities.[27]

Stone identifies three categories which would be subject to more stringent analysis: legislation which violates the Bill of Rights or the Fourteenth Amendment, legislation

26 *Substantive Due Process*, *in* The Oxford Companion to the Supreme Court of the United States, 276 (Kermit L. Hall ed., 2nd ed. 2005).

27 U.S. v. Carolene Products Co., 304 U.S. 144, 152 (1938).

that restricts political processes like voting, and legislation that discriminates against minorities. This new model of determining which cases would be reviewed was not universally accepted among the justices; however, in the years that followed, the Court deferred to the legislature in economic matters but reviewed more cases involving civil rights.[28]

In the following years, the Court used the Due Process and Equal Protection clauses to rule in favor of integration, most famously in *Brown v. Board of Education* (1954). But the Court also "discovered" a new type of substantive due process: cases concerning privacy and individual autonomy.[29] The court continued further afield in *Griswold v. Connecticut* (1965), holding that the Bill of Rights contains "penumbras" of certain unremunerated rights.[30] What exactly is meant by "penumbra" and how justices should discern what rights are within these "penumbras" is unclear. The Court was clear in its decision: the "penumbral rights of privacy and repose" included a right of married couples to use contraceptives.[31] Later, in *Roe v. Wade* (1973), the penumbral right of privacy was held to encompass the right of a pregnant woman to procure an abortion.[32] The Court claimed it was bound to protect not only enumerated rights, but also the "emanations from those guarantees that help give them life

28 Substantive Due Process, *supra* note 26, at 276.
29 Brown v. Board of Education, 347 U.S. 483 (1954).
30 Griswold v. Connecticut, 381 U.S. 479 (1965).
31 *Id.* at 485.
32 Roe v. Wade, 410 U.S. 113 (1973).

and substance."[33] The gradual expansion of what is protected by the Fourteenth Amendment still continues.

With the understanding of how the Fourteenth Amendment has been historically interpreted, one can evaluate the reasoning of Justice Kennedy in his opinion. After a brief overview of the facts, Justice Kennedy presents the two central questions: first, whether the Fourteenth Amendment requires states to license marriages between two people of the same sex, and second, whether states must recognize such marriage licenses legally obtained in other states.[34] Obviously, if the Fourteenth Amendment does require each state to license marriages for same-sex couples, the second question is moot, so Justice Kennedy begins by addressing the first question. He examines the history of same-sex relations, before launching into his constitutional justification in the third section of his opinion. In the fourth section of his opinion, Kennedy addresses some counterarguments. He concludes his opinion in the fifth section.

Justice Kennedy notes that historically, marriage has promised "nobility and dignity", and has been a central part of cultures throughout history.[35] He adds, "It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex." Nonetheless, Kennedy argues,

33 *Griswold*, 381 U.S. at 484.
34 Obergefell v. Hodges, No. 14-556, 2-3 (U.S. June 26, 2015) (Kennedy, J., majority opinion).
35 *Id.*

the public understanding of marriage has fundamentally changed over time.[36] As examples, he cites the practice of arranged marriage and the doctrine of coverture, ideas which were once considered part of marriage. In addition to these past changes, Kennedy notes a shift towards greater public tolerance of homosexuality and the legalization of same-sex marriage in various states, concluding that, "The states are now divided on the issue of same-sex marriage."[37] Kennedy offers very little concrete reasoning for why the past history or the current status necessitates a decision legalizing same-sex marriage. In his dissent, Chief Justice Roberts notes that the historical changes noted did not affect the basic definition of marriage as the "union… of one man and one woman."[38] While it might be convenient for the Supreme Court to resolve the current division among the states on the issue of same sex marriage, neither convenience nor extraordinary conditions can create or enlarge constitutional power, as Chief Justice Hughes noted in his majority opinion in *Schechter Poultry Corp. v. United States* (1935).[39] The history of the issue is not sufficient to justify the decision.

Kennedy provides a more concrete defense in the following section, declaring, "The fundamental liberties protected by [the Due Process] Clause include most of the rights enumerated in the Bill of Rights… [and] extend to certain personal choices central to individual dignity and

36 *Id.* at 4.
37 *Id.* at 10.
38 *Id.* at 7 (Roberts, C.J., dissenting).
39 Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

autonomy, including intimate choices that define personal identity and beliefs."[40] Citing Justice Harlan's dissent in *Poe v. Ullman*, he adds that, although it is the duty of the Judiciary to identify and protect these fundamental rights, there is no formula for executing this task, (1961).[41] Rather, justices are to "exercise reasoned judgement."[42] However, as Justice Roberts mentions in his dissent, Harlan cautions that the Court is not, "'free to roam where unguided speculation might take them.' They must instead have 'regard to what history teaches' and exercise not only 'judgment' but 'restraint.'"[43] Justice Kennedy claims that when "new insights" into the meaning of the Constitution are found, they must be addressed, presumably by the Court.[44]

In his opinion, Kennedy names "four principles and traditions" which he claims demonstrate the Constitution's protection of same-sex marriage. His first claim is that the right to personal choice regarding who one marries is inherent to individual autonomy. However, as Justice Thomas notes, homosexual private religious ceremonies and homosexual cohabitation are legal in all states and civil gay marriages are legal in some states.[45] The only thing lacking is government entitlements, something not encompassed by the traditional meaning of "liberty."[46] The second principle is that the right

40 *Obergefell*, slip op. at 10 (Kennedy, J., majority opinion).
41 *Id.*; Poe v. Ullman, 367 U.S. 497 (1961) (Harlan, J., dissenting).
42 *Obergefell*, slip op.. at 10 (Kennedy, J., majority opinion).
43 *Obergefell*, slip op. at 18 (Roberts, C.J., dissenting); *Poe,* 367 U.S., at 542 (1961).
44 *Obergefell*, slip op. at 20 (Kennedy, J., majority opinion).
45 *Id.* at 1-18 (Thomas, J., dissenting).
46 *Id.* at 7.

to marry is fundamental because it "supports a two-person union unlike any other in its importance to the committed individuals."[47] The third principle is that the right to marry "safeguards children and families."[48] Finally, Kennedy adds that "marriage is a keystone of social order."[49] Justice Roberts comments in his dissent, "The majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society." While these are good policy arguments, they are not Constitutional arguments.

Justice Kennedy relies heavily on precedents from *Loving v. Virginia* (1967), *Zablocki v. Redhail* (1978), and *Turner v. Safley* (1987), which are Supreme Court cases overturning bans on interracial marriage, bans based on a failure to pay child support, and bans based on a person's status as an inmate, respectively. Justice Thomas observes in his dissent that these cases all involved "absolute prohibitions on private actions associated with marriage," not merely a lack of government recognition and benefits.[50] These cases do indicate protection from some restrictions on marriage, but it is not immediately clear that these precedents indicate a protection of same-sex marriage. Certainly that was not the interpretation at the time. The majority claims that marriage has been fundamentally misunderstood by every society until 15 years ago, and they have discovered what

47 *Obergefell*, slip op. at 13 (Kennedy, J., majority opinion).
48 *Id.*
49 *Id.* at 16.
50 *Id.* at 11. (Thomas, J., dissenting).

has slipped past other Supreme Court jurists for over a century.[51] The majority's policy arguments and precedents are not convincing.

