GROVE CITY COLLEGE

JOURNAL OF LAW & PUBLIC POLICY

ARTICLES

GROVE CITY COLLEGE

JOURNAL OF LAW & PUBLIC POLICY

Volume 11 2020

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

2019-2020 Staff List

FALCO A. MUSCANTE II '20
Editor-in-Chief

SUSANNAH E. BARNES '21
Administrative Editor

EMMA N. NITZSCHE '20
Executive Articles Editor

CHRISTOPHER R. OSTERTAG '20
Senior Articles Editor

DAVID S. HUTCHISON '21
Executive Content Editor

STEFANIE B. KLAVES '21
Junior Articles Editor

REBECCA L. POWELL '20
Executive Style Editor

ANNA CLAIRE ROWLANDS '22
Executive Citations Editor

PHILIP E. ST. JEAN '20
Production Editor
Director of Marketing

JEFFERY N. EIDE '22
PAIGE M. FAY '21
TIMOTHY J. HUGHES '22
HANNAH K. HOWE '21
JONATHAN D. SKEE '21
LAURA E. LOCHER '21

Associate Content Editors

EMILY F. BURKE '22
SIERRA M. NAGY '23
KAYLEE E. WITTERS '21
FIONA S. LACEY '22
NATHANIEL J. BENNET '21
MICHAEL F. MARTIN '20

Associate Style Editors

MATT J. SCHOONOVER '22
MICHAEL A. LOVE '22
SCOTT J. AMON '22
CAITLIN M. MCDONOUGH '20
LILIAN L. FORD '22

Associate Citations Editors

FACULTY ADVISORS

EDITORIAL BOARD

RECOGNITION OF DONORS TO THIS EDITION

Joyce E. Brandon

Ronald W. Brandon ’64

Eric E. Brandt ’91

Jean M. Brandt

Brig. Gen. Bradley W. Butler (Ret.) ’76

Paula Butler

Connor J. Baer ’13

Meredith (Sweet ’14) Baer

Laura (Koller ’11) Fryan

Raymond V. Fryan Jr. ’08

Michael D. Culp

O. Alan Holsinger Jr. ’52

Laura A. Jenks ’91

Karen (Eckstrom ’75) Lackey

Robert L. Lackey ’74

Dr. Clair A. Smith Jr. ’97

Bruce Gridley ’69

David P. Kuhta ’10

Valerie H. Kuntz ’05

Dr. Jody L. Mathie ’77

Adam V. Nowland ’07

Gay Stewart

Caleb Wolanek

William C. Stewart ’61

James P. VanEerden ’85

Rachel VanEerden

John J. Vierthaler ‘63

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

Dear Esteemed Reader,

As I write this preface from my desk at home in the midst of my final semester as a Grove City College student, I cannot help but reflect on the four years I have spent with the *Grove City College Journal of Law & Public Policy* and on all our team has accomplished in the last few years. Our student-led organization was founded in the spring of 2010 with a vision that we would exist as a premier publication on Grove City College's campus and as one of only a few entirely student-led undergraduate law journals in the nation. I will avoid the clichés, but ten years later in 2020—especially during an unprecedented worldwide pandemic—we hold true to that vision and move forward stronger than ever.

After production delays in 2018 resulted in the postponement of Volume 9's scheduled release, our team worked tirelessly to complete that volume of the *Journal* and see that volume 10 was released on time. When I assumed the role of Editor-in-Chief in 2018, my vision for our team was to gain a deeper understanding of the unique obstacles facing our organization each year and develop a clear strategy to mitigate some of those challenges. My hope is that some of the changes we have implemented will ensure future editors begin each publication cycle with the confidence and direction necessary to secure the timely release of a quality annual publication.

Throughout the last two semesters, our team has spent significant

time refining the workflow of our editing process, creating a new organizational system for article submissions, and significantly amending our institutional constitution to codify the succession plan for each year. We began implementing these changes in our organization concurrently as we began working on volume 11 of the *Journal.*

We were on par to release this volume well before the end of the semester when the worldwide novel coronavirus pandemic caused an unexpected ripple in our newfound processes and systems. As Grove City College took action to ensure the health and safety of all students by moving classes online and asking students to vacate campus, we postponed work on volume 11 for a few weeks while students adjusted to the changes. Nonetheless, the continual stewardship of the resources and time that had already been invested in releasing this volume remained a top priority.

On behalf of our executive editorial team, I would like to thank our associate editors for their flexibility as we worked through internal changes to the organization and the changes resulting from the coronavirus epidemic, our faculty advisor Dr. Verbois for working with us to amend the constitution, President McNulty and the Administrative Council who reviewed and approved the amendments to our constitution, our authors for their communication and diligence in working with our editors, the administrators and staff in the Office of Institutional Advancement for assisting us with our finances and distribution, the staff in Print Production

& Mail Services for printing and mailing our journals, and of course *you*, our donors and valued supporters.

As I graduate from Grove City College and matriculate at the Duquesne University School of Law in Pittsburgh, Pennsylvania, I will not forget the men and women with whom I have had the privilege of working through my time serving on the editorial board of the *Journal.* This organization operates as a microcosm of the values deeply embedded in the culture of Grove City College. One of those values is community, and your support of our organization allows over twenty-five undergraduate students to experience the community forged among students, faculty, staff, distinguished alumni, and scholars invested in the mission of the College each and every year. We offer this publication free of charge, and your voluntary financial support of our organization ensures that we not only remain faithful to that same vision established ten years ago, but also that future undergraduate editors have the same opportunities to learn about how a law journal works firsthand.

To that end, consider making a financial gift, subscribing to the *Journal,* requesting print copies of past editions, or submitting an article by emailing us at LawJournal@gcc.edu or visiting our website at www2.gcc.edu/orgs/GCLawJournal. We look forward to hearing from you. Electronic copies of all previous editions are archived in the HeinOnline database, which maintains over 2,600 law-related periodicals. Again, thank you for your readership and continued support of the *Grove City College Journal of*

Law & Public Policy.

Falco Anthony Muscante II ’20
Editor-in-Chief

FOREWORD

Dear Reader,

I am pleased to introduce Volume 11 of the *Grove City College Journal of Law and Public Policy.* Being asked to contribute this short foreword is particularly meaningful to me because I got my first taste of publication when I wrote for this journal, while a student at Grove City College, where I'm now privileged to teach. It is thus with great excitement that I draw your attention to this edition's thoughtful commentary provided by five current Grove City College students: Stefanie Klaves, Luke Mason, Alexis Pavlinich, Brendan John, and Timothy Horswill. Additionally, I'm particularly pleased to present a short piece from the prolific pen of Dr. Peter Boettke, University Professor of Economics and Philosophy at George Mason University, Grove City College class of 1983, and an indefatigable contributor to my own doctoral dissertation. As always, we're also eager to welcome new members to the Grove City College community and do so in this edition by presenting the work of current law clerk, Aaron Walayat.

This edition of the *Journal* showcases essays that grapple with one of the most contentious battlegrounds of our times: rights.

Peter Boettke opens the *Journal* by directing his readers' attention to the institutional prerequisites of a free, open, and prosperous society: private property rights. Boettke has dedicated his life's scholarly work to exploring how a regime of "property, contract, and consent" (to use Hume's

felicitous turn of phrase) provides the necessary feedback for individuals to adjust their activities in a way that facilitates social coordination and cooperation, rather than chaos and conflict. I can well attest to the fact that when Boettke gives you a reading assignment, as he does in this essay, you'll only be a better thinker for heeding his advice!

Stefanie Klaves and Luke Mason draw on economic theory to examine the consequences of a wealth tax, which necessarily curtails the property rights a person holds in his or her assets. Their essay is timely, as populist political figures increasingly laud the wealth tax with the support of top public finance economists like Emmanuel Saez and Gabriel Zucman. Unlike so many milquetoast discussions of the wealth tax, which typically devolve into discussions about its optimal rate, Klaves and Mason focus on the oft-overlooked but fundamental question: is the wealth tax even a suitable means of achieving the ends that its advocates champion?

In the third contribution, Alexis Pavlinich explores the age-old question of states' rights *vis-à-vis* the federal government in her piece, "The Problems Inherent in the Court's Broad Construction of the 14th Amendment." Examining one of the most frequently litigated parts of the Constitution, Pavlinich identifies *Duncan v. Louisiana* as a watershed case that led to a federal power grab over states' rights to determine due process. She deploys this interpretation to shed light on the Supreme Court's decision in the landmark *Obergefell v. Hodges*.

The fourth essay, by Brendan John and Timothy Horswill, examines

another sort of right: that of innovators to exclude imitative producers from selling identical or similar products. While many defend patents on the grounds that they foster innovation, John and Horswill draw on theoretical arguments from economics and empirical evidence from the pharmaceutical industry—the very context typically advanced as the *raison d'etre* for a robust intellectual property system—in order to question this conventional wisdom.

Walayat closes this edition of the *Journal* with an investigation of how "American" and "international" "human rights" conceptions tend to clash. He explores these competing perspectives by examining their alternative approaches to defamatory speech against religion.

Rooted in a variety of perspectives and leaning on diverse disciplines to make their arguments, these contributions promise to stimulate thought on issues that are both highly substantive and imminently relevant.

As always, we hope you will enjoy and profit from considering these essays.

Dr. Caleb Fuller '13
Assistant Professor of Economics
Grove City College

FREE MINDS AND FREE MARKETS

Dr. Peter J. Boettke '83

Abstract: *Freedom is crucial both in markets and for ideas. For society to improve upon the human condition, there must be a free flow within both. Drawing on the ideas of J.S. Mill, Immanuel Kant, F.A. Hayek, and other intellectual greats, this essay examines the intellectual connection between ideas and goods and how freedom of speech and commerce breaks down barriers. This essay argues that freeing channels of speech and commerce keeps human behavior in check and sets the necessary foundation to better the human condition and that without a free flow of ideas and goods, society would be worse off.*

* Peter J. Boettke is a University Professor of Economics and Philosophy at George Mason University, as well as the Director of the F. A. Hayek Program for Advanced Study in Philosophy, Politics, and Economics, and BB&T Professor for the Study of Capitalism at the Mercatus Center at George Mason University. Boettke is widely considered one of the most influential Austrian economists today and has developed a robust political economy research framework. Boettke received his Ph.D. in economics from George Mason University and his B.A. in Economics from Grove City College.

My title, "Free Minds and Free Markets," has been the subtitle to *Reason* magazine since its founding. Others have noted the correlation between freedom of speech and thought, and the freedom of contract to determine the terms of exchange. This idea is not at all unique to me. You can unearth the argument in the writings of J.S. Mill and more recently in Thomas Sowell. In fact, I would like to recommend that all of you take the time to read Thomas Sowell's *Knowledge and Decisions*. Although perhaps his most difficult book, I believe it is well worth the effort for students of society.[1] Sowell builds from F.A. Hayek's famous article, "The Use of Knowledge in Society," methodically exploring the logic of the trade-offs that human actors negotiate in all walks of life, examining the alternative institutional arrangements that impress themselves on that ability, and accounting for the ways people interact with each other in these different realms.[2] In order to negotiate these trade-offs, we, human actors, require tools to aid us in

1 Thomas Sowell, Knowledge and Decisions, (Basic Books 1980).

2 Frederick A. Hayek, *The Use of Knowledge in Society,* 34 The American Economic Review 4, 519-530 (1945).

our deliberations over different courses of action. To make our efforts more effective, we must learn from the situations that we face. Given our circumstances, we must strive to do the best we can to achieve our desired goals (whether they be of the highest moral aspirations or simply basic material comforts). Our learning requires feedback, which in turn will guide our adjustments as we strive to better our situation and govern our responses to changing circumstances.

The analogous relationship between freedom of speech and freedom of contract hinges on the necessity of *truthful* feedback. By *truthful*, I mean the unvarnished expression of opinion and exploration of the 'facts' as one understands them. We strive to have free and open discourse, not marred by motivated reasoning, nor by the necessity of content that is hidden or coded to avoid persecution. Discussion, instead, should subject errors in reasoning and the marshalling of facts to constant *reasoned* contestation, with the ultimate aim being mutual enlightenment. Discussion is *not* the same as clever debate, but vigorous debate can be a vehicle for an enlightening discussion. Consider J. S. Mill's argument in *On Liberty* concerning freedom of thought and expression:

> But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[3]

Mill's reasoning on freedom of thought also holds true for the free market. By analogy, if prices are not allowed to reflect freely the expression of the terms of voluntary exchange between parties, they will "rob" us of critical feedback for learning how to better arrange economic affairs. If these prices are distorted by controls, or confusing because of inflationary manipulation by monetary authorities, then human actors will be misled. Consequently, the market will lose both gains from mutual exchange and from technological innovation. Consider the difficulties of allocation arising from the current pandemic. These difficulties are owed

3 John Stuart Mill, *On Liberty,* in John Stuart Mill: A Selection of His Works, 1-147 (John M Robson ed., 1966).

in part to "price-gouging" laws and government dictates concerning production and distribution, which prevent prices from guiding the processes of exchange and production for urgently demanded goods and services. We face a cloudy future in the economic sphere as we await the aftermath of this public health crisis. Extraordinary measures have been taken to alleviate the crisis by the Federal Reserve System. Additionally, the Treasury of the United States has applied extreme fiscal measures to stave off economic collapse. It is one thing to discuss the immediate economic hardships caused by a government-mandated shutdown; it is another to discuss how to unwind these policies once the crisis ends in order to minimize, or avoid altogether, an augmenting of what David Stockman has dubbed "The Great Deformation."[4] The post-crisis stage will require a recalculation of the best use of capital and labor. To engage in that calculation rationally, prices must be allowed to guide us, the possibility of profits to lure us, and the penalty of loss to discipline us. All of this will only be possible if property rights are well defined and enforced. These measures must prod us to act on those

4 David Stockman, The Great Deformation: The Corruption of Capitalism in America (Public Affairs Books 2013).

signals and feedback in a manner that promotes productive specialization and peaceful social cooperation through exchange. To use Mill's term, if we fail to allow property, prices, and profit-and-loss to impress upon us freely the expressions of values and preferences, the technological possibilities and alternative uses, and the possibilities of mutual gains from trade, then we will be "robbed" of the improvements in human well-being that come from the coordination of economic activities through time.[5]

Consider the complications to the economic system if, for whatever reason, profit and loss accounting is not permitted to perform its function within a market economy —rewarding some with profit and penalizing others for poor decision-making with losses. When profit and loss are able to speak the truth, they work in conjunction with hard budget constraints to incentivize both prudence and entrepreneurship in economic actors. When, however, various governmental actions, such as the rules surrounding bank bailouts or housing market policy distort the ordinary

5 John Stuart Mill, *On Liberty,* in John Stuart Mill: A Selection of His Works, 1-147 (John M. Robson ed., 1966).

accounting of profit-and-loss, they create the potential for massive discoordination. If we privatize profits but socialize losses for investment banks, it logically follows that they would become highly leveraged in their portfolio. Similarly, if, to increase access to housing, the government mandates that banks deviate from prudent lending practices in home mortgages, we should not be surprised that individuals then purchase homes that place them in potentially vulnerable financial situations when faced with even slight misfortune. The Savings and Loan Crisis of the 1980s and the Global Financial Crisis of 2008 both illustrate the devastation and despair that can be wrought by government manipulation of money and by credit distortions in the practice of prudent finance and profit-and-loss accounting.

