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ARTICLES

COMMENTS

ORIGINALISM'S RACE PROBLEM

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I was surprised to learn recently, from Ron Chernow's illuminating biography, that George Washington's teeth might have been pulled from the mouths of his slaves.[1] I suppose I should not have been surprised. I certainly knew that Washington kept slaves. I even knew that he was capable of uncommon barbarity with respect to his slaves, forcing them, for example, to clear swamps in the bitterest of winter chill.[2] But even as a relatively sophisticated consumer of American legal and political history, I have been partly captured by the romantic myth around Washington. He paid for the teeth, it seems,[3] but the fact that he bought them from someone from whom he was extracting free labor on pain of lash (or worse) cannot help but lower Washington another notch in my imagination.

I recount this inner intellectual conflict as an entrée into a question that I have been puzzling with for some time, and that this brief essay can better identify than resolve. The question is whether, and if so to what degree, a tension exists between African-American identity and originalism. I do not mean to ask whether it is possible for someone who identifies as African-American to hold originalist views about constitutional interpretation. It is of course possible, as Justice Thomas might attest.[4] I also do not mean to ask whether someone who identifies as African-American *should* be an originalist. I reject the illiberal notion that my own views should have much to say about the relationship between another's race and her political or intellectual commitments. The question, rather, is whether African-Americans have especially good reason to reject originalism, such that selling African-Americans on originalism carries, and reasonably should carry, an unusually high burden of persuasion.

I suspect that for many this sounds like an easy question, but I doubt that everyone who thinks it is easy agrees on the answer. On one hand, if we believe that we can identify interpretive methodologies with constitutional outcomes, and if we believe that originalism in particular is identified with outcomes that African-Americans tend not to support, then we have a simple explanation for why many African-Americans might not

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1. RON CHERNOW, WASHINGTON: A LIFE 438 (2010).
2. *See id.* at 496.
3. *Id.* at 438.
4. *See* Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6–7 (1996).

have warm feelings toward originalism. This explanation, though, is contingent on a set of assumptions about African-American political views and about the actual or perceived substantive outcomes originalism entails. Those assumptions might go some way toward explaining why so few African-Americans in fact identify as originalists,[5] but it does not answer the more fundamental question of whether the methodology itself is or is not, for lack of a better term, racially sensitive.

One potential answer, in the negative, relies on a version of what is often called the "dead hand"[6] argument, and it feels especially urgent when it comes to matters of race. A familiar formulation goes something like this: Accepting the authority of the original understanding of the Constitution requires one to accept that the ratifying process has significant democratic purchase.[7] The reason we do not accept the constitutions of France or Zimbabwe or Utah as binding the rest of us is that those constitutions were enacted through processes in which we had no say. The Constitution of 1787 was submitted to ratifying conventions intended to be representative of relevant members of the population, but, as we all know, those conventions were not in fact representative. Voting for delegates to the state conventions largely excluded women, Indians, blacks, and those who did not own property.[8] The Constitution is as to those marginalized persons as the Zimbabwe Constitution is to the rest of us, and so its authority must follow not from its democratic pedigree but from some other, more inclusive account.[9]

If we accept that argument, it applies not only to racial minorities but also to women and even, perhaps, to many poor people. But the special urgency on issues of race derives from the institution of slavery and its associated badges and incidents. It is not just that people of African

5. In a recent study, my co-authors and I found that only four percent of African-American survey respondents (compared to 29 percent of whites and 32 percent of Hispanics) are originalists, where originalists were identified as those falling within the top quartile along a continuous index of several different measures of originalist affinity. Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 406 (2011).

6. *See generally* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008).

7. I acknowledge that one might distinguish between originalism as purely a question of textual exegesis—divining the meaning of a text—and originalism as an authoritative guide to judicial or political decision-making. This dichotomy sometimes goes under the label "interpretation" versus "construction." *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 99 (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: ORIGINAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 7–11 (1999); Larry Alexander, *Telepathic Law*, 27 CONST. COMMENT. 139, 144 (2010). In my experience this distinction has currency only for specialists; most participants in methodological discourse, including legal scholars, hold a conception of originalism that relies on an account of the political authority of the framers' original intent or the original understanding of members of the ratifying generation. *See generally* Samaha, *supra* note 6, at 636–37.

8. *See* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 240–42 (1913); *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 7 (2005).