The decision is most disturbing because it seemingly leaves very little to restrain the justices in their determination of what rights are regarded as "fundamental rights." In his majority opinion in *United States v. E. C. Knight Co.* (1895), Chief Justice Fuller warned, "Acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."[52] Justices must exhibit caution when interpreting the Constitution, as the precedents they set may later prove destructive. The Fourteenth Amendment "protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."[53] Same-sex marriage is not part of that history and tradition. Instead, in the words of Justice Scalia,

> [The five justices in today's majority] have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since… and they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies,

51 *Id.* at 7 (Scalia, J., dissenting).
52 United States v. E. C. Knight Co., 156 U.S. 1, 13 (1895).
53 Washington v. Glucksberg 521 U.S. 702, 721 (1997).

stands against the Constitution.[54]

The "self-restraint" and "utmost care" required when interpreting the due process clause are noticeably absent in the majority's decision.[55] It is doubtful that a meaningful check on judicial power remains in the absence of self-restraint.[56]

Other problems may arise from the precedent set in *Obergefell v. Hodges*. When the government guarantees "positive liberties," these liberties can conflict with others' "negative liberties." As noted by Justice Thomas, the petitioners did not seek the right to cohabitate, hold a religious marriage ceremony, or raise children, but rather to gain government recognition and benefits.[57] There has already been conflict between these rights and claims of free exercise of religion as protected by the First Amendment in cases like *Craig v. Masterpiece Cakeshop*. If the Court follows the precedent of *Obergefell v. Hodges* and continues to guarantee positive, government-endowed rights, such conflicts may become more frequent, as the courts give deference to new liberties, such as the protection of same-sex marriage, at the expense of liberties like free exercise of religion.

The original meaning of the Due Process Clause was that certain procedural steps must be taken before

54 *Obergefell*, slip op. at 7 (Scalia, J., dissenting).
55 Collins v. Harker Heights, 503 U.S. 115 (1992).
56 United States v. Butler, 297 U.S. 1 (1936) (Stone, J., dissenting).
57 *Obergefell*, slip op. at 9 (Thomas, J., dissenting).

certain rights were abridged. However, over the past 150 years, that meaning has slowly but steadily expanded to include substantive rights to property, as seen in *Dred Scott v. Sandford*, contract, as seen in *Lochner v. New York*, and more recently, privacy and dignity, in cases like *Roe v. Wade* and *Obergefell v. Hodges*. The expansion of judicial power is reminiscent of Abraham Lincoln's fear that the Supreme Court would no longer be checked, but instead be an "eminent tribunal" with the government practically in the hands of the Court. Justices throughout Supreme Court history have emphasized the need for judicial restraint and for basing fundamental rights on the deeply rooted tradition and history of the nation. The majority in *Obergefell v. Hodges* did neither. Instead, it disguised a policy decision as constitutional law, thereby further obscuring the meaning of the due process clause.

CLEANSING THE CONSTITUTION:
THE DUTY OF OFFICEHOLDERS IN THE ANTEBELLUM PERIOD

Joshua Craddock

"The Congress regulates our stewardship; the Constitution devotes the domain to union, to justice, to defence, to welfare, and to liberty. But there is a higher law than the Constitution, which regulates our authority over the domain, and devotes it to the same noble purposes."
— William Seward

ABSTRACT: *Prior to the Civil War and the abolition of slavery, anti-slavery judges and other government officials faced a dilemma: either keep their oaths to uphold the laws and Constitution of the United States (which countenanced slavery) or fulfill their natural law duties to oppose racially-based chattel slavery. This problem prompts a larger question for republican government: when purifying a regime of grave evil, how should the prudent public official balance his duty to principle with his duty to the Constitution? This paper analyzes the question from a Christian natural law perspective and argues that government officials have a duty to uphold absolute moral principles above manifestly unjust positive law. Various approaches to avoid direct conflict between one's oath and the natural law are proposed. Nevertheless, in circumstances where conflict between oath-keeping and natural law cannot be avoided, cautious nullification of pro-slavery laws is defended as an alternative to resignation from office.*

---

* Josh Craddock is a third-year student at Harvard Law School, where he serves as a senior editor of the *Harvard Journal of Law & Public Policy*. Prior to law school, Josh served as an NGO representative at the United Nations, where he participated in negotiations on the Sustainable Development Goals.

THE most hotly debated constitutional question of the 19th century was the extent to which the United States Constitution recognized, tolerated, or protected slavery. The carefully-phrased verbal gymnastics of the Constitution in regard to these "other persons" belied an uncomfortable cohabitation between the American creed and slavery. Nevertheless, the founding document of the United States countenanced the existence of slavery to some degree.[1] This "founding sin" created a quandary for statesmen and jurists.

The debate over slavery in the United States prompts a larger question for republican government: when purifying the regime of a grave evil, how should the prudent public official balance his duty to principle with his duty to the Constitution? Should the republican official hold his oath of office above his moral convictions? Reasoning from the Scriptural principles and natural law framework that many of the Founders followed, the answer to these questions must be principle and conviction, for the public servant must obey God rather than men.[2]

Aquinas calls law "nothing else than an ordinance of reason for the common good, made by him who has care of the community."[3] Proceeding from eternal law, an expression of God's nature by which all human action is measured,

1 Don E. Fehrenbacher, Slavery, the Framers, and the Living Constitution, in Slavery and Its Consequences: the Constitution, Equality, and Race 1-22 (Robert A. Goldwin & Art Kaufman eds., American Enterprise Institute for Public Policy Research 1988).

2 *Acts* 5:29.

3 THOMAS AQUINAS, The Summa Theologica of St. Thomas Aquinas I-II 90.4 (Fathers of the English Dominican Province trans., Burns, Oates & Washburn 2d Revised Ed. 1920) (Online ed. 2008).

man's rational participation in natural law grasps general principles of promoting good and restraining evil to develop positive law.[4] The first principle of natural law is that "good is to be done and pursued, and evil is to be avoided."[5] All "human law always must give way to divine law in cases of conflict."[6]

Human government is merely instrumental to the pursuit of justice, for "justice is the end of government."[7] God delegates authority to governments "to punish those who do evil and to praise those who do good."[8] Governments exercise no authority apart from what Nature and Nature's God has entrusted to them. A government has no authority to legalize behavior that is contrary to natural law. If racial slavery conflicts with natural law, then the positive law that protects it is illegitimate. Yet the republican official must take an oath of office to "preserve, protect, and defend the Constitution of the United States"[9] a Constitution which countenances slavery. Supposing one can conscientiously swear such an oath, how can the republican official execute it without violating natural law?

Though Lincoln found abolition just, he felt

4 Jack Donnelly, *Natural Law and Right in Aquinas' Political Thought*, 33 The Western Political Quarterly 521 (1980).

5 Thomas Aquinas, The Summa Theologica of St. Thomas Aquinas I-II 94.2 (Fathers of the English Dominican Province trans., Burns, Oates & Washburn 2d Revised Ed. 1920) (Online ed. 2008).

6 Donnelly, *supra* note 3, at 525.

7 James Madison, The Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments, Independent Journal, Feb. 6, 1788.

8 *1 Peter 2:15.*

9 U.S. Const. art. II, § 1.

constrained by his oath: "No one who has sworn to support the Constitution can conscientiously vote for what he understands to be an unconstitutional measure, however expedient he may think it."[10] Lincoln explains in his first inaugural address his belief that he has "no lawful right" and "no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists." He views his oath to uphold the fugitive slave clause to be just as binding as toward any other part of the Constitution.[11]

Lincoln calls self-government "the leading principle, the sheet-anchor of American republicanism" and readily acknowledges that "the relation of master and slave is *pro tanto* a total violation of this principle"[12] ("Speech at Peoria"). Yet he affirms the constitutional legitimacy of slavery, despite its incompatibility with the American creed. While expressing his personal desire that "all men, everywhere, could be free," Lincoln admits that his "paramount object in this struggle is to save the Union, and is not either to save or destroy Slavery. If I could save the Union without freeing any slave, I would do it" ("Reply to Horace Greeley").[13]

By elevating the Union above abolition, Lincoln violates his duty to natural law. The union is not an end in itself, but rather a means toward fulfilling government's end.