By contrast, in a free and dynamic market economy, we can observe disciplined creativity. Assuming that prices are permitted to change freely as terms of exchange are negotiated between voluntary parties, and that each party faces hard budget constraints, we can rest assured that the market process will continually agitate to bring about adaptations and adjustments. As time unfolds, these

alterations will bring about the coordination of plans at the most favorable terms and at the lowest cost. In this continual unfolding process, every act of entrepreneurship is a wishful conjecture. However, conjectures that are bold, but wrong, are disciplined. Meanwhile, bold conjectures that prove correct are richly rewarded. In economics, the truth speaks to the demands of consumers, the costs of production, and ultimately the distribution of goods and services among the relevant population. The array of relative prices guides us in our decision-making, the possibility of profit lures us, and the reality of loss disciplines us. It is in this way that the market system impresses upon economic actors a sorting mechanism that classifies enterprises as desirable, feasible, or merely viable. This categorization can only happen if the marketplace is viewed as an arena for the *truthful* expression of ideas, values, and imagined futures. As Deirdre McCloskey often discusses, the market process must be embedded in a social environment that encourages individuals to "give it a go," and in doing so through experimentation in the marketplace,

the "trade tested" ideas will survive and improve our lives.[6]

In the marketplace of ideas, however, can we find disciplining and sorting mechanisms that are analogous to what the competitive market provides for profit-and-loss accounting? Here we turn the analogy back in the other direction. How are incoherent ideas, or coherent but impractical ideas, disciplined in social discourse? The regulation of speech fails to discipline muddled ideas. As with regulation of the market process, regulation of speech will result in the distortion of the signal quality of the information communicated. Thus, the discovered knowledge content will also be distorted. The arguments are symmetrical—freedom of thought is a general example of freedom of exchange. Furthermore, the mechanisms we have identified for disciplined creativity in the market guide us in our examination of mechanisms that discipline the expression of opinion and fact in public discourse. Regulation

6 Deirdre McCloskey, The Bourgeois Virtues: Ethics for an Age of Commerce (University of Chicago 2006); Deirdre McCloskey, Bourgeois Dignity: Why Economics Can't Explain the Modern World (University of Chicago 2010); Deirdre McCloskey, Bourgeois Equality: How Ideas, Not Capital or Institutions, Enriched the World (University of Chicago 2016).

in either instance is not the answer. As Mill put it, rather than exchanging error for truth, we get error embedded into the system.[7] To push the economic analogy, rather than sorting out the bad ideas through a filter of competition, regulation allows loose and wishful thinking to supplant disciplined and rigorous thinking.

Immanuel Kant once argued that out of the crooked timber of humanity nothing straight is ever made.[8] We are imperfect beings who live within imperfect institutions, and thus perfection in human affairs is not a possibility. Falsehoods and errors permeate the marketplace of ideas, just as various imperfections permeate the commercial marketplace. The question is: What are the best mechanisms to minimize the damage from these imperfections and maximize the chance that error will be exchanged for truth?

The answer comes by examining the teachings of the related but distinct disciplines of economics and political economy. These disciplines show that competitive freedom in

---

7 John Stuart Mill, *On Liberty,* in John Stuart Mill: A Selection of His Works, 1-147 (John M Robson ed., 1966).

8 Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Aim,* in Kant's Idea for a Universal History with a Cosmopolitan Aim 9-23 (Amélie Oksenberg Rorty & James Schmidt eds., 2009).

speech and in commerce is our best hope to check the spread of manipulation and deception, falsehood and superstition, dogma and oppression. In our speech, we should strive to speak truth even if that truth challenges the conceit of the powerful. In our acts of commerce, we should strive to offer favorable terms of exchange even if forced to challenge the dominant position in the market of incumbents, including those with privileges bestowed by those in power. Freedom of speech and of commerce breaks down the barriers.

Therefore, read once again J. S. Mill's classic *On Liberty* and follow that up with Thomas Sowell's *Knowledge and Decisions.* I believe you will see the intimate intellectual connection between the free flow of ideas and the free flow of goods and services as a necessary foundation in our quest to improve the human condition.

STATED AND IMPLICIT ENDS OF THE WEALTH TAX: ANALYTICS AND UNINTENDED CONSEQUENCES

Luke Mason '22

Stefanie Klaves '21

Abstract: *There is growing support in the United States for Democratic Socialist policies such as the wealth tax. Under such a policy, wealthy citizens would be taxed according to their accumulated capital in addition to their income. The stated goal of a wealth tax is to reduce inequality. Policy proposers also highlight several implicit goals such as increasing the overall wellbeing of the poor. This paper is an economic analysis of what would occur if a wealth tax were imposed. We argue that neither the stated nor implied goals will be achieved; a wealth tax would hamper investment, societal productivity, and wage growth, and thus decrease the overall wellbeing of the poor.*

---

* Luke Mason '21 studies economics and finance at Grove City College. Mason interned at SA Mason Investment Management LLC over the summer of 2019 and is excited for his upcoming summer with Craig-Hallum Capital Group, a research, trading and investment banking firm in Philadelphia. Mason was the MVP for the GCC varsity swim team, and earned all-school Rookie of the Year in 2019.

Stefanie Klaves '21 is a political science major at Grove City College. She is currently the Joan Duffett '81 Student Research Fellow at the Institute for Faith and Freedom and Junior Editor of the GCC Journal of Law & Public Policy. Klaves has interned at the Acton Institute, Milwaukee District Attorney's Office, and Hildebrand Law Firm LLC.

Winston Churchill observed that "the inherent virtue of Socialism is the equal sharing of miseries."[1] Once an economically prosperous state, Venezuela is now an example of forced equality—an equality of desperation, poverty, and starvation. In a new effort to continue closing the gap between rich and poor, Venezuela imposed a tax on wealth on July 3, 2019. Property subject to this tax includes assets like security and shares, motor vehicles, jewelry, and even artwork.[2] Almost fifty years prior to Venezuela's new requirement, Murray Rothbard analyzed the consequences of wealth taxes in *Power and Market.* Rothbard warned that wealth taxes slash accumulated capital, the factor that "differentiates our civilization and living standards from those of primitive man."[3] Despite Rothbard's bleak assessment, the idea of a wealth tax is gaining popularity not only in Venezuela but also in the Western world. Senator

1 Winston Churchill, *Speech at House of Commons,* International Winston Churchill Society, 1945.
2 Slim Gargouri, *Venezuela Enacts New Wealth Tax,* TaxNotes, July 30, 2019.
3 Murray Rothbard, Power and Market: Government and the Economy (1970).

Elizabeth Warren proposed a wealth tax for the United States in January 2019 and 74% of registered voters now support it.[4]

Warren and her supporters champion wealth equality for the sake of the poor, but further analysis reveals unintended consequences that would in fact decrease living standards for those the policy is intended to help. This paper will first identify both the stated goal of reducing income inequality and the implied goal of increasing the welfare of the poor and then apply positive analysis to determine whether or not the policy accomplishes these goals. Our thesis is that neither the stated nor implied goal of Elizabeth Warren's wealth tax is achieved. Reduced income inequality is unlikely to be achieved due to enforcement challenges and anticipatory actions taken by the wealthy. In addition, hampered investment, reduced societal productivity, and suppressed wage growth would decrease rather than increase the overall wellbeing of the poor.

4 Matthew Sheffield, *New Poll Find Overwhelming Support for an Annual Wealth Tax,* The Hill, Feb. 6, 2019.

Theoretical Framework

Throughout this paper, the wealth tax will be analyzed from an economic, rather than political, constitutional, or ethical perspective. In this section we will outline the definitions, concepts, and methodology that will be employed to gain an economic understanding of the wealth tax. The first is the distinction between positive and normative analytics. Normative analysis studies *what ought* to be. Positive analysis studies *what is*. This paper is concerned with positive rather than normative analytics. That is, we will be showing the clear effects that the wealth tax would in fact have. It could be true, as many of a more libertarian persuasion would argue, that the wealth tax is immoral because it is a form of theft. Likewise, it could be the case that, as a country, we are morally obligated to tax the extremely rich in the name of equality. However, moral concerns such as these are not the subject of this paper. We seek only to demonstrate the economic consequences of the wealth tax.

For the sake of argument, we will not question the normative goals of the policymakers. In this case the stated

end is the alleviation of inequality and the implied end is raising the living standards of the poor. After the ends have been outlined, we will apply economic theory to determine whether the ends of the policy are achieved. First, we will argue that the stated ends of the wealth tax are unlikely to be fulfilled due to the unique enforcement challenges of the wealth tax. Second, we will argue that the implied ends of the wealth tax are also unlikely to be accomplished because of the tax's unintended consequences which reduce investment, societal productivity, and wage growth. For the second point, we will grant perfect enforcement of the wealth tax for the purposes of argumentation. Even a perfectly enforced wealth tax will not help America's poor.

Background: Proposed Tax

The "Ultra-Millionaire Tax" was a signature of Elizabeth Warren's 2020 presidential campaign. Warren's wealth tax applies to households with a net worth of $50 million or more. In practice, the top 0.1%—75,000 households—would pay the tax. Warren proposes a 2% annual tax rate on household net worth between $50 million and $1 billion and a 4% annual rate on net worth above $1

billion.[5] Since the tax is annual, the amount of tax paid on a sum of wealth is cumulative. For example, although the rate is 2% per year, after ten years, an individual will have paid 20% in cumulative tax on a fixed sum of assets.[6] After twenty years, the individual will have paid 40% if their wealth remained constant. The household wealth tax includes both financial and non-financial assets net of debts, from bonds to pension funds to assets held by minor children to shares in non-corporate businesses.[7] For enforcement, the plan would increase the IRS budget and implement a minimum audit rate for taxpayers. In order to deter emigration as a means of tax avoidance, a 40% "exit tax" on net worth over $50 million is required if an individual renounces citizenship.[8]

Warren proposes a tax on wealth because the current tax system allows the rich to insulate their savings with a lower effective tax rate. Top wealth-holders, often because of significant unrealized gains, are able to report an income

5 Elizabeth Warren, *Ultra-Millionaire Tax,* accessed Dec. 9, 2019.
6 Alan Viard, *Wealth Taxation: An Overview of the Issues,* Aspen Institute, Oct. 2019.
7 Emmanuel Saez & Gabriel Zucman, *Progressive Wealth Taxation* 4,1-66 (Brookings Institute, BPEA Conference Draft, 2019).
8 Elizabeth Warren, *Ultra-Millionaire Tax,* accessed Dec. 9, 2019.

on their tax returns that is "less than 4% of their wealth."[9] For example, founders and owners of large companies—like Jeff Bezos, Warren Buffett, and Mark Zuckerberg—have significant unrealized gains because the financial instruments issued by their companies do not pay dividends. If the stakeholders do not sell their stock, they can pay a lower income tax relative to their "true economic income."[10] Opportunities for tax avoidance enable Bezos and Buffett to pay a smaller percentage of their total wealth in taxes compared to other families. Warren's proposal includes the claim that "families in the top 0.1% are projected to owe 3.2% of their wealth in federal, state, and local taxes this year, while the bottom 99% are projected to owe 7.2%."[11] While significant unrealized gains is one factor that distorts taxable income, another factor is accumulated wealth. For example, Warren supposes that a wealthy heir has $500 million in property, trust funds, and investments and makes

9 Alan Viard, *Wealth Taxation: An Overview of the Issues,* Aspen Institute, Oct. 2019.

10 Emmanuel Saez & Gabriel Zucman, *Progressive Wealth Taxation* 17, 1-66 (Brookings Institute, BPEA Conference Draft, 2019).

11 Elizabeth Warren, *Ultra-Millionaire Tax,* accessed Dec. 9, 2019.

$50,000 in 2020.[12] A teacher with no savings might also make $50,000 in 2020. With only a progressive income tax, both the wealthy heir and single mother would pay the same amount of income tax in 2020. Warren thinks this scenario is unfair. As realized income poorly reflects true economic income or wealth, Warren argues that increasing the progressive income tax rate alone will not force the wealthy to pay their fair share.[13] So long as the rich can lower their effective income rate, increasing the progressive income tax rate will not reduce the tax disparity between the wealthy CEO or heiress and the common family.

Warren and her supporters believe that net wealth, which takes all household assets into consideration, is a better indicator of how much in taxes a household should pay. Warren writes that "our tax code focuses on taxing income, but a family's wealth is also an important measure of how much it has benefitted from the economy and its ability to pay taxes."[14] Warren does not intend the wealth tax to replace the progressive income tax; rather, she wants

12 *Id.*
13 *Id.*
14 *Id.*

the wealth tax to supplement the current tax requirements in place. Under a wealth tax, the single mother would pay the progressive income tax rate, but the wealthy heir would pay the progressive income tax rate *and* a 2% tax on her net wealth. A net wealth tax, unlike income tax, considers unrealized gains and all assets; therefore, a taxpayer must pay on the basis of their "true economic income."[15] Since citizens cannot lower their taxable wealth by investing in non-dividend paying stock, buying non-financial assets, or even transferring assets to minor children, the wealth tax purportedly reduces opportunities for tax avoidance.

Senator Warren's "Ultra-Millionaire Tax" is a response to what she deems an "extreme concentration of wealth" held by the richest 400 Americans; the goal of the wealth tax is to reduce wealth inequality while simultaneously generating revenue for government welfare programs. In support of wealth equality, proponents first appeal to morality. Bernie Sanders, for example, says that it is a "moral and economic outrage" for some Americans to be homeless, uninsured, and uneducated when three Americans

15 *Id.*

own "more wealth than the bottom half of American society."[16] According to Sanders, Americans have a moral responsibility to curb the billionaire class that "has been at war with the working-class families."[17] One open letter written in support of the wealth tax echoed this sentiment, stating that "America has a moral, ethical and economic responsibility to tax our wealth more."[18] Supporters of the wealth tax also point out that increased government revenue can be used to help the poor. Warren explained in the October Democratic debate that her wealth tax would generate enough money to pay for government initiatives like universal childcare, pre-K, and tuition-free college.[19] With higher taxes on the rich and more government programs, the goal is to reduce the wealth disparity between the rich and poor.