9. *See* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

descent were not represented at Philadelphia or at the state ratifying conventions, but that the Constitution that emerged from those conventions preserved and protected both slavery itself and slavery's institutional infrastructure. Start with the three-fifths clause, which counted slaves as three-fifths of a person for purposes of representation and direct taxation.[10] Slaves obviously could not vote in southern states, and so bringing slaves into a state would increase a state's congressional representation without giving blacks any additional political power. This is a bad incentive.[11] The three-fifths compromise also affected the Electoral College, since a state's number of electors is based on its congressional representation. It is no coincidence that all but two elected Presidents before Lincoln—the exceptions being one-termers John Adams and John Quincy Adams—were slaveholders or expressed deep and open sympathy with slaveholding interests.[12]

The Constitution included two other direct accommodations for slavery: the Fugitive Slave Clause, which required states to return any escaped slaves and which, as interpreted by the Supreme Court, prevented states from affording due process to their black citizens who were accused of being fugitive slaves;[13] and the importation clause, which prevented Congress from withdrawing from the international slave trade prior to 1808.[14] The importation clause was one of only three expressly unamendable provisions in the 1787 Constitution, along with the prohibition on disproportionate capitation taxes (designed to prevent arbitrary taxation of slaves) and equal state suffrage in the U.S. Senate.[15] All three were concessions to states' rights, the constitutional terms through which much of the nation's institutionalized racism has been defended.

There are answers to this charge. The most persuasive is the simplest: slavery was abolished by the Thirteenth Amendment, and the Constitution's most obvious slavery-protecting provisions have been excised. The process of constitutional design was unrepresentative along racial lines in 1787, but the Constitution that emerged from that process has been amended so as to be more inclusive. The Fourteenth Amendment was drafted expressly to guarantee civil equality, and six of the last thir-

10. U.S. CONST. art. I, § 2, cl. 3.

11. Of course, the three-fifths compromise also increased the tax base of southern states beyond what it would have been if slaves counted neither for representation nor for direct taxation, but it is worth noting that the Constitution also provides that all revenue bills must originate in the arguably perversely malapportioned House of Representatives. U.S. CONST. art. I, § 7, cl. 1. Moreover, per capita tax revenue represented a small share of federal-tax income in antebellum America. *See* AMAR, *supra* note 8, at 93–94.

12. Paul Finkelman, *Thomas R. Cobb and the Law of Negro Slavery*, 5 ROGER WILLIAMS U.L. REV. 75, 89 (1999).

13. U.S. CONST. art. IV § 2 cl. 3, *repealed by* U.S. CONST. amend. XIII; Prigg v. Pennsylvania, 41 U.S. 539, 622–23 (1842).

14. U.S. CONST. art. I § 9 cl. 1.

15. U.S. CONST. art. V. The prohibition on disproportionate capitation taxes, like the importation clause, could be amended after 1808.

teen constitutional amendments have related to voting rights, with every one of them expanding the franchise.[16] Correctly practiced, originalism fixes on the whole Constitution, as amended, and it is to that Constitution we should look in assessing originalism's democratic provenance.[17]

More generally, to the extent the dead hand problem as I have articulated it is a problem, it is not a "race" problem. The challenge to the democratic representativeness of the Philadelphia Convention and the state ratifying conventions is one we all share, regardless of race. It is indeed the central challenge of constitutionalism more generally: How can any political document retain democratic authority across successive generations? Many able scholars have offered answers to that question, but the important point here is that it looms so large that it overwhelms considerations of the representativeness of the founders along racial lines. Put another way, all successful strategies for overcoming the problem of intertemporal constitutional authority accommodate the problem of racial representation at the founding. If originalism can surmount the intertemporal hurdle, as many believe it can, whatever remaining defects it might have as a mode of constitutional interpretation would not derive from the fact that the constitutional conventions were not racially inclusive.