10 Abraham Lincoln, 16th U.S. President, Cooper Union Address (Feb. 27, 1860).

11 U.S. Const. Art. IV, § 2.

12 Abraham Lincoln, 16th U.S. President, Speech at Peoria, Illinois in reply to Sen. Douglas, Illinois (Jan. 1, 1863).

13 Abraham Lincoln, 16th U.S. President, Reply to Horace Greeley: Slavery and the Union, The Restoration of the Union the Paramount Object (Aug. 22, 1862).

A United States serves expediency by avoiding inevitable conflict arising from two competing American nations, but the founding of two nations rather than one would not have been by nature unjust. Constitutional processes designed by man are only valid insofar as they accord with the justice of divine law; processes which deviate "must in no wise be observed."[14]

Aquinas answers that an oath "which is useful and morally good in itself and considered in general," such as an oath to uphold the Constitution, "may be morally evil and hurtful in respect of some particular" such as the provision to return fugitive slaves. He concludes that "anything morally evil or hurtful is incompatible with . . . an oath" so therefore it "admits of dispensation."[15]

President Andrew Jackson offers a second answer regarding the oath of office, one to which Lincoln himself could be sympathetic. Jackson argues that "each public officer who takes an oath to support the constitution, swears that he will support it as he understands it, and not as it is understood by others."[16] Understanding and upholding a contradiction requires Orwellian doublethink: an official cannot consistently uphold "all men are created equal" while enforcing laws that reaffirm racial inequality. For statesman bound to obey to higher law, this tension is unbearable.

---

14 Aquinas, *supra* note 5, at I-II 96.4.

15 *Id*. at II-II 89.9.

16 Henry Clay, The works of Henry Clay: Comprising His Life, Correspondence, and Speeches 19 (Calvin Colton ed., G.P. Putnam's Sons Fed. ed. 1904).

Hebrew scripture describes the double-minded as "unstable in all they do"[17] and contrasts them with those who "love [God's] law."[18]

Like all regimes, America is established upon a moral foundation, not merely a system of governance. The American republic declares a set of virtuous ideals based upon natural law, including that all men are created equal. Lincoln describes the Constitution as a "picture of silver" framed around the "golden apple" of the Declaration ("Fragment").[19] Because "the picture was made for the apple—not the apple for the picture," the republican official ought to side with the Declaration's just principle rather than the Constitution's unjust text enforcing inequality. When evils are so corrupting to the regime as to obscure its founding ideals and render the official's oath contradictory, then "defending the Constitution as one understands it" should mean affirming the ideals rather than strictly adhering to the base processes.

Of course, Jackson's doctrine is subject to Henry Clay's critique, that "there would be general disorder and confusion throughout every branch of the administration."[20] Aquinas suggests that "obedience [to such unjust laws] would preserve public order but only at the infinitely greater

17 *James* 1:8.

18 *Psalm* 119:13.

19 Unpublished letter of Abraham Lincoln, 16th U.S. President, Fragment on the Constitution and Union re. Alexander H. Stephens, Governor, Geor. (Jan. 1861) (sourced from: 4 The Collected Works of Abraham Lincoln 168-69 (Roy P. Basler ed., Rutgers University Press 1953).

20 Henry Clay, The Works of Henry Clay, 19.

cost of the loss of eternal beatitude."[21] Nevertheless, to avoid the tumult that frequent invocation of Jackson's principle would surely cause, the republican official should not take liberties in constitutional interpretation when the matter does not violate the first principles of justice. A representative does not possess authority to disregard secondary, amoral provisions such as the number of representatives per state or the rules of Presidential succession. Aquinas suggests that an individual may consider consequences as prudence dictates to determine his course of action on first principles, so long as he does not violate the natural law that human law is based upon.[22]

Perhaps the best way to evaluate Lincoln's statesmanship as it regards slavery is by his own words, "standing with him while he is right, and part with him when he goes wrong."[23] President Lincoln ultimately did emancipate the slaves "as a fit and necessary war measure for suppressing . . . rebellion," based on his understanding of the Constitution's delegation of wartime powers to the executive.[24] Although he was more motivated by preservation of the Union than respect for natural law, Lincoln achieved a just end consistent with both his obligation to the Constitution and his duty to justice. He "sincerely believed [the Emancipation Proclamation] to be an act of justice,

21 Donnelly, *supra* note 3, at 525.
22 Aquinas, *supra* note 5, at I-II 96.4.
23 Lincoln, Speech at Peoria, at 66.
24 Abraham Lincoln, 16th U.S. President, The Emancipation Proclamation (Jan. 1, 1863).

warranted by the Constitution." The eventual adoption of the 13th and 14th Amendments extended the guarantee of equal protection and justice to all former slaves.

While the statesman is tasked with *executing* the law, the judge must *interpret* the law. In Aquinas' thought, positive laws are only "binding insofar as they do not diverge from the natural law."[25] Since natural law obligations respecting the dignity of persons exists *a priori* to man's positive law, the judge's duty to rule in accordance with the natural law outweighs his duty to the positive law as such when they conflict. Such unjust human laws, which do not participate in eternal or natural law, fail to meet the formal conditions of law and therefore "do not have the nature of law but, rather, of a kind of violence."[26] In practice, however, many antebellum judges ruled to uphold positive law protecting slavery against natural law.

New England's leading jurist, Justice Joseph Story, upheld the stringent Fugitive Slave law in his 1842 *Prigg v. Pennsylvania* decision by interpreting the case in light of other commerce clause decisions promulgated by the court, indicating his opinion of slaves as property. Story "laid the basis for the subsequent nationalization of slavery in the Dred Scott decision of 1857" by upholding and strengthening "the slaveholder's absolute right to have his property protected in every state in the Union." (Mayer 311)[27]. Justice Story believed "that emancipation could only

25 Donnelly, *supra* note 3, at 525.

26 Aquinas, *supra* note 5, at I-II 93.3.

27 Henry Mayer, All on Fire: William Lloyd Garrison and the Abolition of

gradually be accomplished and regarded the abolitionists as malicious obstacles" (Mayer 317).[28]

Story again faced the "conflicting obligations of Constitution and conscience" in a subsequent case concerning George Latimer, a fugitive slave, but upheld his own precedent from *Prigg*.[29] Disregarding any transcendent standard for justice, Story believed that "the Constitution and the Union, for all their compromises, represented the highest possible good."[30] In some ways, this opinion was self-serving. Despite his forward-looking rulings on matters related to his own class of commercial entrepreneurs, he deferred to "the old ways of precedent and compromise"[31] when it came to racial justice, in order to "transmit the Constitution *unimpaired*" to the next generation.[32]

Massachusetts Chief Justice Shaw declared himself personally sympathetic to Latimer, but declined involvement in the federal case, making explicit his view that "an appeal to natural rights and the paramount law of liberty could not override an obligation to the Constitution and the laws".[33] Shaw, like Story, argued that positive law trumped natural rights, for judges and people alike "were bound to [the laws] under a compact which could not have been secured on any other terms."[34] In upholding the ever more stringent fugitive

Slavery 311 (1998).