An analysis and proper understanding of the wealth tax's goal is necessary for determining whether or not the wealth tax would accomplish its purpose. Warren and her

16 Bernie Sanders, *The October Democrat Debate transcript,* WASHINGTON POST, Oct. 16, 2019.
17 *Id.*
18 Russel Hotten, *US Billionaires' group calls for wealth tax,* BBC NEWS, June 24, 2019.
19 Elizabeth Warren, *Ultra-Millionaire Tax,* accessed Dec. 9, 2019.

supporters seem to suggest that the primary *stated* goal is to reduce wealth concentration. Reducing wealth concentration is relatively straightforward. If the government extracts from the rich more taxes than the status quo then the rich will have less wealth than they did previously. Increasing taxes of any kind can effectively work to bring the wealthy closer to the median. The rhetoric used by Warren, Sanders, and supporters, however, suggests that their *implicit* goal is much more than merely reducing wealth concentration. By appealing to the plight of the homeless, uninsured, and uneducated, supporters of the wealth tax imply that they want not only to reduce the wealth of the rich but to also increase the living standards of the poor. After all, even if the wealthy retain a smaller percentage of their wealth, the morally outrageous circumstances of the poor will still exist if the policy does not somehow improve their welfare as well. In analyzing the wealth tax, then, there are two questions: first, will the wealth tax accomplish the stated goal of reducing wealth inequality, and second, will the policy accomplish the implicit goal of improving the welfare of the poor?

ANALYTICS: DOES THE WEALTH TAX ACHIEVE THE STATED END?

Most economists agree that wealth taxes would reduce inequality. Saez and Zucman write that

> in the IGM poll on wealth taxes, 73% of economists agreed and only 12% disagree [sic] with such a statement (results weighted by self-reported expertise). The reason is simple: if the rich have to pay a percentage of their wealth in taxes each year, it makes it harder for them to maintain or grow their wealth.[20]

One thing to note is that this analysis assumes that wealth of the non-wealthy is either increasing or remaining constant. As will be argued later, wages and material welfare would decrease due to a wealth tax; however, the reduction in the wealth of the top 0.1% would be much greater per individual than the decrease in wealth of the poor due to lower wages. Therefore, the implicit assumption granted in the question posed above is a valid one. It seems clear that an *enforced* wealth tax would decrease inequality in society.

---

20 Emmanuel Saez & Gabriel Zucman, *Progressive Wealth Taxation* 37, 1-66 (Brookings Institute, BPEA Conference Draft, 2019).

Predictions of reduced inequality are based on the assumption that the wealth tax could be effectively implemented in the first place, but a review of European precedent suggests that this assumption is misguided. Between 1978 and 2017, ten European countries repealed their wealth tax laws for a variety of reasons, including high administrative costs, ineffectiveness in raising revenue, and evasion problems.[21] Valuation difficulty and anticipatory action are the two primary reasons to think that a wealth tax would be almost impossible to enforce effectively, and therefore, would not achieve a reduction in wealth inequality.

The first enforcement concern is the challenge of valuing the estates of the wealthy. Warren proposes a tax as a percentage of all household wealth, but assets like jewelry, household furnishings, and family businesses that have not been publicly traded are difficult to accurately value.[22] For example, Fleischer explains that closely-held businesses are usually undervalued by balance sheet analyses.[23] Although a

21 Chris Edward, *Taxing Wealth and Capital Income,* 85 CATO Tax and Budget Bulletin, 2019.

22 *Id.* at 5.

23 Miranda Perry Fleischer, *Not So Fast: The Hidden Difficulties of Taxing Health* (San Diego Legal Studies Paper No. 16-213).

private business can be compared to another in its industry, a host of factors must be taken into consideration, and differences in any of these "can cause significant disparities in value."[24] The amount of wealth fraught with valuation problems is not insignificant. Using IRS data, Kamin estimates that about 50% of the wealth held by the wealthiest 1% of Americans is not easily valued.[25] Although estate, property, and gift taxes also require the valuation of assets, current tax procedures are hardly a successful precedent. Viard describes property tax appraisals as "notoriously inaccurate."[26] Raub compared the value of estates reported on estate tax returns to the value of the same estates on the *Forbes* 400 list of wealthiest Americans.[27] The estate tax return data could only account for 50% of the wealth estimated by *Forbes.* Raub concludes that "the portfolios of very wealthy individuals are made up of highly unique assets and often the value of assets, such as businesses, are

24 *Id.* at 17.

25 David Kamin, *How to Tax the Rich,* 146 Tax Notes 123, 119-129 (2015).

26 Alan Viard, *Wealth Taxation: An Overview of the Issues,* Aspen Institute, Oct, 2019.

27 Brian Raub et. al., *A Comparison of Wealth Estimate's for America's Wealthiest Decedents Using Tax Data from the Forbes 400,* National Tax Proceedings, 128-135 (2010).

very closely tied to the personality and skills of the owner."[28] Although proponents argue that net wealth is a better indicator of how much an individual should pay in tax, net wealth is difficult to determine accurately. Warren wants to ensure proper enforcement of the wealth tax by expanding the IRS, but Daniel Hemel argues that "valuation problems won't be solved by more manpower."[29] The value of some assets, like rare jewelry or artwork, is difficult—if not impossible—to accurately value if the assets are not publicly traded, regardless of how many people staff the IRS.

The second enforcement challenge concerns anticipatory actions taken by the wealthy to evade wealth taxes, whether by moving assets or concentrating wealth in easily concealed items. For example, while wealth that is invested in stocks and bonds is visible to the IRS, an individual might choose to buy diamonds instead—and then store the jewels offshore. In Japan, the wealth tax was abolished in part because there was a "severe disparity" between the impact on those with assets that are difficult to trace, like

28 *Id.* at 134.

29 Daniel Hemel, *Elizabeth Warren's Wealth Tax on the Super-Rich Is the Wrong Solution to the Right Problem,* TIME, Jan. 30, 2019.

cash and jewelry, and those with real property that is easily identifiable.[30] If not easily identifiable or hidden abroad, assets may nonetheless present other valuation problems. Writing on the wealth tax in Europe, Brumby and Keen explain that "the rich have proved adept avoiding and evading taxes by placing wealth abroad in low tax jurisdictions."[31] Although the richest in America currently invest the large majority of their wealth in value-creating businesses, the introduction of the wealth tax incentivizes the wealthy to keep their visible wealth under the $50 million threshold.

These challenges to effective enforcement thwart the practical implementation or success of the wealth tax. Enforcement challenges can dramatically raise the cost of implementing the policy to the point where administrative costs surpass the tax revenue.[32] Enforcement challenges can also block the tax's intended reduction in wealth inequality, as the rich avoid tax payments and retain their wealth. While

30 Mo Mofokeng, *Wealth Tax: A Systematic Literature Review,* Northwest University, 2018.

31 James Brumby & Michael Keen, *Game-Changers and Whistle-Blowers: Taxing Wealth,* IMF Blog (Feb. 2018).

32 Richard Epstein, *The Toxic Warren Wealth Tax,* Hoover Institute, Feb. 11, 2019.

economists agree that taxes reduce inequality, the taxes can only do so if the government is able to effectively enforce the new policy. The unique enforcement challenges of the wealth tax suggest that this would not be the case.

Analytics: Does the Wealth Tax Achieve the Implicit End?

While enforcement challenges hamper the accomplishment of the stated end of reducing inequality, there are also significant unintended consequences that harm the poor, rendering the implicit end unachieved. In order to analyze the unintended consequences, we will grant in this section that the tax is both effectively implementable and costless to enforce. The goal of this section is twofold: First, to demonstrate, using financial and historical arguments, that the wealth tax would reduce the amount of saving and investing, and therefore capital accumulation in society; second, to highlight how the implicit ends of helping the poor would not be achieved due to this reduction in capital accumulation.

The primary unintended consequences of the wealth tax are caused by hampered capital accumulation. Capital

is what allows our economy to function. Capital consists of the machinery, warehouses, trucks, land, buildings, etc. that are used by businesses to generate revenue. Capital is what creates wealth and allows for the provision of needs and wants in society. Businesses obtain capital through investment. They raise funds from investors, in the form of debt or equity, so that they can obtain capital goods and produce goods and services for consumers. The vast system of mutually beneficial exchanges known as the market is fueled by investments that allow businesses to acquire capital. Without investment, the capital accumulation that makes a society prosperous could not occur.

By examining the perspective of an investor responding to the new after-tax rate of return, it is easy to see how overall investment will be reduced. For example, imagine a taxpayer with $10 million over the benchmark of $50 million. Assume that prior to the tax, the investor could expect an average 6% rate of return that compensates the investor for the risk borne by investing. Prior to the tax, the investor could expect to possess, at year end, his original $10 million plus $600,000. Once the tax is implemented, the

investor will anticipate a tax at year end of 2% on his entire sum of $10.6 million. The anticipated rate of return after the tax is implemented is now 3.88%. At 4% (the bracket for the ultra-rich) the expected ROR is pushed down to 1.76%. After considering taxes from capital gains as well as the effect of inflation, the ROR is pushed into negative territory. This example considers the implications over the course of only one year; however, the actual tax would occur every year, further magnifying the effects.

In short, as demonstrated from the example above, a wealth tax raises the costs associated with investing. The investors on the margin, who would not invest for a return any less than what they are currently earning, will cease their investment. Those that do not cease investing will likely pivot into riskier investments.[33] This is because individual investors' percentage returns scale with rates of return. For example, a 2% tax on an investment with a 3% ROR absorbs ⅔ of the total return, whereas a 2% tax on an expected return of 12% comprises only 16.67% of the total return.

33 Robert Murphy, *Understanding Elizabeth Warren's 'Radical' Wealth Tax,* Mises Wire, Dec. 3, 2019.

Because a greater percentage of the returns are maintained when pursuing a risky investment, the investments that do occur will be skewed in this direction. This shifts more resources into investments that would not be funded in the same quantity in the unhampered market while lowering the amount of investment provided to lower-risk enterprises. Due to a lowered after-tax rate of return, the total amount of investment in society would be lowered and the investment that did occur would be allocated toward riskier ventures. By thinking through the financial logic from the perspective of the investor, it is easy to see how a wealth tax would lower and misallocate investment and therefore reduce capital accumulation throughout society.

Another way to demonstrate that a wealth tax would likely reduce investing (and therefore capital accumulation) in society, is to examine countries—such as Germany and Switzerland—that have imposed wealth taxes. In these countries, the policy operated as a tax on savings, which reduced the amount of savings and investment. For example, the abolition of the wealth tax in Germany

had a positive effect on savings.[34] Brülhart studied how wealth holdings responded to changes in the Switzerland wealth tax.[35] Switzerland imposes wealth tax at the canton-level, so the authors take into account all canton-level tax changes. Brülhart found that, "reported wealth holdings are highly sensitive to wealth taxation. According to our baseline cross-canton panel estimate, a 1 percentage point increase in wealth taxes leads to 43% lower wealth holdings after five years."[36] Whereas the imposition of a wealth tax lowered reported wealth holdings, tax repeal produced the opposite result. For example, Brülhart also examined the Lucerne wealth tax cut and notes that both financial and nonfinancial taxable wealth subsequently increased after the cut.[37] A plausible explanation for the increase is that when the wealth tax was in place, Switzerland taxpayers faced less incentive to invest and a greater incentive to hide undeclared assets; when the wealth tax was abolished, investments

34 Alena Bachleitner, *Abolishing the Wealth Tax: A Case Study for Germany,* (WIFO Working Paper No. 545, 2017).

35 Marius Brülhart et. al., *Behavioral Responses to Wealth Taxes: Evidence from Switzerland,* (CESifo Working Paper No. 7908).

36 *Id.* at 35.

37 *Id.* at 26.

produced higher returns and the benefits associated with hiding undeclared assets no longer outweighed the costs of possible imprisonment.[38] Household savings are necessary for the investments in capital goods that lead to productive laborers, higher wages, and value creation; however, the OECD countries' experience with wealth taxes reveals that household savings decrease with the imposition of the wealth tax and increase with the tax's abolition. The effect of the wealth tax on savings and investment is therefore not only hypothesized theoretically but confirmed by a historical review. The historical studies are unique in that they reveal the magnitude of the wealth tax's real effects.

Now that it has been shown that a wealth tax would reduce the amount of saving, investing, and capital accumulation in society, we will employ basic economic theory to outline the unintended consequences and demonstrate how a wealth tax would harm, rather than help, the poor. The effect of a reduction in accumulated capital would be significant. First, the wealth tax would have the unseen effect of reducing employment and economic growth

38 *Id.* at 30.

that would have existed as a result of capital accumulation in society. As tax policies enable government to funnel the wealth of the rich that was once invested in business ventures toward free child care, universal free education, and student loan forgiveness, the pool of capital goods that was being employed to grow the economy, provide value to consumers, and maintain current living standards in society will diminish. As the old adage goes, there is no such thing as a free lunch. The wealth of the ultra-rich does not primarily consist of luxury goods or highly liquid assets; rather "73% of their [the top 0.1% of Americans] wealth is equity in private or public companies."[39] Warren's policy discourages this investment in business and the capital goods that are used by businesses to generate revenue. As investments in business are taxed and decrease over time, the wages of workers also decrease. This is because capital goods, such as machinery, warehouses, and equipment, allow workers to be more productive. A reduction in capital goods would make the worker on average less productive.[40] The primary

39 Chris Edward, *Taxing Wealth and Capital Income,* 85 CATO Tax and Budget Bulletin, 2019.

40 Alan Viard, *Wealth Taxation: An Overview of the Issues,* Aspen Institute, Oct. 2019.

determinant of the wages a worker earns is that individual's discounted marginal revenue product (DMRP). This is the discounted future stream of revenue earned due to the worker's labor. Therefore, if a worker is less productive due to the reduction of capital goods, his or her DMRP would decrease and wages likewise would fall.

In a free market, the interests of the ultra-rich are not antithetical to the interests of the poor. In a market where exchanges are voluntary, both the buyer and seller mutually benefit. Investors benefit by obtaining a rate of return on their investment while businesses benefit by reaping profits from their productive activity, and consumers benefit as their living standards are raised and needs met through the market system. Taxing the rich hampers this process. Because investment directly affects employment, economic growth and wages (all of which help the poor) would be likewise slashed. Ultimately, improving the welfare of the poor is contingent upon a growing economy and the investments from the rich that drive the economy. Although a wealth tax might temporarily aid the poor in the form of debt relief or subsidized education, policymakers would be plucking fruit

from a tree they are simultaneously cutting down.

This point is made even stronger by a brief look into the institutional effects a wealth tax would have. A wealth tax not only poses a threat to wages and economic growth, it also deconstructs the institutional pillars upon which a free and prosperous society is built. Although the institutional framework of an economy is easy to overlook, it is the most significant driver of economic development and prosperity. The protection of private property creates an incentive for productive activity. It is also the foundation of a free society. A wealth tax, although it may decrease inequality, will change the incentive structures faced by individuals with capital, lowering material living standards for society as a whole. To be clear, it is not being argued that freedom, protection of private property, and material prosperity are necessarily superior to the ideal of equality (though we believe them to be). We merely show that long-run equality and better living standards for the poor are rendered impossible due to the unseen effects of the wealth tax such as slashing accumulated capital and creating an institutional framework that disincentivizes productive activity.