This response might be adequate to one especially narrow version of the dead hand argument, but for at least two reasons it is not adequate to my original question. First, the most persuasive originalist response to the problem of intertemporal authority raises additional, less easily dismissed race-related complications. One common originalist answer to the problem seeks to identify some way in which current generations have consented to constitutional provisions that justifies preserving the original understandings of those provisions.[18] For reasons I have elaborated elsewhere, consent is not a persuasive justification for relying on original understanding to answer current constitutional questions, not least because few Americans have a defensible understanding of what originalism would entail for constitutional law in practice.[19] A better, more interesting originalist response to the intertemporal problem is to argue that the authority of the ratifying generation derives from its *normative* continuity with our own. On this argument, we are a complicated, multifaceted "people" constituted across time and in constant search of our better

16. U.S. CONST. amends. XIV, XV, XVII, XIX, XXIII, XXIV, XXVI.

17. *See* John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1697, 1757–64 (2010) (defending originalism in part on the ground that constitutional provisions marginalizing women and blacks have been amended or excised).

18. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3–4 (1971) (suggesting that the American people have consented to an originalist reading of the Constitution).

19. *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 668–70 (2009).

selves.[20] The originalist claim is that we locate our true values by looking backward rather than laterally or forward. On this account, originalism is best defended as a persuasive form of ethical argument; it is a normative account of national identity.[21]

So understood, the divide between originalists and living constitutionalists is between those who believe we are at our best when we are who we have been and those who believe we are at our best when we are who we might become. Jack Balkin has expressed this divide through the competing aspirational narratives of constitutional "restoration" and constitutional "redemption."[22] For Balkin, originalism may accommodate both narratives—one might faithfully work out the meaning of broad constitutional text either by fixing it in the past or by reimagining it in the service of subsequent social and political agendas[23]—but for most everyone else, originalism is centrally committed to and indeed fixated on a narrative of restoration. As Justice Scalia has written, the purpose of constitutionalism from an originalist perspective is to "obstruct modernity," and to prevent current majorities from diluting or altering the values of the past.[24] On this understanding, the potential for a race problem becomes more transparent. For me, as an African-American, a narrative of restoration is deeply alienating; what America *has been* is hostile to my personhood and denies my membership in its political community. The only way I can call this Constitution my own is to view it through a lens of redemption, the lens that originalism rejects.

Accounts of the authority of original understanding that do not rely on a narrative of restoration might avoid this problem, but few can avoid a second, related but more trenchant race-based critique. Originalism need not in theory, but in practice almost always assumes that the meaning of any particular constitutional provision is fixed at some historical moment.[25] Indeed, I would argue that its claim as to the determinacy of constitutional meaning is the single most consistent distinguishing fea-

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20. *See* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 145 (2001) ("Commitmentarian democracy holds that a people, understood as an agent existing over time, across generations, is the proper subject of democratic self-government.").

21. *See* Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 82–85 (2009). Some strategies for addressing the intertemporal problem consist in ignoring it—that is, defending originalism on prudential or pragmatic grounds. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 116–17 (2004) (arguing that originalism cannot be justified based on consent, but is normatively appropriate because it best preserves individual liberty); John O. McGinnis & Michael Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U.L. REV. 383, 385 (2007) (defending originalism on the ground that supermajoritarian processes produce superior political rules). My argument does not turn on whether these defenses are persuasive.

22. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 301, 308–09 (2007).

23. *Id.* at 295–303.

24. *See* Antonin Scalia, *Modernity and the Constitution*, *in* CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS 313, 315 (Eivind Smith ed., 1995).

25. Again, Balkin is a lonely dissenter on this point. *See supra* note 22, at 295–303.

ture of originalism, whose definition can otherwise be elusive.[26] Insisting that the meaning of the Constitution is fixed is an especially unsympathetic response to the challenge Robert Cover posed nearly three decades ago in his essay *Nomos and Narrative*.[27] Cover criticized hyper-positivist modes of interpretation as being, in his term, "jurispathic."[28] On this conception the judge who understands herself to be promulgating the uniquely correct application of a legal norm is engaged in an act of violence, insofar as she is destroying the alternative conceptions advanced by dissenting normative communities.[29] Cover urged instead that judges "stop circumscribing the *nomos*" and recognize the possibility of plurality within legal interpretation.[30]

African-Americans constitute a nomic (not to say monophonic) community, if not generally, then around particular constitutional issues likely to affect them. The role of the jurispathic judge in a case implicating our *nomos* is either to adopt it or to suppress it in favor of a competing one. This binary is not one any minority community likely wishes to face, but it is especially daunting for one whose relative discreteness and insularity leads and has historically led it both to be excluded from and to resist normative assimilation. A jurispathic approach to legal interpretation wishes to deny that unassimilated norms hold legitimate claims to legal authority. Yet, the possibility of indeterminacy, of plurality, within law is precisely the mischief for which originalism is often promoted as an especially effective remedy.[31] Originalism treats *nomoi* that diverge from the one blessed by the originalist judge as a scourge that it is the function of law to eradicate.