28 *Id.* at 317.

29 *Id.*

30 *Id.*

31 *Id.* at 318.

32 *Id.* at 317.

33 *Id.*

34 *Id.* at 318.

slave laws, Shaw and Story conscripted every citizen to become a slave-catcher regardless of conscientious objection.

Many conservatives of their day defended Story and Shaw by saying they merely performed their duty, properly detaching themselves from their personal views and upholding the law. Was this the only legal avenue available to Shaw and Story? Was there nothing they could have done to uphold both their duty to the natural law and to the Constitution?

One permissible strategy would be to interpret charitably. If one's oath to uphold the Constitution implies a duty to protect its founding principles, then a judge might charitably interpret the Constitution to reach a ruling consistent with natural law. Presented with a case like Latimer's, the judge might rule him to be free on a reasonable technicality or by gently affirming the ideational natural law principles of the Constitution. Indeed, contemporary commentators suggested that the justices could have exercised "sufficient discretion to interpret the law more generously in Latimer's favor."[35]

Justice John McLean exercised this sort of discretion in his *Dred Scott v. Sandford* (1857) dissent. McLean cast the intentions of the Founding Fathers in the best possible light, recalling that "James Madison . . . was solicitous to guard the language of that instrument [the Constitution] so as not to convey the idea that there could be property in man."[36]

35 *Id.*

36 Scott v. Sandford, 60 U.S. 393, 11 (1857) (McLean, J., dissenting).

McLean invokes "the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution" and elucidates their belief that "the institution of slavery would gradually decline, until it would become extinct."[37] Operating based on his presuppositions, yet still acting within constitutional confines, McLean renders his decision based on lengthy precedent and established laws. This judgment could be consistent with Aquinas's natural law guidelines for officials.

McLean controverted his charitable interpretation, however, in his reaffirmation of slavery's legitimacy. Based on long precedent, he acknowledges the states' right to sanction slavery within its jurisdiction and excludes any federal interference. McLean cites the *Somersett* decision, which declares that "slavery is of such a nature . . . that nothing can be suffered to support it but positive law."[38] Rather than declaring the positive law's subservience to natural law principles, McLean encourages the court to recognize the sovereign power of the states "emanating from the voluntary action of the people," by respecting each state's right to prohibit or admit slavery.[39] Reaffirming the *Prigg* decision, he proudly underscores his own role in dutifully upholding the fugitive slave laws brought before his judicial circuit. When long precedent supports an unjust positive law, the charitable interpretation approach appears less plausible.

A secondary response could be to resign or recuse oneself from the case at hand. This reaction allows the jurist

37 *Id.*
38 *Id.* at 9.
39 *Id.* at 36.

to avoid becoming the agent responsible for upholding an unjust law, while still maintaining his oath. Agents participating in an otherwise just system are free to refrain from particular acts within the system that would require them to perform an injustice. Because of the judge's position of authority and his role in promulgating the law as a moral teacher, however, recusal or resignation may appear feckless.

Abolitionist Lysander Spooner advances another theory of keeping one's oath without resigning office. If a constitutional office is understood as a measure of power conferred upon an individual, granted with the condition that "he will use that power to the destruction or injury of some person's rights," then the condition is certainly void. Yet the officeholder maintains the power with the same legitimacy as if there had been no such unjust condition. Entrusted with "certain power over men," a just officeholder "is bound to retain and use [that power] for their defense."[40] Spooner likens the power to a sword, handed to the officeholder by a criminal with the condition it be used on an innocent bystander. One has neither a duty to use the sword unjustly nor to return the sword to the criminal, but a positive obligation to use the sword in the innocent's defense. Indeed, returning the sword, knowing it would merely be used to kill the innocent bystander by another would nearly make one an accomplice to the crime ("Ought Judges Resign Their Seats?").

From a natural law perspective, neither the executive nor the jurist is excused from moral culpability because he

40 Lysander Spooner, The Unconstitutionality of Slavery 150 (1860).

simply followed the process: the blood on Pilate's hands was not cleansed because he procedurally followed the legal custom. At the Nuremberg trials, Nazi judges claimed their judicial duty had forced them to follow Germany's constitutionally instituted laws and that they had only reluctantly upheld death sentences against Jews. Allied judges did not judge them by their personal feelings toward the Jews, but found them guilty on the basis of natural law. Regardless of the positive laws in a country, a judge is still obligated to protect the innocent.

The legal positivism espoused by Story, Shaw, and the German judges contradicts natural law by suggesting that legal truth is decided by the will of the state. Without access to a transcendent standard of justice, legal positivism becomes the equivalent of moral relativism in the courtroom. Critics may accuse judges who side with natural law over positive law where the two conflict, of ruling based on their own moral predilections. Yet legal positivism is guilty of the same defect, leaving the determination of truth to the whims of the majority and relegating justice to upholding the law regardless of its morality. As the increasingly pro-slavery gloss on the antebellum Constitution (culminating in *Dred Scott*) demonstrates, strict construction of the text cloaks the moral discretion of judges just as easily.

Spooner asserts that no "majority, however large, [has] any right to rule so as to violate the natural rights of any single individual. It is as unjust for millions of men to

murder, ravish, enslave, rob, or otherwise injure a single individual, as it is for another single individual to do it."[41] He criticized judges who "continually offer . . . statutes and constitutions as their warrant for such violations of men's rights," since such positive laws can in no sense be a "higher authority than the principles of justice and natural law" ("The Supreme Power of a State")[42].

William Lloyd Garrison believed that "Story and Shaw had read the law correctly" and took the Latimer fugitive slave decision as evidence that the Constitutional compact was incorrigibly corrupted. Garrison advocated "come-outerism," which beckoned Americans to abandon the Constitution for the sake of the regime's founding principles. In Garrison's view, one could not conscientiously swear to uphold the document which he called "a covenant with death and an agreement with Hell."[43]

To be clear, Garrison was not fundamentally opposed to union. He preferred disunion to the indefinite perpetuation of slavery and sought rectification of the "Founding sin" of the Constitution through the introduction of a new national compact reflecting the ideals of the Declaration. Garrison argued that tacit approval of the soul-corrupting evil of slavery was too high a price to pay for Union.[44]

Nevertheless, even Garrison called on elected officials to exercise whatever Constitutional power they

41 *Id.*
42 Lysander Spooner, The Unconstitutionality of Slavery 154 (1847)
43 Mayer, *supra* note 27, at 327.
44 *Id.* at 300-330.

might have in favor of the natural law. An early abolitionist aim was to "choose representatives courageous enough to abolish slavery where no constitutional compromise restrained them, in the capital city itself."[45] Some legislators, like John Quincy Adams, heeded the call and pursued policies consistent with both natural law and their delegated authority. The president-turned-representative entertained the petitions of abolitionists seeking to abolish slavery in the territories or the end of the slave trade in Washington D.C. He presented them to the House of Representatives at every opportunity in the innocent guise of supporting the citizens' right to petition for a redress of grievances. Despite the "gag-rule" that prevented Adams from formally introducing the petitions and referring them to committee, Adams used his position as a pulpit to advocate for anti-slavery positions as best he could.

Others, however, accepted compromises with slavery in the interest of Union. Senator Daniel Webster, who in 1820 called upon Americans to "cooperate with the laws of man, and the justice of Heaven" through efforts "to extirpate and destroy" the wicked institution of slavery, shamefully departed from his first principles in the Compromise of 1850.[46] Unlike his strong denunciations of slavery as a moral evil years before, the Senator ridiculed the natural law perspective that some grave evils can be identified with moral certitude and portrayed disagreements over slavery

45 *Id.* at 66.