Conclusion

Critics of the wealth tax reject the policy for a variety of reasons. Many political conservatives, for example, question the constitutionality of the wealth tax. Libertarians may challenge the very morality of coercing the wealthy to pay higher rates. This paper does not evaluate these normative questions of what policy the government *ought* to implement based on constitutional, traditional, or ethical considerations. Instead, this study uses positive analytics to determine *what is*; in other words, this paper takes the policy's goals as given and evaluates the policy's efficacy by examining whether or not it achieves its goals. On the basis of positive analytics, it is clear that the wealth tax is ineffective with regard to wealth equality and even counterproductive with regard to living standards for the poor.

The wealth tax presents unique enforcement challenges, as net wealth can be difficult if not impossible to accurately value. Furthermore, the historical record is marked with examples illustrating how the wealthy can take anticipatory actions to evade wealth taxes. If the government

cannot effectively implement the wealth tax, the proponents' stated goal of reduced wealth inequality cannot be achieved. The rhetoric of politicians highlighted in this paper, such as the appeal Sanders makes on behalf of the homeless and uninsured, seems to imply an even broader implicit goal of increasing the overall wellbeing of the poor. Assuming that the government can effectively enforce the wealth tax, it would do so only at the cost of society's welfare at large due to the decrease in capital accumulation. If the goal is also to increase the living standards of people in the bottom wealth bracket, the wealth tax accomplishes the opposite. By reducing investment, a wealth tax would only contribute to an "equal sharing of miseries" as average productivity and wages decrease. The wealth tax, therefore, accomplishes neither its stated nor its implicit goals.

THE PROBLEMS INHERENT IN THE COURT'S BROAD CONSTRUCTION OF THE 14TH AMENDMENT

Alexis Pavlinich '20

Abstract: *Since Duncan v. Louisiana in 1968, the courts have interpreted the text of the Fourteenth Amendment to assert a single form of due process that all lower courts and state courts must follow. Prior to that case, the amendment was interpreted to mean that states could determine the rights of their citizens as well as by what process those rights could be stripped. The federal government only had authority to intervene when a state violated its own due process procedures for one of their own citizens. This paper will examine how, when reinterpreting the amendment, the Supreme Court assumed the authority to not only prescribe a single form of due process to which all states must abide, but also to determine which rights must be protected by that form. Further, this paper will assert that such assumption of judicial power following the reinterpretation of the text grants the judicial branch more legislative abilities than originally intended by the founders.*

* Alexis Pavlinich is a senior Political Science major at Grove City College with a minor in Pre-law. She is active on campus as a member of the American Enterprise Executive Council, which brings opportunities for critical thought and discussion to the student body. She has served as president of the College Republicans, co-president of Network of Enlightened Women, 2018-2019 junior senator of communication and marketing for SGA, and chaplain of the Theta Alpha Pi sorority. Since 2018, Alexis has also worked for the Institute of Faith and Freedom as both a marketing and research fellow.

In 2015, the Supreme Court of the United States released its decision regarding *Obergefell v. Hodges*. The Court's examination of *Obergefell v. Hodges* prompted a re-evaluation of states' authority to restrict marriage, particularly between a man and a woman. The Court's decision held that the states lack any authority to define marriage as a legal arrangement which may only obtain between a man and a woman, and thus ruled that state bans on same-sex marriage were unconstitutional. The basis of this decision stemmed from the court's determination that marriage is a fundamental right of citizens of the United States.[1] However, some critics regard this basis as inadequate and, consequently, question many aspects of the *Obergefell* decision. How has our constitutional structure changed such that rights of citizens of the United States limit not only the federal government, but state governments as well? From where did the Court draw a right to marriage? What establishes a right as absolute?

In addressing these queries, the court refers to its interpretation of the Fourteenth Amendment to the United

1 Obergefell v. Hodges, 576 U. S. 14-556, (2015).

States Constitution. This amendment ensures that state action adheres to principles of due process and equal protection under the law.[2] At its inception, the amendment only authorized the federal government to ensure that each state both applied its laws and granted its privileges equally amongst citizens, as well as to ensure that states did not deprive a citizen of any state-given right without due process. The court recognized this interpretation of the text for over fifty years following the amendment's ratification. Over time, the court has broadened its reading of the text and conception of due process. Under its current construction of the Fourteenth Amendment, the federal government assumes authority to ensure that state laws do not infringe on selected federally-granted rights of citizens. This paper will argue that such an interpretation of the Fourteenth Amendment is improper. Support for this argument rests on two principal consequences that arise from the Court's application of a broad interpretation. The first consequence of such an interpretation is federal infringement on state power. The second consequence of this interpretation is its

2 U.S. Const. amend. XIV, § 1.

justification of substantive due process, which establishes certain, arbitrarily determined rights as absolute. In order to prevent the judiciary from overstepping its role in the American constitutional system, the Court should narrow its construction of the Fourteenth Amendment

The Court applied a narrow construction of the Fourteenth Amendment in cases closely following the amendment's ratification. In order to understand this narrow construction, one must look to the historical context in which Congress adopted the amendment—one of two immediately following the Civil War. The conflict over the asserted rights of state governments to allow slavery resulted in precedent-setting legislative measures. The aftermath of the Civil War saw slavery abolished throughout the nation. Congress ensured such abolition through its ratification of the Thirteenth Amendment, which states that "neither slavery nor involuntary servitude…shall exist within the United States."[3] However, southern states quickly proved the Thirteenth Amendment inadequate to protect the emancipation of freedmen. Many southern states passed

3 U.S. Const. amend. XIII, § 1.

"Black Codes", which allowed state governments to convict black citizens of crime more easily than white citizens, and then enforce punishment that rendered these men dependent on white plantation owners—effectively reinstating them as slaves.[4] Congress responded to this development by ratifying the Fourteenth Amendment, which prevents states from "depriv[ing] any person of life, liberty, or property, without due process of law."[5] This clause of the amendment protects freedmen from state attempts, such as through "Black Codes," to deprive them of their freedom without following the due processes established for all other citizens of the state.[6] Supreme Court Justices kept this historical context in mind when citizens later presented cases regarding the Fourteenth Amendment. Proper context allowed the court to construe the amendment narrowly and provided a standard the court could use to determine whether a state action had violated the due process clause.

Two early Supreme Court cases address the original

4 Eric Foner, *Freedom's Dream Deferred,* 50 American History 41, 42-51 (2015).

5 U.S. Const. amend. XIV, § 1, cl 3.

6 Eric Foner, *Freedom's Dream Deferred,* 50 American History 41, 42-51 (2015).

intention of the Fourteenth Amendment. The first of these, the *Slaughter-House Cases*, occurred in 1873. In this case, butchers from Louisiana contended that an act of state legislation effectively deprives them of the right to exercise their trade, and thus violates the due process clause of the Fourteenth Amendment. The legislation consolidated all slaughter-house operations in New Orleans under a single corporation, forcing every other slaughterhouse in the city to close, and preventing butchers from establishing their own, new slaughterhouses. Justice Miller denies any intention of the amendment to broadly protect citizens of a state from the legislative powers of that state, concluding that the amendment only authorizes the federal government to ensure that, once a state establishes some principle as a right of its citizens, granted in its constitution, that state does not then deny that right to any particular citizen without following due process. Therefore, the court ruled that the state of Louisiana, by democratically passing a law regulating the slaughter of animals, did not violate the due process clause.[7]

In 1908, *Twining v. New Jersey* emerged as another

7 Association of New Orleans v. The Crescent City Live-Stock Landing and Slaughter-House Company, 83 U.S. 36 (1873).

notable case informing interpretations of the Fourteenth Amendment. In his decision, Justice Moody agrees that the Fourteenth Amendment protects citizens of a state from arbitrary government deprivation of state-given rights. In order to guarantee such protection, the amendment grants the federal government authority to ensure that states apply due process. Moody asserts that this power does not authorize the federal government to prescribe any particular form of due process. Instead, states retain the ability to determine what procedures they adopt, so long as those procedures apply equally to all citizens. Moody further states that the Fourteenth Amendment's grant of federal power does not authorize the federal government to determine what legal rights the state must assert. As long as rights are granted to all citizens equally, state governments retain the ability to determine the rights of their citizens through the democratic legislative process. In summary, Moody ruled that, under the due process clause, states may constitutionally enforce different procedures and grant different rights.[8] Under this interpretation of the amendment, the federal government has

8 Twining v. New Jersey, 211 U.S. 78 (1908).

no jurisdiction to enforce any particular form of due process or set of rights in the states simply because it believes that form or right to be "of great value."[9] Should the elected legislative body of a state agree to a due process procedure or citizenship right, then that legislative body would adopt it into their own system.

However, the court did not long uphold the sovereign authority of states to determine their own due process procedures. In 1968, the court reinterpreted the Fourteenth Amendment, empowering the federal government to compel state recognition of particular citizenship rights. In his *Duncan v. Louisiana* opinion, Justice White argues that some rights are inherent to due process. Therefore, states must recognize these rights to carry out due process properly. Consequently, for a state to deny an inherent right would violate the Constitution. Justice White goes on to establish rights inherent to due process as those principles that "are fundamental to the American scheme of liberty, justice, and fairness."[10] Justice White's interpretation of the Fourteenth

9 *Id.*

10 Duncan v. Louisiana, 391 U.S. 145 (1968).

Amendment, and its expansion of federal authority, proved influential in future cases.

The Court's application of this interpretation carries several implications regarding judicial review. This is because it implies that states must conform their laws to and treat their citizens in accordance with a national standard of fairness. The Court determines this national standard by its recognition of different rights as fundamental to justice. No explicit boundaries, however, determine which rights the Court recognizes. Under the standard of fundamentality, the Court can selectively incorporate rights listed in the Bill of Rights while refusing to incorporate others. The Court can also enforce rights that are not explicit in the Bill of Rights, so long as it connects that right to a fundamental principle. When conducting judicial review, the Court now has a larger platform from which it can strike down democratic state laws. The expanded jurisdiction implied by a broad constructing of the Fourteenth Amendment results in the two problematic consequences aforementioned: infringement on state power and the justification of substantive due process.

The first consequence of a broad

construction of the Fourteenth Amendment is the infringement on state power. In his 1833 *Barron v. Mayor and City Council of Baltimore* decision, Chief Justice Marshall explained the intended role of federal rights. According to Marshall, the Constitution grants rights to American citizens as a safeguard against the abuse of federal power. Responding to Anti-Federalist critiques, the founders established these rights as a way to limit the scope of federal authority. However, the founders did not intend for these rights to also limit state power. Marshall assert that

> each state establishe[s] a constitution for itself, and in that constitution provide[s] such limitations and restrictions on the powers of its particular government as its judgement dictated.[11]

According to Marshall, the founders intended that state legislatures would retain the power to determine the limitations on state power. Ideally, legislatures could decide these limitations democratically, in a manner based on local interests. As Justice Moody echoes in his *Twining v. New Jersey* decision, Marshall recognizes the state legislatures'

11 Barron v. Mayor and City Council of Baltimore, 32 U.S. 243 (1833).

authority to replicate certain federal rights within their own constitutions should they see the need.[12]

By forcing states to recognize particular rights, the court's construction of the Fourteenth Amendment inhibits the people's ability to restrict and empower their state governments according to local needs. In his *Duncan v. Louisiana* dissent, Justice Harlan notes that such selective incorporation of rights "radically redefines federalism" within our governmental system.[13] The federalist structure of our government delegates certain enumerated powers to the federal government and distributes remaining powers to either the states or individuals citizens. Courts have consistently questioned or overridden state authority over police powers. Historically, federal courts would review state legislation and strike down laws that exceeded the state's police powers and interfered with federal interests, such as in the 1830 case *Craig v. Missouri*. In *Craig*, the United States Supreme Court declared a Missouri law unconstitutional due to its interference with the federal government's sovereignty

12 *Id.*

13 Duncan v. Louisiana, 391 U.S. 145 (1968) (Harlan, J. M., dissenting).

over the emission of bills of credit, pursuant to Article I Section 10 clause 10 of the U.S. Constitution.[14] Now that courts have incorporated particular rights to the states, the Court can also strike down laws that fall within state police powers so long as the Court can prove that the law violates an incorporated right. This incorporation allows the federal government to assert jurisdiction over issues previously reserved for the states.

The *Obergefell v. Hodges* decision illustrates the crippling effect that selective incorporation has on state power. As Justice Scalia notes in his dissent, the federal government had previously deferred marriage policies to the domain of state authority. On this basis, many states had democratically chosen to require that marriage consist only of a man and a woman. The people of these states had determined that empowering their governments with the authority to restrict marriage best protected their interests. On the other hand, a few states democratically chose to "expand the traditional definition of marriage."[15] The people

14 U.S. Const. art. I, § 10, cl. 10.

15 Obergefell v. Hodges, 576 U. S. 14-556, (2015) (Scalia, A.G., dissenting).

of these states had determined that extending the right of marriage to same-sex couples best protected their interests.[16] The *Obergefell* decision subverts the autonomy of states to determine policy based on local interest. In this way, the Court assumes the authority to reverse state action with regard to rights that the founders originally intended to leave to state discretion.

The second consequence of selective incorporation stems from the ambiguity of the Court's standard of fundamental fairness. Establishing fundamental fairness as a standard for incorporation empowers the Court to determine both the uniform rights that states must recognize and the uniform procedures that states must follow to legitimately deprive an individual of those rights. Both aspects of empowerment allow the Court to assert its own will, thus overstepping its original function in the American governmental system.

The first form of empowerment—the power to incorporate selective rights based on fundamental principles of justice—allows the Court to act as a policy-making body.

16 *Id.*

The ambiguity of the "fundamental principles of justice" standard does not restrict the Court to the incorporation of those rights that are granted within the Bill of Rights. Instead, the Court may grant a right of its own creation as long as the right in question is connected to a fundamental principle of justice. Justice Black, in his *Duncan v. Louisiana* concurrence, criticizes the ambiguity of the fundamental fairness standard, arguing that it allows the court to inflict individual justices' political will on the people.[17] Justices Holmes later agrees with Justice Black, stating in his *Lochner v. New York* dissent that the court uses the vague principle of fundamental fairness as an "opportunity to justify its own political ideologies."[18] Legal scholar Robert Bork agrees with this criticism and presents another problem with the court's assertions. Bork writes, "When the judiciary creates new rights not found in the Constitution, it substitutes the courts' own conception of morality for the moral judgements of society as embodied in laws enacted by the people's elected representatives."[19] The Court deprives the people of

17 Duncan v. Louisiana, 391 U.S. 145 (1968) (Black, H. L. concurring).

18 Lochner v. New York, 198 U.S. 45 (1905) (Holmes, O.W., dissenting).

19 Robert Bork, The Tempting of America: The Political Seduction of The law (Collier Macmillian eds. 1990).

the ability to debate, through their elected representatives, whether the government should recognize a principle as a right of the people.