Constitutional methodology translates, between word and deed, hope and reality, authority and violence. To choose a methodology is to choose the connective tissue between Constitution and subject. It is to adopt a narrative that enables a people not merely to submit to the state but to experience the Constitution as theirs. For that choice to be right, it needs to *feel* right; it must resonate with how one in fact experiences one's relationship with the nation and its commitments. A racially-sensitive constitutionalism must always, therefore, hold out the possibility of legitimate dissent from history. Originalism denies that possibility, and so for me, as I suspect for many African-Americans, it speaks in a foreign tongue.

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26. *See* Jamal Greene, Heller *High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 326–27 (2009).
27. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).
28. *Id.* at 40.
29. *See id.*
30. *Id.* at 68.
31. Greene, *supra* note 21, at 74.

POPULAR CONSTITUTIONALISM ON THE RIGHT: LESSONS FROM THE TEA PARTY

CHRISTOPHER W. SCHMIDT†

INTRODUCTION

Within the legal academy over the past decade or so, popular constitutionalism has emerged as an important and often quite controversial theoretical framework for understanding the dynamics of constitutional development.[1] In its strongest and most provocative form, popular constitutionalism demands that the American people play a central role in interpreting the meaning of the Constitution, and that the courts should, to one degree or another, defer to the legitimate constitutional claims of the people and their elected representatives. The Supreme Court is not (or should not be) the final arbiter of constitutional meaning.[2] Ordinary citizens should regularly engage with their Constitution, and they should do so not just in some abstract sense, but in an immediate and active way.[3] Popular constitutionalism, in short, is based on the belief that responsibility for shaping the meaning of the Constitution is not just the province of the courts; it is also a basic duty of the people themselves.

History provides a rich canvas for exploring the record and potential of popular constitutionalism. Much of the work produced by scholars of popular constitutionalism has been efforts to excavate past moments of popular mobilization around constitutional claims. They have examined episodes of U.S. history, identifying ways in which popular demands made upon constitutional text and principles resulted in shifts in general

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1. *See, e.g.*, Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 960 (2004) (describing the popular constitutionalism as an "emerging new discourse" within the legal academy); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2048 n.1 (2010) (citing sources describing popularity of popular constitutionalism among legal academics).

2. This normatively oriented version of popular constitutionalism is found most prominently in the work of Larry Kramer. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 6–7 (2001); *see also, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

3. Kramer, *supra* note 1, at 959 ("In a system of popular constitutionalism, the role of the people is not confined to occasional acts of constitution making, but includes active and ongoing control over the interpretation and enforcement of constitutional law.").

assumptions and expectations about the Constitution.[4] This, in turn, pressured those in positions of official authority—most notably but not exclusively judges—toward new interpretations of the Constitution. Popular constitutionalism thus offers a response to the tension inherent in democratic constitutionalism: between a commitment to popular sovereignty and a commitment to constitutionally entrenched norms that stand above majoritarian decision-making. Through this dynamic of constitutional responsiveness, both the Constitution and the courts benefit. A constitutional system that is responsive to the constitutional commitments of the people serves a crucial legitimating function.[5]

While American history reveals a robust tradition of popular constitutional engagement, popular constitutionalists generally see developments of recent years as reasons for concern. Larry Kramer, whose book *The People Themselves* is the single most prominent contribution to the field of popular constitutionalism, laments that Americans no longer take seriously their responsibility as interpreters of the Constitution.[6] The people have become too deferential to the courts; they have lost a sense of authority over their founding document.[7] In accepting judicial claims of primacy over interpreting the Constitution, the people themselves have abdicated a basic duty of constitutional citizenship.[8]

The modern judiciary—particularly the Supreme Court of recent years—is also to blame for the decline of popular constitutional engagement. Advocates of popular constitutionalism have attacked the Court's efforts to assert a preeminent, even exclusive role in defining the meaning of the Constitution for all of American society.[9] By Kramer's ac-