46 Daniel Webster, 14th & 19th U.S. Sec'y of State, Address on the Compromise of 1850 (Mar. 1850).

as a "difference of opinion," questioning man's ability to know which side was right about slavery.[47] While Webster's policy recommendations may have been constitutional, they abandoned the natural law principles that undergirded the American regime in the first place. When Webster's call for "liberty and Union" in 1850 rang hollow in the ears of many Northerners, it was an abolition-minded audience that began to question the viability of union as long as slavery continued.

Such a Union was indeed "divided against itself," between the practice of slavery and the principle that "all men are created equal" as much as between North and South. Lincoln correctly predicted that such a "government cannot endure permanently half slave and half free."[48] The incompatibility of slavery with the American creed eventually snapped the cords of union. By the end of the Civil War, that nation "conceived in liberty" had truly experienced "a new birth of freedom" and could re-consecrate itself "to the proposition that all men are created equal."[49] Today's statesmen ought to dedicate themselves to this proposition once more. Only this devotion, under God, to the transcendent principles of justice and righteousness can sustain a nation of self-government "of the people, by the people, for the people."[50]

47 *Id.*

48 Abraham Lincoln, 16th U.S. President, Address to the Illinois Republican State Convention: A House Divided (June 16, 1858).

49 Abraham Lincoln, 16th U.S. President, Gettysburg Address (Nov. 19, 1863).

50 *Id.*

KOLBE V. HOGAN

Timothy Ososkie '16

Abstract: *In the 2016 case Kolbe v. Hogan, the U.S. Fourth Circuit Court of Appeals upheld a challenge to Maryland's 2013 Firearm Safety Act (FSA), a radical expansion of Maryland's existing gun-control laws, on the grounds that the District Court at Baltimore did not consider the "assault weapons" ban with the proper level of scrutiny. Though they concluded that the FSA's regulations substantially burdened the core protections of the Second Amendment, the Fourth Circuit Court did not declare the FSA to be unconstitutional, but merely remanded the case back to the District Court for a more scrupulous review. As the first instance where a U.S. court of appeals required strict scrutiny in the consideration of an "assault-weapons" ban, the Kolbe decision nonetheless represents a significant development in gun control litigation. The long term effects of the decision are far from apparent, but gun rights advocates are celebrating the Court's recognition of the Second Amendment's fundamental protections as much needed and perhaps overdue.*

---

* Timothy Ososkie graduated Magna Cum Laude from Grove City College in 2016 with highest honors in Political Science and a minor in Economics. Passionate about Constitutional rights and free-market economics, Tim plans to gain experience in a related role and is seriously considering a career in law. He hails from Bellefonte, Pennsylvania, and alongside his academic and occupational pursuits, he is an active piano student and outdoor enthusiast.

I. Introduction

In the recent case of *Kolbe v. Hogan,* the United States Fourth Circuit Court of Appeals decided a challenge to a 2013 Maryland arms prohibition statute, the Firearm Safety Act (FSA), declaring that the U.S. District Court at Baltimore's application of intermediate scrutiny to their consideration of a ban on "assault weapons" and "larger-capacity" magazines did not sufficiently pass Constitutional muster.[1] Citing *District of Columbia v. Heller*, *Heller and McDonald v City of Chicago*, and their own subsequent precedent, the Fourth Circuit Court concluded that Maryland law implicated the core protection of the Second Amendment, namely "the right of law abiding citizens to use arms in defense of hearth and home."[2] The panel, however, affirmed neither the plaintiff's Equal Protection challenge nor their appeal that the law is void for vagueness.[3]

While the status of Maryland firearms law is yet precarious, gun rights advocates have some legitimate reason to celebrate this decision, especially given the tenor of the corresponding national debate over Second Amendment policy. Taking into account the precedent set by the *Heller*, *McDonald,* and *Kolbe* cases, one may be somewhat confident that states do not have near the length of free rein to subvert the Second Amendment as many previously thought. The *Kolbe* case does not, however, represent in any way a

1 Kolbe v. Hogan, No. 14-1945, slip op. at 6, (4th Cir. Feb. 4 2016), http://www.ca4.uscourts.gov/opinions/published/141945.p.pdf.

2 D.C. v. Heller, 554 U.S. 570, 635 (2008).

3 *Kolbe*, slip op. at 6-7.

panacea for those seeking relief from legislation hostile to the Second Amendment. Rather, if nothing else, the case has offered the nation a rare opportunity to pause and consider the restraint with which the courts were intended to handle issues of such great constitutional import.

II. Procedural History

The plaintiffs Stephen Kolbe and Andrew Turner were joined in their challenge of Maryland's FSA by Wink's Sporting Goods Inc. and Atlantic Guns Inc. Additionally, several trade, hunting, and gun-owners' rights organizations joined as plaintiffs on their own behalf and also on behalf of their members.[4] Days before the Firearm Safety Act ("FSA") took effect on September 27, 2013, the plaintiffs filed a motion for a Temporary Restraining Order and sought declaratory and injunctive relief, arguing that (1) the ban on possession of so-called "assault rifles" and the detachable magazine limitation within the FSA abridged their rights under the Second Amendment,[5] (2) that the exemption for retired police officers under the FSA violates the Equal Protection Clause of the Fourteenth Amendment,[6] and (3) that the term "copies"[7] as it is applied in Maryland's "assault weapon" ban is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment.[8] The defendants, Governor

4 *Id.* at12-13.
5 *Id.* at 13.
6 *Id.*
7 Md. Pub. Safety Code §5-101(r)(2) (2013).
8 *Kolbe*, slip op. at 13.

Martin O'Malley of Maryland (2007-2015), Larry Hogan (2015-), Maryland Attorney General Douglas Gansler, and Maryland State Police Superintendent Marcus Brown filed a Motion to Dismiss the Plaintiffs' Third Amended Complaint on November 22, 2013.

Following the district court's denial of the plaintiffs' Motion for Temporary Restraining order, the parties filed cross motions for summary judgment on the merits, and the district court determined that intermediate scrutiny applied to Second Amendment claims.[9] Summary judgment was thereby granted to the state, the court concluding that under intermediate scrutiny, Maryland's ban on "assault" rifles and "large capacity" detachable magazines "met the applicable standards and was thus valid under the Second Amendment."[10] The district court also granted summary judgment for the State on the Plaintiffs' Equal Protection claim, holding that retired officers "are differently situated" than ordinary citizens who wish to obtain "assault rifles."[11] And finally, the district court granted summary judgment for the State on the Plaintiffs' vagueness claim, concluding that the ban on "assault rifles or their copies" sets forth "an identifiable core of prohibited conduct."[12] The Plaintiffs challenged each of the district court's rulings.[13]

Throughout the proceedings of the subsequent

9 *Id.*
10 *Id.*; Kolbe v. O'Malley, 42 F. Supp. 3d 768, 797 (D. Md. 2014).
11 *O'Malley*, 42 F. Supp. 3d at 798.
12 *Id.* at 802.
13 *Kolbe*, slip op. at 14.

challenge, a multitude of amici, including twenty-one states and the National Rifle Association, joined the Plaintiffs. Significantly fewer joined the defendants, including eight states, the District of Columbia, and the Brady Center to Prevent Gun Violence. The challenge was decided by the Fourth Circuit Court on February 4, 2016 in favor of the Plaintiffs, the court holding that strict scrutiny is the proper standard of review for bans on common arms, such as those involved in *Kolbe v. Hogan*.[14]

III. Background

In April 2013, Maryland passed the Firearms Safety Act ("FSA"), which bans law-abiding citizens, except for retired law-enforcement officers, from possessing what Chief Judge Traxler in his opinion described as "the vast majority of semi-automatic rifles commonly kept by several million American citizens for defending their families and homes and other lawful purposes."[15] The FSA constituted a radical expansion of Maryland's existing gun-control laws. Prior to passage of the FSA, Maryland law permitted citizens in good standing to possess semi-automatic rifles after passing an extensive background check.[16] Following passage of the law on October 1, 2013, it was a crime to

14 David Kopel, *Kolbe v. Hogan: 4th Circuit Requires Strict Scrutiny for Maryland Ban on Magazines and Semiautomatics*, Wash. Post (Feb. 4, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/04/kolbe-v-hogan-4th-circuit-requires-strict-scrutiny-for-maryland-ban-on-magazines-and-semiautomatics/?utm_term=.33f5e08758b7.