In the case of *Obergefell*, the Court wills that the nation recognize the principle of marriage as a right of the people. In order to enforce such recognition, the Court connects the principle of marriage to fundamental principles of justice, thus rendering it incorporated under the current interpretation of the Fourteenth Amendment. Scalia notes in his *Obergefell* dissent that such incorporation represents "social transformation without representation," as the Court made the decision to expand the definition of marriage without considering the will of the constituency.[20] Consequently, the Court overrides the ability of the legislature to debate the expansion of marriage as a faithful representation of the people's interests. The Court's usurpation of the elected legislative body's authority leaves the construction of policy in the hands of the unrepresentative and unelected justices. Such usurpation of legislative power subverts the founders' originally-intended role of the Court, which Alexander

20 Obergefell v. Hodges, 576 U. S. 14-556, (2015) (Scalia, A.G., dissenting).

Hamilton discussed in *Federalist Paper #78*. Hamilton writes in this essay that the court should exercise neither "force, nor will. Only judgement."[21] Thus, the Court's assertion of authority to establish new rights defies its original role.

The second form of empowerment—the power to enforce uniform due process procedures—allows the Court to render absolute those rights that align with its current philosophical perspective. The determination of certain rights as absolute is called substantive due process.[22] Once the Court declares a right absolute, neither the federal nor the state governments can deploy practical due process procedures to restrict that right. In justifying the implementation of substantive due process, the Court's broad interpretation of the Fourteenth Amendment creates an expanded platform for bench legislation. The Court appropriates authority to determine which rights require the protection of substantive due process and strikes down any legislative attempt to limit those rights, even if Congress enacted the limitation by legitimate constitutional processes. This assumption of

21 The Federalist No. 78 (Alexander Hamilton).

22 Peter Strauss, Due Process, Legal Information Institute.

judicial authority justifies further assertion of the Court's will and subjects the nation to arbitrary interference with legislation depending on the zeitgeist in the Court.

The substantive due process claims made by the Court during the *Lochner* era of federal jurisprudence highlight the arbitrariness of such claims. The 1905 case of *Lochner v. New York* regarded the indictment of a bakery owner that had violated a state law that limiting bakers' maximum weekly work hours. After the owner appealed to the Supreme Court, the Court ruled the New York law unconstitutional based on a claim of substantive due process. Justice Peckham wrote in his majority opinion that the case presents "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."[23] The Court examined this question and determined that the individual's freedom of contract contained a substantive element that placed it above the ordinary due process of state legislation. In his dissent, Justice Oliver Holmes accuses the majority of using the "guise of constitutional interpretation" to advance its

23 Lochner v. New York, 198 U.S. 45 (1905).

political agenda.[24] Robert Bork argues that the majority of the justices made their substantive due process claim on the basis of an ideological preference for *laissez-faire* economics, rather than any substantial aspect of the Constitution.[25] Over the following thirty years, the Court upheld *Lochner* and struck down numerous economic regulations. That is, the Court did so until the nation fell subject to the economic suffering of the Great Depression and the Court's political priorities changed. The 1937 case *West Coast Hotel Co. v. Parrish* provided the Court an opportunity to assert its new agenda. In the opinion of the Court, Justice Hughes revoked the substantive status of the right to contract.[26] From that point on, the Court assumed the rationality of the legislature in passing economic regulations, and seldom reversed any such regulation so long as the legislature enacted it through practical due process. The revocation of the substantive status of contract rights illustrates the Court's arbitrary promotion of political ideologies. Under a substantive due process

24 Lochner v. New York, 198 U.S. 45 (1905) (Holmes, O. W., dissenting).
25 Robert Bork, The Tempting of America: The Political Seduction of the Law (Collier Macmillian eds. 1990).
26 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

philosophy, the Court reserves the power to determine what rights deserve substantive due process.

The Court bases this determination not on any explicit interpretation of Constitutional text, but rather the needs associated with its own political agenda. As the political agenda of the Court changes, so does its evaluation of rights and substantive due process. Due to absence of a standard in such determinations, the people have to adapt their understandings of rights to the political agendas of the Court; they have been rendered incapable of predicting the Court's arbitrary assessments that some rights deserve greater protection than others. Ultimately, the broad interpretation of the Fourteenth Amendment's due process clause not only allows the Court to assert its will by creating rights to advance political ideologies: it also allows the court to further advance those ideologies by affording some rights greater protection than others. In the case of *Obergefell*, the Court advanced its political preference for social progress and life-style tolerance first by establishing marriage as a fundamental right and second by granting this right a substantive property that insulates it from democratic

legislative restrictions. This assumption of power by the Court opposes the founders' intended role of the judiciary as a mere body of judgement.

The decision in *Obergefell* illustrates the problems inherent in the Court's broad interpretation of the Fourteenth Amendment. Construing the amendment broadly, as the Court has done since its reinterpretation of the text in *Duncan v. Louisiana,* has allowed the Court to assert the existence of a singular, proper form of due process. The existence of proper due process requires not only state adherence to that form, but also state recognition of rights inherent in that form. Traditionally based on "fundamental principles of justice," the Court assumes authority to determine the structure of proper due process, as well as the rights inherent in this structure. This permits federal infringement on state authority; the state no longer retains power to determine which rights best protect the local interests of its people. Following its conception of fundamental principles of justice, the Court also assumes the authority to legislate. Therefore, the rights courts obligate states to protect depend not on the Constitution but on the political preferences of

individual justices. Due to the fickle nature of these political preferences, rights are legislated arbitrarily, rendering the people powerless to determine which rights they truly want and which rights they do not. The Court's assumption of such power both violates its intended role of legal review and usurps the legislative power of the elected Congress. Reverting to a more narrow interpretation of the Fourteenth Amendment would defer policy-making authority to the elected legislature, observe the sovereign autonomy of states in determining necessary procedure to protect local interests, and preserve the intended neutral nature of the Court.

THE ECONOMIC EFFECTS OF PATENTS IN THE PHARMACEUTICAL FIELD

Timothy Horswill '22

Brendan John '22

Abstract: *In economic and political circles, discussion about patents has reached an all-time high. Despite this academic development, many businessowners and policymakers seem to feel the necessity of more effective policies concerning the matter. This paper will discuss several prominent arguments regarding patents in the pharmaceutical industry, inside and outside of the academic field. Economic theory and empirical evidence will explain where the arguments presented are incorrect or misrepresentative. This analysis will provide a basis for the claim that pharmaceutical patents are ineffective at best and, at worst, harmful to innovation.*

* Timothy Horswill is a sophomore Economics Major at Grove City College. He is currently involved on campus as a member of the Omicron Delta Epsilon honorary society, the Alpha Sigma men's housing group, and the fencing club. When Timothy graduates, he plans to attend law school and become a defense attorney.

Brendan John is a sophomore Economics major with a minor in Political Science. He is currently involved in Newman Club and the Grove City College fencing club on campus, and enjoys studying economic history, playing guitar in his band, and weight-lifting. In addition to the Journal of Law & Public Policy, Brendan presented a paper at the 2020 Austrian Student Scholars Conference. Once Brendan graduates, he aims to work in public policy in a conservative think tank to spread understanding and knowledge of economics.

Section 1A: Introduction to Patent Law

Professionals in the medical field often argue that in order to sustain and promote economic innovation in the pharmaceutical industry, governing bodies must protect patents across the market. For instance, Advil PM, a common drug classified as a "[n]onsteroidal anti-inflammatory drug," is protected by three patents and owned by GlaxoSmithKline. Before discussing this claim's validity, some clarification is required. The U.S. Code defines the exact nature of a patent:

> A right granted to the inventor of a (1) process, machine, article of manufacture, or composition of matter, (2) that is new, useful, and non-obvious. A patent is the right to exclude others from using a new technology. Specifically, it is the right to exclude others from making, using, selling, offering for sale, importing, inducing others to infringe, and/or offering a product specially adapted for practice of the patent.[1]

This paper particularly concerns itself with patents as government grants of monopoly privilege over the production of pharmaceuticals. One claim commonly made in the medical profession is that medical innovation requires

1 Content and Term of Patent: Provisional Rights, 35 U.S.C. § 154 (a) (2013).

the granting and enforcement of monopoly privileges. While patents increase profits for pharmaceutical innovators, they establish perverse incentives for innovation in the medical field overall. The evidence and economic theory are clear: patents, unnecessary to spur initial investment into research, halt future innovation and drive misallocation through pervasive rent-seeking behavior.

Section 1B: Common Arguments for Patents

There are two key arguments for the existence of and need for patents in the medical field. The first asserts that intellectual property rights should be protected like any other property rights, such as from theft of a house or car. This argument appears in the United Nations' *Universal Declaration of Human Rights,* which states, "[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[2] Though significant, this argument's normative considerations exceed the scope of this paper.

Proponents of another argument for patents reason

2 G.A. Res. 27 (II), A Universal Declaration of Human Rights (Dec. 10, 1948).

that "without patent protection and regulatory exclusivity… innovators would be unlikely to make the substantial investments required to bring new drugs to market."[3] This claim assumes that, without patents protection for new medicines, the opportunity cost of developing a new drug is higher than the relevant alternatives. Additionally, some argue that capital assets could better be allocated elsewhere in a free market. Proponents of this view believe that, after the costs of investment into the technology of a new drug have sunk, the risks of competing with others are too high. They argue that whoever funded research and development would have to price their version of the drug substantially higher than competitors who were able to avoid those costs. Consequently, the original developers would not be able to make a profit. As a result, innovators would lack the proper incentives to invest in research and development for potentially life-saving drugs. Thus, proponents of patents conclude that these monopoly grants are necessary to ensure that people who are capable of creating these drugs will

3 Iain Cockburn, *The Importance of Patents to Innovation: Updated Cross-Industry Comparisons with Biopharmaceuticals,* 25 Expert Opinions On Therapeutic Patents, 739-742 (2015).

engage in development.

Section 2A: Patent's Effect on Future Innovation

Pro-patent groups often err in their assumptions about the amount of innovation occurring once the patent process is completed. Patents remove the incentive to innovate beyond the current point of development. Furthermore, the law prevents continuing research and development on the patented medicine. In a truly free market, alternatives drive innovation. If people demanding a certain cancer-curing drug may buy from multiple suppliers, then they will choose to purchase the least expensive option. One way a company can raise their price is by creating a superior drug, which differentiates their product from other cancer-curing medicines.

Section 2B: Innovation from Patent Holders

If a cancer-curing drug is patented, then there is little incentive for the supplier to create a superior product as no direct alternative to the drug exists. Since no new drug may enter the market, the opportunity cost for further innovation rises. Michele Boldrin and David Levine, in their paper *Against Intellectual Monopoly,* explain this phenomenon,

arguing that

> new drugs are also extremely costly to develop. Hansen, Grabowski and Lasagna, in 1991, provide the following estimates of the cost in millions of dollars of bringing a 'new chemical entity' to market, assuming a success rate of 23% for patented drugs.[4]

Bringing a new drug to market poses a high risk accompanied by potentially little reward. When an entrepreneur holds a patent, the cost of development significantly outweighs the potential increase in price from new drug innovation. Because those entrepreneurs do not have to account for potential competitors, they can already charge a high price for the good. Thus, the benefit they would gain from the small price increase of a new good is negligible. In a market without patents, however, the incentive to differentiate your product lowers the opportunity cost of the risk. The entrepreneur must innovate, providing higher quality drugs, in order to profit.

Section 2C: Innovation from Non-Patent Holders

As the situation stands, nothing incentivizes an

4 Michele Boldrin & David Levine, Against Intellectual Monopoly, 2 (2005).

innovator to make a better drug. However, granting patents causes other issues. Under current patent law, only the initial producer may lawfully invest in further research and development for a given drug.[5] This law prohibits potential researchers from further developing a patented drug. Thus, if a patent holder is unwilling to innovate their product, then little to no innovation will occur.

Section 2D: Patent Enforcement Effect on Italy

If the pro-patent position is correct, then countries with patent protection on pharmaceutical drugs should develop further and outperform the countries that do not protect these developments. Analysis of Italy from 1961-1983 suggests that the opposite is true. Up until 1978, Italy had prohibited pharmaceutical patents and the enforcement of foreign claims. Before this change, Italy was the fifth largest producer of pharmaceuticals, having discovered 9.28% of the world's new active chemical compounds. From 1980 to 1983, following Italy's adoption of patents, their discovery of chemical compounds dropped to 7.50%

5 Content and Term of Patent: Provisional Rights, 35 U.S.C. § 154 (a) (2013).

of the world's discovery.[6] Given the large quantity of new active chemical compounds discovered each year, 2% is a considerable decrease. This data shows the negative impact patent protection can have on the pharmaceutical industry.

Section 3A: Patent Necessity for Pharmaceutical Innovation

Thus far, this paper has assumed that patents are necessary to encourage the initial innovation of pharmaceuticals. These assumptions, however, must be tested. As mentioned previously, some claim that the costs of research and development for new drugs are so high that no innovation would be possible without the protection of cost recuperation.

When arguing for patents, some commentators assume that an entrepreneur only engages in a venture if they profit more than the other companies in the market—but this is not the case. Entrepreneurs pursue ventures when they expect to receive benefits of greater value than their own relative alternatives. They base their actions in the market upon a cost-benefit analysis that weighs their own options

6 BOLDRIN, *supra* note 1, at 8.

and opportunity costs, not whether they will make more profit than others will. If entrepreneurs truly based their actions on the latter method, then the market would not—as it does—include a multitude of different brands spanning so many industries.

Some claim that the high costs associated with new drug research would prevent innovators from making up the necessary costs and covering their expenses because their competitors would not face the same investment requirements. Advocates of patents often point out that, in the early 2000s, the average cost of research for the development of a new drug was approximately $1.2 billion.[7] This sum of money, while large, does not necessarily preclude the possibility of entrepreneurial profit.

The price of entry into a new market and the risks of expensive research investments are simply components of the cost structure. By default, an entrepreneur must consider a number of expenses, such as property taxes, material costs, and labor costs. When an entrepreneur enters a market,

7 Berry Werth, *A Tale of Two Drugs,* MIT Technology Review, (Dec. 2019) https://www.technologyreview.com/s/520441/a-tale-of-two-drugs/.

they expect to pay those costs and allocate their resources accordingly. The argument for patents claims that because fixed costs differ between an entrepreneur who invests in research and development and a competitor who does not, the government should insulate entrepreneurs from competition. However, this line of argumentation could apply to any fixed costs, such as property taxes or salary wages. By this logic, if one entrepreneur were to pay a lower price for their property than a competitor, then the government ought to protect the competitor with the higher fixed costs. Obviously, the government does not protect competitors in such cases. The responsibility rests on the entrepreneur to plan for costs associated with property.

Section 3B: Research and Development in Other High-Cost Fields

While the costs of research and development may be high, entrepreneurs are capable of accounting for them. For instance, though not protected from competitors, Tesla Motors, Inc. nevertheless invests a great deal of capital in innovation. In the year of 2018 alone, Tesla spent approximately $1.5 billion on research and development.