15 *Kolbe*, slip op. at 6.

16 *Kolbe*, slip op. at 7-8.

"possess, sell, offer to sell, transfer, purchase, or receive" or transport into Maryland any weapon defined as an "assault weapon,"[17] "or their copies."[18] Also included in the FSA were impositions of new restrictions on the acquisition of certain detachable magazines deemed "large capacity"[19] in the state of Maryland.[20] Prior to passage, Maryland law permitted the acquisition of and transfer of detachable magazines with a capacity of up to 20 rounds. The FSA imposed significant alterations to said law. Under the FSA, it is illegal to "manufacture, sell, offer for sale, purchase, receive, or transfer a detachable magazine that has a capacity of more than 10 rounds of ammunition for a firearm."[21] Unlike the enumeration in the so-called "assault weapon" restriction, though, the FSA does not expressly prohibit the transportation of detachable magazines into Maryland from out of state.

Exceptions to the FSA are few. The statute allows the continued possession and transportation of the prohibited class of rifle if the owner "lawfully possessed" or "completed an application to purchase" prior to the FSA's implantation on October 1, 2013.[22] Additionally, the FSA's prohibitions do not apply to certain classes of individuals. Among the excepted individuals are active law enforcement officers and licensed firearm dealers under certain

17 Md. Crim. Law Code §4-303 (a).
18 Md. Pub. Safety Code § 5-101(r)(2).
19 *Kolbe*, slip op. at 74.
20 *Id.* at 10.
21 *Id.*
22 *Id.* at 10-11.

circumstances.[23] Another exception allows retired state or local law enforcement officers to possess the banned class of weapon and detachable magazines, given the prohibited items were "sold or transferred to the [retired agent] by the law enforcement agent on retirement," or the retired agent "purchased or obtained" the weapon "for official use with the law enforcement agency before retirement."[24] The stated objectives of the FSA upon passing included the usual rationale: "keep[ing] guns away from criminals," and lowering the rate of gun deaths from incidents like "murders, suicides, and accidents," all, of course, while "protecting legal gun ownership."[25]

IV. The Case

The plaintiffs challenged the FSA on the basis of three objections. Principally, they challenged that the FSA implicates their Second Amendment right—"the right of law-abiding responsible citizens to use arms in defense of hearth and home."[26] As this challenge was upheld by the Court, more time is spent in its discussion here. Second, the plaintiffs raised a challenge that the exception to the ban for retired officers violates the Equal Protection Clause, asserting that retired police officers are, in fact, "similarly situated" with the public at large, and yet receive different

23 Md. Crim. Law Code §§ 4-302(1), (3); *Kolbe,* 14-1945 at 10-11.
24 Md. Crim. Law Code § 4-302(7)(i), (ii); *Kolbe*, slip op. at 10-11.
25 *Kolbe,* 14-1945 at 55, 57.
26 D.C. v. Heller, 554 U.S. 570, 635 (2008).

treatment under the law.[27] Third, the plaintiffs challenged that the FSA is "void for vagueness" in that it prohibits possession of "copies" of the specifically banned firearms banned in the FSA,[28] while yet leaving the exact meaning of "copies" undefined, in their view violating Due Process.

V. Judicial Reasoning

A. The Second Amendment Challenge

The Court turned first to the Plaintiffs' Second Amendment Challenge to the FSA's ban on semi-automatic rifles and "LCM's." For this particular challenge, the Court applied a "two-part approach"—one it had previously fashioned for use in cases involving Second Amendment challenges.[29] First, the Court asked "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee."[30] If to the first question the answer is no, "the challenged law is valid."[31] If, the Court further explains, "the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny."[32] The Court first moved to establish whether the FSA burdens constitutional conduct.

Pivotal in the Court's reasoning and final decision concerning the Second Amendment challenge was the

27 *Kolbe*, slip op. at 48.
28 *Id.* at 6.
29 U.S. v. Chester, 628 F.3d 673, 680 (4th Cir. 2010)
30 *Id.*
31 *Id.*
32 *Id.*

fundamental "individual right to possess and carry weapons in case of confrontation,"[33] that "the central component of the Second Amendment right" is individual self-defense,[34] and that the right to keep arms is at its greatest strength in "the home, where the need for defense of self, family, and property is most acute."[35] Bearing in mind the provisions of the FSA, establishing the illegality of any citizen to "possess, . . . purchase, or receive" an "assault weapon,"[36] the statute prohibits a law-abiding citizen from keeping any such weapons in the home for any reason, including the "defense of self, family," or property. Accordingly, the Court concluded, the conduct regulated by the FSA includes the heretofore discussed individual's possession of a firearm in the home for self-defense. Additionally, the Fourth Circuit relied on the Supreme Court's historical analysis of the traditional understanding of the Second Amendment right, which concluded that "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" lies at the core of the Second Amendment.[37]

Therefore, the Court reasoned that "any prohibition or restriction imposed by the government on the exercise of this right in the home clearly implicates conduct protected by the Second Amendment.[38] However, the Court first needed to establish whether the "particular class of weapons" prohibited

33 D.C. v. Heller, 554 U.S. 570, 592 (2008).
34 McDonald v. Chicago, 561 U.S. 742, 767.
35 *Heller*, 554 U.S. at 628.
36 Md. Crim. Law Code § 4-303(a).
37 *Heller*, 554 U.S. at 635.
38 *Kolbe*, slip op. at 17.

by the statute are themselves protected by the Second Amendment.[39] Citing the Heller case's historical analysis,[40] the Fourth Circuit Court noted that the right to keep and bear arms "as a matter of history and tradition, is not unlimited," and that even law-abiding citizens do not have "a right to keep and carry any weapon whatsoever in any manner and for whatever purpose."[41] The Court's reasoning, then, hinged on the burden of establishing whether the class of firearms in question fit within three parameters of the historically and judicially established limitations of the Second Amendment, namely, that they are (1) commonly possessed by law-abiding citizens[42] for (2) lawful purposes,[43] and are not (3) "dangerous and unusual."[44]

1. Commonly Possessed

The burden of establishing the common possession of the semi-automatic rifles in question was not particularly difficult for the Court, as numerous courts previously considering the same question have found a preponderance of evidence in support of "common use by law abiding citizens."[45] The Court concluded that it is beyond dispute

39 *Id.* at 18.
40 *Heller*, 554 U.S. at 635.
41 *Kolbe*, slip op. at 17.
42 *Id.* at 18.
43 *Heller*, 554 U.S. at 625.
44 U.S. v. Marzzarella, 614 F.3d 85, 90 (3d Cir. 2010).
45 *See, e.g.,* Heller v. D.C., 670 F.3d 1244, 1261 (D.C. Cir. 2011) (Heller II). ("We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in `common use,' as the plaintiffs contend. Approximately 1.6 million AR-15s alone have been manufactured since 1986, and in 2007 this one popular model accounted for 5.5

that law-abiding citizens commonly possess semi-automatic rifles such as those under the umbrella of "AR" and "AK" variant rifles.[46] Between the years of 1990 and 2012, for example, more than eight million AK and AR variant rifles were manufactured in or imported into the United States.[47] For perspective, the Court noted that "in 2012, the number of AR and AK-style weapons manufactured and imported into the United States was more than double the number of Ford F-150 trucks sold, the most commonly sold vehicle in the United States."[48] The overwhelming weight of evidence was stacked against the Defendants on this point.