The costs do not appear to have overwhelmed the company, considering its global status as the most successful and best-known electric car manufacturer.[8] Furthermore, Tesla, and other companies owned by Tesla CEO Elon Musk have vowed not to restrict the usage of any of their previously patented ideas or initiate patent lawsuits against persons using their ideas. In 2014, Musk stated,

> "If we clear a path to the creation of compelling electric vehicles, but then lay intellectual property landmines behind us to inhibit others, we are acting in a manner contrary to that goal. Tesla will not initiate patent lawsuits against anyone who, in good faith, wants to use our technology."[9]

Despite this lack of protection from competitors, Tesla still managed to make a net profit around $440 million in the last two quarters of the 2018 fiscal year.[10] While Tesla did receive government subsidies that same year, the money

---

8 I. Wagner, *Tesla's Research and Development Expenses from FY 2010 to FY 2018,* STATISTA.COM, (Aug. 23, 2019) https://www.statista.com/statistics/314863/research-and-development-expenses-of-tesla/.

9 Elon Musk, *All Our Patents Are Belong To You,* TESLA MOTORS INC. (June 12, 2014) https://www.tesla.com/blog/all-our-patent-are-belong-you.

10 Sean O'Kean, *Tesla Posts Back-to-Back Profits for the First Time,* THE VERGE (Jan 30, 2019) https://www.theverge.com/2019/1/30/18203886/tesla-earnings-q1-revenue-profit-record-model-3.

did not confer an advantage over their direct competition. In 2018, Tesla received around $4,918,326 in government subsidies, while General Motors received $494,035,990.[11] While proving that Tesla does not operate in a truly free market, these subsidies do not discount the evidence that entrepreneurs who invest in their own research and development can profit, even without patent protection.

These profits contradict the argument that patents are necessary to spur initial innovation. Costs of research and development for a new medicine are about $1.2 billion over the whole period of research. By contrast, in a single year, Tesla sunk $1.5 billion in research and development. High research and development costs and a lack of protection from competition did not prevent Tesla from innovating. The risks associated with innovation are simply another type of fixed cost that entrepreneurs must consider, in the motor industry or the pharmaceutical field.

Section 4A: Rent-Seeking Behavior with Patents

---

11 *Parent Company Name General Motors: Subsidy Tracker Parent Company Summary,* GOOD JOBS FIRST,(last visited April 2020) https://subsidytracker.goodjobsfirst.org/prog.php?parent=general-motors; *Parent Company Name Tesla Inc: Subsidy Tracker Parent Company Summary,* GOOD JOBS FIRST,(last visited April 2020) https://subsidytracker.goodjobsfirst.org/prog.php?parent=tesla-inc.

In addition to being unnecessary for initial innovation, the patent institution is rife with rent-seeking behavior and perverse incentives. These problems further hinder the effectiveness of patents in the pharmaceutical field. Rent-seeking, as defined by Michele Boldrin, occurs when "abundant skills and resources are invested in keeping the competitive advantage by turning the innovation into a monopoly…through various forms of legal exclusion."[12] Rent-seeking behavior misallocates resources and draws them from more-productive sectors in order to secure future profits. The use by an entrepreneur of legal means, such as patents, to prevent competitors from using their discoveries and competing with their product exemplifies rent-seeking. By definition, then, patents are a form of rent-seeking. They also bring about future misallocation when patent-holders attempt to further abuse the process.

The rationale of patents is that they protect the innovator from competition for a time so that they can recoup their higher cost of investment. Currently, within

12 Michele Boldrin, *Rent-Seeking and Innovation,* FEDERAL RESERVE BANK OF MINNEAPOLIS STAFF REPORT 347, (Oct. 1 2004) https://www.minneapolisfed.org/research/sr/sr347.pdf.

the pharmaceutical field, most countries allow innovators to hold the monopoly for twenty years. However, if certain conditions are met, then innovators may extend this period by five years.[13] Unsurprisingly, patent-holders often find ways to extend this time period past its due, expending resources in the process. This tactic falls under the classification of evergreening, which refers broadly to any means taken by an entrepreneur to extend the duration of their patent, thus prolonging their monopoly privilege.

Section 4B: Rent-Seeking by AstraZeneca

In the pharmaceutical industry, evergreening often takes the form of re-patenting existing drugs. From 1989-2000, only 23% of all drugs approved by the FDA contained new active ingredients and offered significant clinical benefits relative to their existing pharmaceutical alternatives.[14] The rest of the drugs approved in this period were simply re-patented versions of existing drugs, submitted to extend their patent period by another twenty years. This process was costly, using resources that might have contributed to

13 *How Long Does a Drug Patent Last?,* Upcounsel, (accessed Dec. 2019) https://www.upcounsel.com/how-long-does-a-drug-patent-last.

14 Boldrin, *supra* note 4, at 10.

the innovation of a more efficient drug. Instead, the resources were spent extending patent periods and re-monopolizing products. This re-classification process clearly misallocates resources and misuses the patent system in order to secure future transfers. Clarinex and Claritin, which are both produced by Schering-Plough, and Nexium and Prilosec, both produced by AstraZeneca, all used re-patenting:

> If the report doesn't convince you, just turn on your television and note which drugs are being marketed most aggressively. Ads for Celebrex may imply that it will enable arthritics to jump rope, but the drug actually relives pain no better than basic ibuprofen; its principal supposed benefit is causing fewer ulcers, but the FDA recently rejected even that claim. Clarinex is a differently packaged version of Claritin, which is of questionable efficacy in the first place and is sold over the counter abroad for vastly less. Promoted as though it must be some sort of elixir, the ubiquitous "purple pill," Nexium, is essentially AstraZeneca's old heartburn drug Prilosec with a minor chemical twist that allowed the company to extend its patent. (Perhaps not coincidentally, researchers have found that purple is a particularly good pill color for inducing placebo effects.)[15]

15 *Id.*

Well-known companies—not just little-known companies selling rare drugs—engage in this pervasive rent-seeking activity. The patenting process itself incentivizes behavior that extends monopoly privileges by legislative means. A monopoly is a powerful tool for producers, and the incentive to extend that government-granted power is proportionally powerful.

Section 5: Conclusion

The patent process fails in multiple regards. Even if patents are necessary for initial innovation in the pharmaceutical industry, the process itself halts any future development. The process removes producer incentives to make further innovations and forbids competitors from doing their own research and possibly improving the existing drug. More importantly, patents are not necessary to spur innovation in the first place. Entrepreneurs already put the risk of researching a drug into their cost structure and calculate accordingly. The patent structure incentivizes companies to use their capital resources to keep a monopoly rather than to innovate and push ahead of competitors. Those desiring to encourage innovation, develop new cures, and

improve existing drugs should not expect pharmaceutical patent policy to advance these goals.

RELIGION: AMERICAN AND HUMAN

Aaron Joseph Walayat

ABSTRACT: *In his lecture, "Rights: American and Human," the international law professor Louis Henkin noted the great difference between the nature of rights as conceptualized in the United States, what he calls American constitutional rights, and the nature of rights as conceptualized in the international human rights instruments. In his discussion, he found that the fundamental difference between American rights and human rights was the central focus of liberty and equality, respectively. This article explores the difference of the conception of religion between the American and international systems. The legal conception of religion in the United States is as an institution separate from the religious community while in the international human rights instruments, religion is an essential identifying factor among communities. Using Henkin's language, religion in America tends to focus on a liberty-centric relationship between the religion, the state, and the people while religion in international human rights focuses on the equality-centric relationship among religious, but ultimately human, communities. This distinction is fundamentally important in when concerning the defamation of religion, with such speech hardly invoking human rights within the United States while taking on a more defamatory character in international human rights law.*

* Aaron Joseph Walayat is a judicial law clerk for the Honorable William S. Stickman IV, Judge of the United States District Court for the Western District of Pennsylvania. He received his Juris Doctor in 2019 from Emory University School of Law and his Bachelor of in 2016 from Washington & Jefferson College, where he majored in International Studies. While at Emory, he served as Assistant Managing Editor for Special Content for the Journal of Law and Religion.

Introduction

In his lecture, "Rights: American and Human," Louis Henkin contrasts the idea of human rights as developed and understood in an American context with human rights as espoused in the international human rights instruments.[1] He specifies American constitutional Rights as having emerged from Eighteenth Century European ideas and antecedents while international human rights emerged during and in revulsion to the horrors of the Second World War.[2]

To Henkin, the fundamental difference between American constitutional rights and international human rights is the nature of equality within the respective systems, both in the way it is emphasized and the way it is defined. He contrasts the "limited" American understanding of equality, focusing on equal protection of the laws and equality of opportunity, with the expansive international human rights view of equality, which extends equality to the economic and social needs of individuals and groups. Henkin finds

1 Louis Henkin, *Rights: American and Human*, 79 Colum. L. Rev. 1 (1979).
2 *Id*. at 4.

American equality to be necessary to, but as an insufficient basis for, international human rights.[3] American and international theories differ on the topic of the liberty-equality distinction. The conception of equality is the principal theme of the international human rights instruments.[4]

This paper seeks to explore the different conceptions of religion between the American and international human rights systems. Henkin fairly argues that different views of equality are the fundamental difference between international and American approaches. However, the reason for the distinction within the religious liberty concept bases itself on the very nature of religion. The legal conception of religion and that conception's relationship with human legal subject takes on the form of a liberty-focused understanding in the United States and a more equality-focused understanding in the international human rights instruments.[5]

In America, religion exists as an institution separate from human communities, and due to the severability from individuals from their religion, a balancing of the rights of the

3 *Id*. at 22-23.

4 *Id*. at 23.

5 This paper is concerned with the legal conception of religion and not a sociological definition of religion.

people and the rights of the religious institution has created a jurisprudence focused on the liberty of individuals as opposed to the institution of religion. However, international human rights instruments understand religion as a human phenomenon and an important marker of identification among human communities. Religion bleeds outside of the individual's belief system, becoming a part of the individual's culture and identity. This approach has led to an equality-focused jurisprudence that has sought to balance the liberties between human communities whose religion demarcates their characterizing factor. I begin with a short sketch of the background of religious freedom jurisprudence in each context, followed by a short analysis of how the American and international approach would interpret the controversial matter of the defamation of religion. Finally, I end with an examination of the importance of each conception of religion to their respective tradition.

American

It is complicated to determine the direct, guiding influence of American constitutional rights. For Henkin, American rights are, by their own claim, natural and inherent.

They exist antecedent to the Constitution rather than being derived from the Constitution and retain substantial autonomy and freedoms as individual rights against the government.[6] American rights are also inherent, yet they only held legal weight once they were fleshed out through the relationship of struggle between the individual and his society.

In American law, the most important principle regarding the freedom of religion is the First Amendment of the Bill of Rights. The religion clauses of the First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…."[7]

The First Amendment remains the most important provision in American religious liberty jurisprudence because it enshrines a fundamental right rather than creating a new right. The right to the freedom of religion was previously and principally fleshed out and defended by the state constitutions before, and for many decades after, the ratification of the First Amendment. Henkin cites

6 Henkin, *supra* note 1, at 7.

7 U.S. Const. amend. I.

the Virginia and Massachusetts constitutions as the most influential documents in the development of the United States Constitution.[8] Thus, it is important to look at important influences on the United States Constitution and the Bill of Rights, including the 1776 Virginia Declaration of Rights, principally drafted by George Mason with amendments by Robert C. Nicholas and James Madison, as well as the 1780 Massachusetts Constitution, principally drafted by John Adams.

The Virginia Declaration of Rights, drafted in 1776, was written in tandem with the Virginia Constitution of 1776, as a proclamation of the inherent rights that later came to embody Henkin's idea of American constitutional rights. The document became an important influence on later instruments including the United States Declaration of Independence and the United States Bill of Rights. Section 16 is of the Declaration specifically handles the issue of religion, providing for the free exercise of religion.[9] The section defines religion as a "duty" which can only be

8 *Id.* at 2.

9 V.A. Decl. of Rights, § 16 (1776).

discharged by reason and conviction.

Furthermore, the Massachusetts conception of religion also provides an important influence on religious liberty in America. The document, primarily drafted by future American President John Adams, agrees with Mason's Virginia conception of free expression, with Article II of the Massachusetts Constitution protecting citizens from being "hurt, molested, or restrained," for worshipping according to his conscience or his religious profession or sentiments as long as he does not disturb the public or obstruct on others' religious practice.

Here, Adams provides again for the freedom of religion of individual believers, with the constitution providing for the protection of free expression. To the surprise of modern Americans, the Massachusetts Constitution provides for a light form of religious establishment. Clause 1 of Article III of the constitution, shares Adams belief that religion provided an important public function and his recognition for the pragmatic need for state support of religious institutions, seeking to establish religious institution's rights within the constitution. Article III goes on

to provide that the people of Massachusetts have the right to "invest their legislature with power to authorize and require . . . the several towns, parishes precincts, and other bodies politic" provisions for public worship and the "support and maintenance of public Protestant teachers of piety, religion, and morality." However, Adams maintains that localities have the exclusive right of electing these public teachers, that the moneys paid by citizens should be directed toward the teachers of his own religious sect or denomination, and that every denomination of Christian should be "equally under the protection of the law" and that no sect or denomination should be subordinated by law.[10]

The late Judge John T. Noonan, Jr. decried the Massachusetts model, describing the state's blasphemy laws, religious tests, and financial support for religious institutions as an antiquated model of political power for the Congregationalist majority to retain their supremacy in state-level politics.[11] However, the relationship between the church

10 M.A. Const, art. III (1780).

11 John T. Noonan, Jr. *Quote of Imps* in The Virginia Statute for Religious Freedom: Its Evolution and Consequence in American History 171 (Merrill D. Peterson & Robert C. Vaughan ed., 1988).

and the state in Massachusetts should be seen in the context of Anglo-American legal history, particularly in the legal mythology of England. Adams' political theory derived from a general sense of caution in the use of political power, with Adams' pessimism taking the form of important constraints through having different segments of society maintain checks and balances on the others. It was this pessimism of political power that led him to draft the clause, following the principle that what can be enumerated can be controlled. The provision of rights to the church also creates duties of the church, as well as defining the relationship between the church and the people of Massachusetts. In some ways, the provisions for the church define the rights and duties between the church and the state similar to Chapters 1 and 63 of Magna Charta, which defined the rights of the church against the rule of King John.

The apparent friction between the free expression provisions of the Virginia and Massachusetts constitutions and the extensive but restricted form of religious establishment in the Massachusetts constitution is discussed by Joseph Story in the 1833 commentaries on the United

States Constitution. While Justice Story recognizes the importance of promoting public worship, he states that the "duty of supporting religion . . . is very different from the right to force the consciences of other men, or to punish them" for worshipping God according to their own conscience.[12] Story's commentaries on the First Amendment provide important insights into the drafting of the free exercise clause. The state constitutions suggest in their free exercise clauses that while a government may establish a religion, it must balance the liberties of religious dissenters, whose right to free expression of religion is protected. Free exercise in the United States was thus originally drafted in the context of the establishment clause and must be understood in its relationship to the clause.