In tandem with the discussion of common possession of semi-automatic rifles, the Court also affirmed that LCM's are likewise commonly possessed by law-abiding citizens, with more than seventy-five million in circulation in the United States. In fact, virtually every federal court to have addressed this question has concluded that "magazines having a capacity to accept more than ten rounds are in common use."[49] The Court likewise considered and rejected the State's argument that the Second Amendment does not apply to detachable magazines because magazines are not firearms—i.e. "bearable arms."[50] Proceeding with Maryland's logic, they argued, the government could circumvent *Heller*,

---

percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market.").

46 *Kolbe*, slip op. at 21.

47 *Id.* at 21.

48 *Id.* at 22.

49 Fyock v. City of Sunnyvale, 25 F.Supp.3d 1267, 1275 (N.D. Cal. 2014).

50 *Kolbe*, slip op. at 22-23.

which established that the state cannot ban handguns kept in the home for self-defense, simply by banning the possession of particular components of firearms, "such as the firing pin" in most any firearm.[51] Such prohibition would render firearms useless, and would make exercising the right to bear arms impossible. A right to keep and bear arms necessarily "implies a corresponding right" to possess "component parts necessary to make the firearm operable."[52] The same reasoning applied to the magazines in question—that to the extent certain firearms are equipped with detachable magazines and are in common use, "there must also be an ancillary right to possess the magazines necessary to render those firearms operable."[53]

2. Lawful Purposes

The plaintiffs both sought to acquire and keep the rifles in question in their homes primarily for self-defense. Among other evidences showing that the primary reason for acquiring the weapons in question is for self-defense, the BATF uncharacteristically indicated in a 1989 report that self-defense was indeed a suitable purpose for semi-automatic rifles. Maryland conversely argued that there is nothing on record that reflects that said weapons are commonly used for self-defense, especially in Maryland's case, premised on the plaintiffs' lack of evidence that "assault weapons" have actually been used in self-defense in Maryland. The Court

51 *Id.* at 23.
52 *Id.*at 23-24.
53 *Id.*

denied the state's reasoning on the grounds that it flowed out a "hyper-technical, out-of context parsing"[54] of the Supreme Court's statement in *Heller* that "the sorts of weapons protected were those in common use at the time."[55]

Whereas the state interpreted the statement erroneously as depending on how often semi-automatic rifles or LCM's are *actually* used in self-defense, the proper standard under *Heller* is whether the weapons and magazines are "typically possessed by law-abiding citizens for lawful purposes" *as a matter of history and tradition*, not in some conception of contemporary common practice. The Court found "nothing" in the record demonstrating the state's implicit claim that law-abiding citizens have been historically prohibited from possessing semi-automatic rifles and LCM's. To the contrary, and noted by the Court, firearms have a strong historical precedent of common use, at least a century long.[56]

3. "Dangerous and Unusual" Weapons

Finally, the state, creatively gerrymandering the *Heller* statement that "dangerous and unusual" weapons are not those typically possessed by law-abiding citizens for lawful purposes, argued that the banned rifles in this case are "unusually dangerous."[57] Contrarily, in distinguishing between Second Amendment protected and unprotected

54 *Id.* at 26.
55 D.C. v. Heller, 554 U.S. 570, 627 (2008).
56 *Kolbe*, slip op. at 28.
57 *Id.* at 29.

weapons, *Heller* focused on "whether the weapons were typically or commonly possessed," not whether they reached some undefined level of "dangerousness," as the State of Maryland erroneously purported. The Court concluded on this point that there is no precedent to suggest that in considering Second Amendment challenges the Court must decide whether a weapon is "unusually dangerous," and that such a standard would entail obvious difficulties in application in the long-run.[58] In sum, the Court decided that semi-automatic rifles and LCM's are commonly used for lawful purposes and are thus covered by the Second Amendment.

B. Appropriate Level of Scrutiny

The strict-scrutiny standard requires the government to prove its restriction is "narrowly tailored to achieve a compelling government interest,"[59] and that the law must employ the least restrictive means to achieve the government's compelling interest. To select the proper level of scrutiny, the Court considers "the nature of the conduct being regulated" and the extent to which the new law burdens the right in question.[60] On both counts, the Court found that the FSA's ban "implicates that core of the Second Amendment."[61] First, the ban burdens the availability and use of an entire class of firearms for self-defense in the home, where the Second

58 *Id.* at 31.
59 Abrams v. Johnson, 521 U.S. 74, 82 (1997).
60 *Kolbe*, slip op. at 34.
61 *Id.* at 35.

Amendment protection is strongest.[62] Second, as the Court has heretofore established that the weapons in question are protected by the Second Amendment, the FSA's total prohibition would in practice substantially burden the core Second Amendment right mentioned above. Additionally, the FSA would burden every instance in which a semi-automatic rifle is "preferable to handguns or bolt-action rifles," further implicating the Second Amendment on the grounds that many said instances are lawful purposes protected therein. Bearing in mind that the FSA "restricts that right of Maryland's citizens to select the means"[63] by which they exercise their well-established Second Amendment right, the Court concluded with certainty that the "district court did not evaluate the challenged provisions of the FSA under the proper standard of strict scrutiny, and the State did not develop the evidence or arguments required to support the FSA under the proper standard." They therefore vacated the district court's order as to the Plaintiffs' Second Amendment challenge and remanded the court to apply strict scrutiny.[64]

C. The Equal Protection Challenge

The Plaintiffs' second appeal, challenging the exemption of retired police officers from the FSA's restrictions, was hinged upon the Equal Protection Clause, which guarantees that no state shall "deny to any person

62 D.C. v. Heller, 554 U.S. 570, 635 (2008).
63 *Kolbe*, slip op. at 38.
64 *Kolbe*, slip op. at 45-46.

within its jurisdiction the equal protection of the laws."[65] The Court sided with the state on this issue, concluding that the district court correctly determined that retired police officers are not "similarly situated" with the public at large "for purposes of the Maryland Firearm Safety Act. The "similarly situated" standard requires the plaintiff to identify persons "materially identical" to him or her who has yet received different treatment under the law. Therefore, the two groups in question must be "identical or directly comparable in all material respects"[66]—or, as the First Circuit stipulated, "apples should be compared to apples."[67]

Under the FSA, retired officers enjoy two privileges that the public does not.[68] The exceptions were noted above, and the Court cited numerous examples of similar exceptions, common in other firearms regulations. The plaintiffs' challenge that Maryland's law renders the FSA unconstitutional, then, faced an uphill battle from the start. The plaintiffs argued that, when it comes to owning the FSA-prohibited items, retired police officers and the public at large are "similarly situated." The Court found the plaintiffs' argument flawed in that retired law enforcement officers are, by the Court's definition, different from the public in three particularly relevant ways.