The current understanding of religious freedom in the United States, however, rather than following the tradition of Mason or Adams is, ironically, heavily influenced by the thought of Thomas Jefferson. Certain Jeffersonian maxims, including the "wall of separation between Church and state" and the threat of "Public Religion" and "political ministry"

12 JOSEPH STORY, COMMENTARIES, 1869-870, (1833).

to the political realm are accepted notions in American political and legal culture.[13] However, as John Witte remarks, the Jeffersonian vision did not become prominent until the 1940s.[14] John Adams' vision of religious liberty, exemplified by the Massachusetts Constitution as a "mild and equitable establishment of religion," required the balance between the freedoms of private religions with the establishment of one public religion.[15] While the Supreme Court gradually adopted Jefferson's vision, it was the Adams model that dominated American constitutional law during the first 150 years of the American republic.[16]

The Adams model should not, however, be idealized. Witte notes how states applied Adams' model, balancing the general freedom of private religions with the "general patronage" of the common, public religion.[17] States, however, still discriminated against religious minorities,

13 H. WASHINGTON, ED., THE WRITINGS OF THOMAS JEFFERSON, 113 (1853-1854); Martin E. Marty, *On a Medial Moraine: Religions Dimensions of American Constitutionalism,* 39 EMORY L. J. 1, 16-17 (1990).

14 JOHN WITTE JR., GOD'S JOUST, GOD'S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION, 244 (2006).

15 *Id*. at 247.

16 *Id*. at 244.

17 *Id*.

particularly those with "high religious temperature or low cultural conformity" by delaying corporate charters, tax exemptions, and educational licenses and turning a blind eye to private abuses against minority religious groups.[18] Indeed, the history of the United States indicates that the power of institutionalized religion was often utilized as a form of control over religious minorities. Noonan contrasts the 1780 Massachusetts model with the much freer model celebrated in the Virginia Statute of Religious Freedom.[19] The utilization of institutionalized religion continued to be a means of asserting control over minorities, a form of oppression that would not be curbed until the 1940s when the United States began to take on and implement a more Jeffersonian model of religious liberty.

Public religion prior to 1940 was generally Christian, if not Protestant, as state and local governments endorsed religious symbols and ceremonies. These governing bodies inscribed Decalogues and Bible verses on the walls of public buildings, erected crucifixes on public grounds, subsidized

18 *Id*. at 244-45.
19 Noonan, *supra* note 11, at 171.

Christian missionaries, underwrote expenses for Bibles and religious books, supported mandatory courses in the Bible and religion in public educational institutions, and predicated laws and policies on biblical teachings.[20] Such a model of religious liberty in eighteenth and nineteenth-century America invokes Blackstone in that religion. Specifically, this established, ecumenical form of Christianity provided an important tradition that formed the assumptions of the national, political, and cultural structures. During those centuries, "Christianity was part of American common law."[21]

However, the Second Great Awakening (cir. 1810-1860), the ratification of the antislavery amendments to the United States Constitution (1865-1870), and waves of immigration from Europe and Latin America transformed the American religious landscape, challenging the efficacy of Adams' model of religious liberty.[22] These new religious groups challenged the traditional Calvinist and Anglican strongholds of the republic, and when neither assimilation

20 Witte, *supra* note 18, at 250-51.
21 *Id*. at 251.
22 *Id*. at 252-53.

nor accommodation policies were effective, state and local governments began to clamp down on dissenters.[23]

Beginning in 1940, the United States Supreme Court responded to discrimination against religious minorities with the landmark cases *Cantwell v. Connecticut* (1940) and *Everson v. Board of Education* (1947), which incorporated the First Amendment religion clauses through the Fourteenth Amendment due process clause to the states.[24] At this point, the Court introduced a Jeffersonian distinction between church and state through a strong free exercise clause, protecting the rights of new religious groups against local officials, and a strong disestablishment clause, which directly outlaws the state establishment of public religion.[25] Most of these later cases were applied in jurisprudence regarding traditional state patronage of religious education, but the Supreme Court expanded this logic to all establishment clause cases through a general test in *Lemon v. Kurtzman* (1971).[26] The shift from Adamsian to Jeffersonian logic by the Supreme Court was an

23 *Id*. at 253.
24 *Id*. at 254.
25 *Id.* at 254-55.
26 *Id*. at 255-56; John Witte Jr., Religion and the American Constitutional Experiment, 193 (2nd ed. 2005).

important response to the changes of the American religious landscape in the nineteenth century.

However, the shift from the Adamsian logic to the Jeffersonian logic of religious establishment did not change the conception of religion as an institution within American law. Inherent in Jefferson's famous quote, a "wall of separation between church and state" takes for granted the Christian institution of the church as an entity separate from individual adherents and of parallel status to the state. Witte argues that the move toward a Jeffersonian separationism was spurred by the Warren Court's concern for the freedom of conscience and the right of people to choose to forgo religious education and religious ceremonies, as well as a principle of religious equality, where the rights of persons of all faiths and of no faith ought to receive the equal protection and treatment of the laws.[27] The Warren Court's concern for religious establishment echoes some of the concerns in international human rights, where establishment necessarily deprives the equality among religious groups. However, while the Court hinges upon the notion of equality, the

27 Witte, *supra* note 31, at 222.

cases maintain an emphasis on the freedom of conscience of individuals against state supported religion, placing more weight on the individual side of the scales.

The Supreme Court has slowly stepped away from its Warren Court-era separationism, with certain cases relaxing the strict *Lemon* test rules.[28] This return appears to be creating a hybrid model, taking aspects of the Adams and Jefferson vision of religious establishment which would place emphasis on the rights and freedoms of individuals against the institution of religion. The emphasis, despite its more egalitarian vision during the Warren Court, has always been placed on the liberty-centric balancing between the free expression and the freedom of conscience of individuals against the rights of an established religion. While the United States currently shows no signs of a return to state-level established churches, the current emphasis between balancing the rights of people against the rights of

28 *See* Agostini v. Felton, 521 U.S. 203 (1997); *See also* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Rosenberger v. Rector of Univ. of V.A., 515 U.S. 819 (1995); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Bd. of Educ. Of the Westside Cmty. Sch. V. Mergens, 496 U.S. 226 (1990); Bowen v. Kendrick, 487 U.S. 589 (1988).

religious organizations continues in issues concerning public education and other state funding questions.

Human

International rights, on the other hand, do not reflect a "single, comprehensive theory of the relation of the individual to his society," being instead an "article of faith" that would appeal to diverse global political systems, designed to correspond to human nature and human society.[29] Henkin notes that international human rights have a "less-exalted status" than American rights.[30] Despite the influence of American rights on international human rights, there exist major systemic differences between the two. Most importantly, American rights are part of a larger theory of representative democracy while international human rights were designed to be acceptable in very different political systems.[31]

Freedom of conscience and religion are mentioned in Article 18 of the Universal Declaration of Human Rights. This article allows that everyone has the right to freedom

29 Henkin, *supra* note 1, at 9.
30 *Id.* at 14.
31 *Id.* at 19.

of thought, conscience and religion, including the right to change one's religion and the freedom to manifest one's religion in teaching, practice, worship and observance.

Religion also appears within the Declaration as a category not to be infringed upon. Article 2 declares that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, *religion*, political or other opinion, national or social origin, property, birth or other status" (emphasis added). Moreover, Article 16 mentions religion as a category not to be limited in guaranteeing the right to marriage. Article 7 proclaims that all people are entitled to equal protection against discrimination and the equal protection of the law.

Brice Dickson adds that Article 7 is not confined to the other rights specified in the Declaration. He states that a person's religion, along with other personal attributes, must not be permitted to affect the person's entitlement to the equal protection of the law.[32]

---

32 Bruce Dickson, *The United Nations and Freedom of Religion*, 44 Int. and Comp. L. Q. 333 (1995).

Article 18 of the International Covenant on Civil and Political Rights (ICCPR) reiterates the UDHR's protection of religious freedom. It further adds that coercion cannot be used to impair or force a person into or out of a religion and limitations on religious freedom must be "prescribed by law" and must be necessary for public safety, order, health, or morals or the fundamental rights and freedoms of others.

Dickson notes that Article 18 of the ICCPR should not be read in isolation from Article 19, which "guarantees the rights to hold opinions without interference and to freedom of expression," overlapping with Article 19 regarding the protection of the right to disseminate religious ideas.[33] Dickson adds that this is bolstered and limited by Article 20(2), which stipulates, "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[34] Article 27 also provides for religious minorities, entitling them to "enjoy their own culture," to "profess and practice [sic] their own religion," and "to use their own language."

33 *Id.* at 340.
34 *Id*.

International human rights norms are designed to address the pluralism of various confessions and faiths. They note the distinct functions of parents, teachers, and religious officials as well as the special place of religious minorities and non-traditional religions, with states obligated to be "particularly solicitous" of their needs. Furthermore, "equality of religions before the law is not only to be protected but to be affirmatively fostered by the state."[35]

Both national and international authorities struggle to arrive at a proper legal definition of religion. For instance, T. Jeremy Gunn notes how the legal definition of religion often varies due to the different outlooks upon familiar and unfamiliar belief systems. Widely practiced forms of religion are more easily recognized under the law while obscurer beliefs are excluded from legal protections.[36] Bruce Dickson remarks that religion is characterized by the UN Charter as a personal attribute, akin to race, sex, and language.[37] On November 25, 1981, the General Assembly unanimously

35 Witte, *supra* note 26, at 242.

36 T. Jeremy Gunn, *The Complexity of Religion and the Definition of "Religion" in International Law,* 16 HARVARD HUM. R. J. 189, 195-96 (2003).

37 Dickson, *supra* note 32, at 332.

adopted and proclaimed a declaration, specifying in the Preamble that religion or belief is "one of the fundamental elements in [an individual's] conception of life and that freedom of religion or belief should be fully respected and guaranteed."[38]

Article 2(1) of the 1981 Declaration states that "no one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief."[39] The declaration clarifies in Article 4 that member states must "take effective measures to prevent and eliminate discrimination on the grounds of religion or belief."[40] Furthermore, Article 7 provides that "the rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice."[41] Dickson argues that these three articles, when read together, call on national laws to protect

38 G.A. Res. 63/181 A, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (March 16, 2009).

39 *Id.* at 344-45.

40 *Id.* at 345.

41 *Id.*

all persons against religious discrimination from all other persons, which is a "bold attempt" to outlaw both public and private religious discrimination.[42] The emphasis remains on human beings, with religion categorized as an identifying factor akin to sex, race, or ethnicity.

Both American constitutional rights and international human rights provide for the freedom of conscience and the free exercise of religion. While the protections of individual freedom of conscience contain general similarities, significant differences remain between the two approaches. However, the fundamental difference between free exercise in the United States and international human rights is that free exercise in America is interpreted in the context of religious establishment. In contrast, international human rights interprets free exercise in the context of religion as an identifying factor of populations. The American approach attempts to balance the rights of individual people, and their freedom to exercise, with the rights of religious institutions that exist separate from human populations. It is thus concerned with the *liberty* of individuals against

42 *Id.* at 344.

the government and the government's established religion. In international human rights, religious institutions do not appear to have a separate legal status. Instead, religion is considered an identifying characteristic among a people, with nations balancing the interests of religious majorities with religious minorities. International human rights thus concerns itself with the *equality* among religious groups to be able to practice their religion according to their individual consciences.

The fundamental difference between these approaches is that the direction of American law has come to value the rights of individuals over the rights of religious institutions. In international human rights, however, the balance is not between groups of individuals and institutions, but between different groups of individuals, with the rights of both groups inviolable. The intrinsic nature of religion to human communities in international human rights law has made issues of rights balancing more difficult as it has created more protections for religious ideas given their connection to groups of people. It is along these lines that the liberty-equality distinction becomes most clear, with the liberty

of individual religious believers being asserted against institutionalized religion in the American context, and the equality of different religious groups being emphasized in the international context. These different emphases lead to different outcomes in deciding issues that concern the free exercise of religion among different groups. One example between the different outcomes is observable in the matter of the defamation of religions.

The Defamation of Religions

The defamation of religions is a controversial issue that invokes both the right to free speech and expression and the right to religious freedom. The extent of freedom of speech and expression in American and international contexts is very different, with the right being much more expansive in the United States. The debate over the defamation of religion in the United Nations has a long history, being one of the overriding motivations for the Organization for Islamic Cooperation (OIC), which argued that "the right to freedom of thought, opinion and expression could in no case justify blasphemy."[43]

43 Robert C. Blitt, *Defamation of Religion: Rumors of Its Death are Greatly Exaggerated,* 62 Case W. Res. L. Rev. 347, 352; *See also* U.N. GAOR, 49th Sess., 65th mtg. para 44, U.N. doc. A/C.3/49/SR.65 (Dec. 13, 1994).

In 1999, Pakistan, on behalf of the OIC submitted a draft resolution subtitled "Defamation of Islam" to the United States Commission on Human Rights. In its resolution, Pakistan expressed "deep concern that Islam [was] frequently and wrongly associated with human rights violations and with terrorism," as well as concern that Islam was the target of increasing intolerance while encouraging states to "combat hatred, discrimination, intolerance and acts of violence" in order to "encourage understanding, tolerance and respect in matters relating to freedom of religion or belief."[44] Despite the resolution's facial preference for Islam, the Commission passed the resolution without a vote.[45] Similar resolutions were passed in 2000 and 2001.[46]

After the attacks on September 11, 2001, the Commission, concerned by the impact of the events on Muslim minorities and communities within some non-

---

44 Allison G. Belnap, *Defamation of Religions: A Vague and Overbroad Theory that Threatens Basic Human Rights* 2 BYU L. Rev. 635, 637-38 (2010); *quoting* ESCOR, Comm'n on Human Rights, Pakistan, Draft Res. *Racism, Racial Discrimination, Xenophobia and all Forms of Discrimination*, U.N. Doc.E/CN.4/1999/L.40 (Apr. 20, 1999).

45 *Id*. at 638; *citing* CHR Res. 1999/82, at 280-81, U.N. ESCOR, 55th Sess., Supp. No. 3, U.N. Doc. E/CN.4/1999/167 (Apr. 30, 1999).

46 CHR Res. 2000/84, at 336-38, U.N. ESCOR, 56th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2000/167 (Apr. 26, 2000).

Muslim countries, the negative projection of Islam by the media, and laws specifically targeting and discriminating against Muslims, called for a vote on the defamation of religions resolution, passing with a majority vote of twenty-eight States in favor, fifteen opposed, and with nine abstaining.[47] However, there remained a continuing concern that the resolution specifically favored Islam, though some references to "religion" and "religions" implied the inclusion of other religions.

However, defamation of religion drew controversy after the *Jyllands-Posten* incident in 2005, in which the Danish newspaper printed cartoons of the Prophet Muhammad in a "less than favorable" light.[48] The cartoons incited acts of violence, with Muslim extremists directing death threats, violent acts, and subsequent casualties in response to the publication of the cartoons. Addressing the issue of defamation of religion, the United Nations General Assembly passed a resolution to combat religious defamation.[49] The resolution pits the protection of Islam

47 Belnap, *supra* note 42 at 634-35; *citing* ESCOR, *supra* note 41, at 1.
48 *Id.* at 639.
49 *Id*. at 640.

against the free expression of the press. The United States, considering the implications the resolutions could have on First Amendment free speech principles, joined with other Western states in vigorous opposition.