The first dissimilarity the Court noted was that of

65 U.S. Const. amend. XIV, § 1.

66 LaBella Winnetka, Inc. v. Vill. of Winnetka, 628 F.3d 937, 942 (7th Cir. 2010).

67 Barrington Cove Ltd. P'ship v. R.I. Hous. & Mortg. Fin. Corp., 246 F.3d 1, 8 (1st Cir. 2001).

68 *Kolbe*, slip op. at 49.

the unique "combination of training and experience related to firearms."[69] They concluded that the combination of retired officers' practical duty experience and specific and formal training endow them with a "special familiarity" with the specific weapons they are legally permitted to obtain through the FSA.[70] The second dissimilarity noted by the Court is the "special degree of trust" granted to police officers upon their entry into public service.[71] As a matter of employment, the Court argued that officers are required by law to meet the highest standards of conduct as they utilize their authority to arrest, detain, and use force. Their publicly-oriented responsibilities, then, set them apart in that they are used to acting in the public interest in a way that does not apply to the public at large, that is, their professional ethos situates them differently from the average citizen. Third is the reality of the unique threats with which officers have been trained to deal and continue to face post-retirement. The Court concluded that the possibility of retaliatory violence, for which strong evidentiary precedent exists and which "continues following retirement" makes law enforcement officers different from employees of any other non-combat role.[72]

D. The Void for Vagueness Challenge

Finally, the Plaintiffs contended that the FSA is unconstitutionally vague—that it was not "drafted with

69 *Id.* at 50.
70 *Id.* at 52.
71 O'Donnell v. Barry, 148 F.3d 1126, 1135 (D.C. Cir. 1998).
72 *Kolbe*, slip op. at 54-55.

sufficient clarity to allow the ordinary citizen to understand when a firearm qualifies as a copy," which the statute prohibits.[73] Therefore, the Plaintiffs argued that the FSA violates Due Process, which requires that "a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal."[74] The void-for-vagueness doctrine, on which the plaintiffs' challenge is predicated, requires that a penal statute likewise define a criminal offense with "sufficient definiteness" that ordinary people can understand what conduct is prohibited."[75] The State urged the Court to apply the rule set forth in *United States v. Salerno*, requiring that Plaintiffs establish that "no set of circumstances exists under which the Act would be valid."[76]

In the end, the Court rejected the Plaintiffs' void-for-vagueness contention on several grounds. Perhaps the most simple is their consensus that the phrase "assault weapons and their copies" has a "plainly legitimate sweep" and is not unconstitutionally vague. Although not defined, the Court reasoned that the "plain" meaning of the word "copy" is not beyond the grasp of an ordinary citizen in the same way that possession of an imitation firearm during the commission of a crime is likewise prohibited.[77] More explicitly, the Court also cited the Maryland Attorney General's guidance on the

73 *Id.* at 61.
74 U.S. v. Sun, 278 F.3d 302, 309 (4th Cir. 2002).
75 Kolender v. Lawson, 461 U.S. 352, 357 (1983).
76 U.S. v. Salerno, 481 U.S. 739, 745 (1987).
77 U.S. v. Fontaine, 697 F.3d 221, 226-27 (3d Cir. 2012).

meaning of the word "copy" provided in the Public Safety code, i.e. "similar in its internal components and function to the designated weapon."[78] Important to note is that cosmetic similarity to the said "assault weapon" *alone* would not bring the weapon within the scope of the FSA.

It was argued by the Plaintiffs that the typical gun owner would have no way of knowing whether the specific internal components of one firearm are interchangeable with another, but the Court found their argument to be inadequate for two reasons. Paramount was the Plaintiffs' lack of identification of any firearm that they would not risk possessing because of uncertainty over the meaning of "copy." Secondly, the Court found it telling that the weapons the Plaintiffs, according to their own testimony, wished to acquire are all clearly prohibited under the FSA. For that reason, the Court concluded that the Attorney General's clarification of "copy" was sufficiently valid in its intended application. Finally, the Court's rejection of the vagueness challenge was based on the fact of historical record of the list of "assault weapons or their copies," on Maryland public record for more than 20 years.[79] Though possession of the weapons listed was not prohibited prior the FSA, the Court rightly pointed out that an individual could not acquire an "assault weapon" or "copy" without submitting to a background check. The Plaintiffs' failure to provide an instance where the term "copy" created uncertainty in this

78 Md. Pub. Safety Code 5-101(r)(2).
79 *Kolbe*, slip op. at 65.

case was pivotal.

VI. Implications and Conclusion

In some ways, *Kolbe v. Hogan* represents both a relief from a trend and more of the same. A citizen with even a superficial conception of American society and the laws of governance therein is well aware of the social, political, and emotional waves that so often toss public opinion to and fro. These trends are especially prevalent and often most volatile within the Second Amendment arena, where no less than the most fundamental right—the right to defend one's life[80]—and the most politically expedient emergency—the loss of life—seem to be in constant conflict. For this reason alone, the Fourth Circuit Court's objectivity in *Kolbe* must be commended, whether or not their decision yields any lasting impact on the Second Amendment discourse.

The trend, of course, within American society is one that has for years focused not upon the actors but the prop (here, firearms) in his or her hand. Maryland's proposed Firearm Safety Act constitutes the most contemporary example of that skewed focus, and offers more of the same legislative activism. *Kolbe v. Hogan* plainly demonstrates that the battle over gun rights is far from over. Despite the oft-cited landmark Supreme Court decision in *District of Columbia v. Heller* where the Court held that the Second Amendment protects the individual's right to keep and bear arms, laws such as Maryland's FSA continue to be passed, seemingly in

80 D.C. v. Heller, 554 U.S. 570, 635 (2008).

hopes that sympathetic judges will be found here and there to lend an ever-willing rubber stamp.[81] The *Kolbe v. Hogan* decision, though, is an unexpected break in the momentum and has provided a much-needed constitutional reality check.

The Fourth Circuit Court did not declare the FSA unconstitutional; such was stated explicitly in the Court's final opinion.[82] What it did rule is that the proper test of the constitutionality of restrictive laws like the FSA is distinctive from that applied by the district court. In fact, the *Kolbe* decision is the first instance where a United States court of appeals required strict scrutiny in the consideration of a ban on so-called "assault weapons" and detachable magazines.[83] The Fourth Circuit prudently affirmed through its decision that fundamental rights are not so easily up for grabs, and that compelling government interest and minimal restriction are and must continue to be the standard measures of review in similar cases. The case now (February 2016) returns to the district court with instructions from the Fourth Circuit to reconsider the FSA under *strict* scrutiny, and though there is no reason to presume the district court will do an about face on the FSA, there is certainly legitimate cause

---

81 *George Leef, Fourth Circuit Court Gets the Second Amendment Right: Americans Can Choose How Best to Defend Themselves,* Forbes Mag., (Feb 10, 2016), http://www.forbes.com/sites/georgeleef/2016/02/10/fourth-circuit-gets-the-second-amendment-right-americans-can-choose-how-best-to-defend-themselves/#27f13e865f4f.

82 *Kolbe*, slip op. at 46.

83 *Breaking News: Federal Court of Appeals to Review Important Gun Rights Decision,* NRA Inst. for Legis. Action, (Mar. 4, 2016), https://www.nraila.org/articles/20160304/federal-court-of-appeals-to-review-important-gun-rights-decision.