In 2011, the United Nations Human Rights Council, the successor body of the Human Rights Commission, agreed to condemn "any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence" and set out suggestions to foster an environment of religious toleration, respect, and peace.[50] However, Robert Blitt argues that while these remarks espouse a consensus approach, the legitimacy of the prohibition of defamation of religion remains alive and well.[51] Some critics go so far as to interpret the previous resolutions and the rather weak consensus to amount to an international blasphemy law. Despite this, defenders of the consensus claim that a blasphemy law would be offensive to the Resolution, with Comment 34 expressly providing that

50 Blitt, *supra* note 41, at 361; *citing* Human Rights Council Res. 16/18, Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against, Persons Based on Religion or Belief, 16th Sess., Mar. 24, 2011, U.N. Doc. A/HRC/RES/16/18 (Apr. 12, 2011).

51 *Id*. at 362.

blasphemy laws among other prohibitions are "incompatible with the Covenant."[52]

The defamation of religion controversy pits the freedom of religion and the freedom of speech against each other. While American law provides more explicit protections for the freedom of speech, both rights are important to both contexts. In Europe, however, freedom of religion is typically prioritized over freedom of speech. In an October 27, 2018 article in *The Atlantic*, Graeme Wood reported on a determination of this nature by the European Court of Human Rights (ECHR). The ECHR determined that Austria did not violate the rights of a woman when they required her to pay a fine of 480 euros or spend 60 days in jail for holding seminars in which she claimed that the Prophet Muhammad was a child molester.[53] The ECHR, weighing the accused's "right to freedom of expression with the right of others to have their religious feelings protected" found that Austria's law abridging the accused's freedom of expression served the "legitimate aim of preserving religious peace in

52 Comment 34.

53 Graeme Wood, *In Europe, Speech Is an Alienable Right*, The Atlantic, Oct. 27, 2018.

Austria."[54] The ECHR upheld the woman's conviction for "disparagement of religious precepts," which is a crime in Austria. This case is particularly interesting because the accused woman was fined for attacking the Prophet Muhammad as opposed to attacking individual Muslim people, an important distinction as defamation jurisprudence is specifically directed toward individuals or groups. The case also illustrates the difference in freedom of speech and expression jurisprudence between the United States and other advanced democracies. Abroad, freedom of speech is not as fundamental as it is in the United States.

Defamation of religion as an idea, indeed even the defamation of a religious group, is likely to be protected speech in the United States. In *Joseph Burstyn, Inc. v. Wilson* (1952), the Court determined that provisions in the New York Education Law restrained freedom of speech, violating the First Amendment, because it censored content in a motion picture that it deemed sacrilegious.[55]

---

54 Chase Winter, *Calling Prophet Muhammad a pedophile does not fall within freedom of speech: European court,* DW, Oct. 26, 2018, https://www.dw.com/en/calling-prophet-muhammad-a-pedophile-does-not-fall-within-freedom-of-speech-european-court/a-46050749.

55 Justin Burstyn Inc. v Wilson, 343 U.S. 495 (1952).

While other Western nations limit the freedom of speech in cases of hate speech, no such exception appears to exist in the United States. Indeed, University of California at Los Angeles law professor, Eugene Volokh, argues that there is no hate speech exception in the United States.[56] Volokh allows that there is some case law indicating a special exception for "group libel." In *Beauharnais v. Illinois* (1952), the Supreme Court upheld a "group libel" law claiming that the Constitution "does not prohibit a state from passing a statute penalizing publication of any lithograph which 'portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed, or religion' or which exposes them to 'contempt, derision, or obloquy, or which is productive of breach of the peace or riots."[57] Despite *Beauharnais*'s move toward creating a hate speech exception, and though *Beauharnais* has never been overturned, it is not generally deemed relevant.[58] In

56 Eugene Volokh, *No, there's no 'hate speech' exception to the First Amendment*, Wash. Post, May 7, 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/07/no-theres-no-hate-speech-exception-to-the-first-amendment/?utm_term=.79723084b570.

57 Beauharnais v. Illinois, 343 U.S. 250 (1952).

58 Volokh *supra* note 56; *citing* Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 672 (7th Cir. 2008); Dworkin v. Hustler Magazine

New York Times Co. v. Sullivan (1964), the Court rejected the view that libel is categorically unprotected by the First Amendment, and that the libel exception requires a showing that libelous accusations be "of and concerning" a particular person.[59] In *R.A.V. v. City of St. Paul* (1992), the Supreme Court struck down a Minnesota city ordinance that made placing symbols, objects, appellations, characterizations or graffiti, which "one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender," which is a misdemeanor offence.[60] Therefore, American law asserted that the free speech provision of the First Amendment does not provide special protection for religious groups on the basis of their religion.

Philosopher Jeremy Waldron, however, has been a

Inc., 867 F.2d 1188, 1200 (9th Cir. 1989); Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 331 n.3 (7th Cir. 1985); Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir. 1978); Tollett v. United States, 485 F.2d 1087, 1094 n.14 (8th Cir. 1973); Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1043-45 (4th ed. 2011); Laurence Tribe, *Constitutional Law,* §12-17, at 926; Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, WM. & MARY L. Rev. 211, 219 (1991); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 330-31 (1988).

59 New York Times Co. v. Sullivan*,* 376 U.S. 254 (1964).

60 R.A.V. v. St. Paul, 505 U.S. 377, 380 (1992).

noted defender of laws against hate speech, which he also describes as "group libel."[61] Waldron considers special protections provided by European governments to specific groups to be beneficial. To Waldron, group libel goes beyond "fighting words" and creates a public threat by challenging another person's social or legal status.[62] It is an attack on the dignity of individual members of the group, a dignity which includes the person's basic social standing as persons bearing human rights and constitutional entitlements.[63]

Given the international human rights regime's focus on protecting the inherent dignity of religious groups, the defamation of religion in international human rights must be limited to speech directed against the individual dignity of religious groups. Defamation of religions is overbroad, providing protections for religious institutions rather than protecting the human dignity of religious groups. Waldron expounds on the difference between preserving individual dignity and protecting people from offenses, even when

61 *See generally* Jeremy Waldron, *Dignity and Defamation,* 123 Harvard L. Rev. 1596 (2010).

62 *Id*. at 1604.

63 *Id*. at 1610.

such offenses go "to the heart of what they regard as the identity of their group."[64] Thus, speaking specifically on the topic of defamation of Islam, the community of Muslims, as Muslims, should be protected. However, the insult against Islam, the Quran, and the Prophet Muhammad should not be protected. While the danger of denigrating the Muslim community is a matter of group libel, the matter of insulting Islam as an institution does not encroach upon the inherent dignity of the Muslim community, despite the offense felt by Muslims to such speech. Waldron's view, therefore, cannot be taken as the logical product of the Austria case. In such an instance, he would likely take the accused woman's assertion that Muhammad was a child molester as an attack upon Islam as a religion rather than one directed at Islamic communities.

While it can be argued that American law simply favors free speech, the nature of the different views of religion plays a role in identifying how American courts would rule differently from European courts on the matter of defamation of religion. In international human rights law, religion is an

64 *Id*. at 1612.

important identifying factor among religious communities and groups. The defamation of religion thus attacks the religious community, potentially violating their human dignity. This human-centric vision of human rights law has weakened the individual's freedom of speech because it challenges the religious identity of another group of human beings. Since the rights of humans with their identifying factors are inviolable within international human rights law, an attack on another individual's religion becomes an attack on that individual's identity and, consequently, on their dignity. By lowering the status of religion to a human identifying factor, seemingly removing religious considerations from the law, international human rights law has unexpectedly provided religion with even more protections than it previously possessed. Under this definition, religious principles have nearly unchallengeable protection from outside opinions. Challenging these principles risks attacking the religion-at-large, which in turn risks attacking the identity of religious communities.

In United States law, the religion and the religious community are severable. However, neither of the groups

receive protection from hurtful speech. While a religion and a community may be inexorable in international human rights law, they are separable in American law. In examining the two relationships between speech and religion under the liberty-equality distinction, American law's liberty-based approach would find that an individual's free speech rights likely outweigh the interests of a religious institution. By contrast, under international human rights law's equality-based approach, the free speech rights of an individual may not necessarily overcome the interest in protecting a religious group's collective dignity from offensive speech.

Religion: American and Human

Henkin notes that the most fundamental difference between American and international human rights is each contexts' respective focus on equality. The American conception of equality is considerably more limited than the international conception of equality.[65] International human rights take equality as a principal theme.[66] The difference between the American and international approaches regarding

65 Henkin, *supra* note 1, at 22.
66 *Id.* at 23.

the freedom of religion, while most easily interpreted by the liberty-equality distinction, also differ in each systems' respective conception of religion.

In his magisterial 1833 commentaries on the United States Constitution, Justice Joseph Story writes that the right and duty of the government to interfere and promulgate a religion is "uncontested" and that the real issue is the "limits" of the government's right to foster and encourage religion.[67] To Story, the purpose of the First Amendment was to:

> …exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government.[68]

John Witte, commenting on religion in America, seems to agree with Story's characterization. Witte notes that a theme common to American jurisprudence on religious freedom is the freedom of public religion. This freedom sometimes requires the support of the government though with a recognition of an open public square of various religious

67 Joseph Story, Commentaries, 723 (1865-66).

68 *Id.* at 728, (1871).

beliefs and with a guarantee of freedom *from* public religion.[69]

This American notion of religion differs greatly from the international notion of religion. Religion in American law appears to exist as an institution outside of the religious community. Indeed, religion in America may not even need to be held by a natural person at all, as even closely-held corporations can be said to have a religion.[70] The late Antonin Scalia, a former Associate Justice on the United States Supreme Court, said that the religion clauses were interpreted to guarantee a freedom from establishment of religion, though this was not the original interpretation of the establishment clause. To Scalia, the First Amendment's language saying, "Congress shall make no law *respecting* an establishment of religion. . ." (emphasis added), meant that Congress will not pass a law to establish a national church nor disestablish a church due to many of the individual states having established churches.[71] As Scalia notes, the original interpretation of the First Amendment is

69 Witte, *supra* note 26, at 256-57.

70 *See generally* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

71 University of California Television (UCTV), *Legally Speaking: Antonin Scalia*, YouTube (Mar. 17, 2011) https://www.youtube.com/watch?v=KvttIukZEtM.

no longer jurisprudential canon in the United States because both the establishment and free exercise clauses have been incorporated in *Everson v. Board of Education* (1947) and *Cantwell v. Connecticut* (1940), respectively.[72] While established churches are no longer humored in the individual states, religion continues to be interpreted as an institution rather than solely as an identifying factor. The American government has rapidly swallowed up the utilization of religious language and symbols so that traditional symbols are identifiable with other government-supported meanings.[73]

The distinction between the religious institution and the religious community is important in American law because, even if America should move toward Waldron's position, creating stronger hate speech laws to uphold the human dignity of individual people and groups, such protections would not be extended toward the religious institution. This diverges from the international human rights approach which, despite attempts to showcase how

72 Everson v. Board of Education, 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 296 (1940).

73 American Legion v. American Humanist Association, 588 U.S.__(2019); *See also,* Freedom from Religion Foundation v. County of Lehigh, no. 17-3581 (3d Cir. 2019).

religion as an idea is not protected, has had more difficulty implementing such an interpretation, given the identarian nature of religion as a defining characteristic of groups and peoples.

American law values both the freedom of religious individuals and groups as well as the freedom of religious institutions. International human rights law, on the other hand, takes religion as a major factor of a group's identity. A decent respect to the equality of people requires the international human rights regime to provide protections for groups' religious identities in order to uphold the groups' human dignity. Alternatively, American law acknowledges religious institutions, existing almost independently of human communities as well as the political role that these institutions play. Thus, the American legal regime emphasizes protecting the freedom of individuals who do not belong within the religious institution. Religious institutions, existing outside of human identity, are not protected from defamatory speech in the same way as religious groups in other countries. While offensive speech against a religion in the United States would be directed against unprotected religious institutions, such

offensive speech in other democracies would be directed against protected religious groups.

The international human rights regime, because of its principal focus on humans and human communities, cannot implement an American approach balancing the rights of people with the rights of religious institutions. Doing so would open international human rights law to the complicated jurisprudence of attributing rights to religious institutions, which are not bearers of human dignity. However, the United States' model may also face difficulties as it must consider other religious institutions. Many of these institutions do not share models similar to the Christian church, a structure with which courts have grown familiar and comfortable. Some criticize the United States legal approach because its interpretation of religion founds itself on the religious notions within its specific country. By contrast, international human rights defines religion following a multinational, human-focused approach. However, the benefits of the American approach still offer a few important takeaways.

The severability of religion as an institution from individuals maintains individual liberty, fleshing out the

relationship between the individual and the state, the religion and the state, and the individual and the religion. Rather than being born from a single document, this approach developed gradually as Anglo-American legal experience progressed. While the separation and defining of rights of each group appears to have led to a state level recognition of religion, it has also defined religions' limits. This separation, initially indicating a special place for religion in society, has been the fundamental tool used to uphold American constitutional rights against religious institutions, and to balance different constitutional rights, such as the freedom of speech and the freedom of religion. However, the American model has experienced change through the introduction of Jeffersonian philosophical concepts. These concepts have edged American religious liberty jurisprudence to a model closer to international human rights law. Naturally, international human rights law encapsulates many concepts within religious liberty which the United States may seek to incorporate. Similarly, the Jeffersonian philosophy implemented by the Warren Court also incorporated a model of religious liberty that allowed the legal system to consider

the various religious backgrounds of new immigrants. Unfortunately, this incautious human-centered philosophy espoused by Jefferson has led to an incongruence between the freedom of religion and the freedom of speech. While a Jeffersonian vision, like Waldron's theory, would see nothing wrong with offensive speech directed at a religion, the internationalist tendency to define religion solely within the context of human communities has made attacks against ideas indistinguishable from attacks against human identities. International human rights law must be wary of attributing religion completely within the realm of human communities. This attribution could potentially provide religions with excessive dignitarian protections reserved for humans.

The development of Jeffersonian optimism, shared as much by the international human rights instruments as modern American thought, is necessary for the changing landscape of religion in the United States. A tempered and healthy dose of Adamsian pessimism is also necessary to define and constraint the political power of any group,

whether it be the church, the state, or the people.[74] Therefore, the United States must seek to harmonize an internationalistic tolerance that incorporates religious pluralism with the traditional Adamsian approach that allows individual and specific constitutional rights to coexist within the American constitutional framework.

74 *See generally* Aaron J. Walayat, *Adams and Jefferson: American Religion and the Ancient Constitution,* 11 Faulkner L. Rev. (forthcoming).