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4. The bulk of Kramer's book is a close reading of the practice of extrajudicial constitution claim-making and judicial review in the early republic. KRAMER, *supra* note 2 *passim*; *see also* Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); William E. Forbath, *Popular Constitution in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967 (2006); William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165 (2001); Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All"*, 74 J. AM. HIST. 1013 (1987); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004) [hereinafter Post & Siegel, *Popular Constitutionalism*]; Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000) [hereinafter Post & Siegel, *Equal Protection*]; Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

5. On this point, the work of Post and Siegel is essential. *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

6. KRAMER, *supra* note 2, at 227-48.

7. *Id.*

8. *Id.*

9. Recent cases in which the Court has emphasized its exclusive interpretive supremacy on questions of constitutional interpretation include Dickerson v. United States, 530 U.S. 428, 428 (2000); United States v. Morrison, 529 U.S. 598, 616 n.7 (2000); City of Boerne v. Flores, 521 U.S. 507, 524 (1997); Planned Parenthood v. Casey, 505 U.S. 833, 866–67 (1992) ("Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever

count, the Court's repeated claims that it is supreme in defining the meaning of the Constitution, coupled with widespread popular acceptance of these claims, from both left and right, caused "popular constitutionalism [to] fade[] from view" in the post-New Deal period.[10] Popular constitutionalists have called for increased popular engagement with the nation's founding document as an antidote to the problem of judicial supremacy.[11]

As if made to order, we are today witnessing in the Tea Party a political movement that has, to an extent unprecedented in modern American history, placed the Constitution at the center of its reform agenda. This movement has done so with remarkably little concern for the courts and judicial interpretations of the Constitution. As I explain below, Tea Party constitutionalism is premised on a belief that citizens have a responsibility to read their Constitution, to stake out claims about its meaning, and to demand that public officials act in accordance with these claims. The Tea Party, it would seem, is precisely the kind of popular assertion of responsibility over the Constitution that popular constitutionalists had been calling for.

But the Tea Party has hardly been embraced by advocates of popular constitutionalism. The reason is not hard to discern. Although as a formal matter, the theory of popular constitutionalism has no ideological or partisan valence, it has for the most part been advocated by liberals and progressives. It has generally been framed as a critique of recent Supreme Court decisions, particularly those that have served conservative interests.[12] The underlying assumption behind much of the scholarship on popular constitutionalism is that the Supreme Court, at least in recent years and perhaps as a general rule, is more conservative than the populace.[13] Therefore a more democratically responsive constitutional system, a system in which popular claims on the Constitution play a larger role, would generally serve the causes of most concern for liberals

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the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."). The seminal articulation of this principle, prominently referenced in all these recent cases, is Cooper v. Aaron. 358 U.S. 1, 18 (1958) (proclaiming the Supreme Court to be "supreme in the exposition of the law of the Constitution").

10. KRAMER, *supra* note 2, at 223.

11. *See, e.g., id.* at 228–32.

12. Much of the momentum for popular constitutionalism as a scholarly movement derived from (1) the Rehnquist Court's decision in Bush v. Gore, 531 U.S. 98 (2000), *see, e.g.*, KRAMER, *supra* note 2, at 231; Kramer, *supra* note 2, at 153; and (2) the Rehnquist Court's limitations on congressional power under Section 5 of the Fourteenth Amendment in cases such as Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 374 (2001); *Morrison*, 529 U.S. at 616 n.7; Kimel v. Florida Board of Regents, 528 U.S. 62, 81 (2000); Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 637–38 (1999); *City of Boerne*, 521 U.S. at 524; *see, e.g.*, Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003) [hereinafter Post & Siegel, *Juricentric Restrictions*]; Post & Siegel, *Equal Protection*, *supra* note 4, at 441–42.

13. Kramer, *supra* note 2, at 130–31.

and progressives—most notably the promotion of various human rights causes.[14]

So the Tea Party's emergence presents something of a dilemma. Here we have a movement that seems to be doing much of what popular constitutionalists have been calling for. It is claiming independent interpretive authority over the Constitution. It is finding ways in which to act upon its constitutional claims that do not depend upon the courts. Yet the central claim on the Constitution that the Tea Party has embraced is a commitment to sharply limited government. The Tea Party vision of the Constitution is in direct opposition to the idea of the Constitution as a vehicle for the protection of civil rights and social welfare rights that has been at the heart of the popular constitutional project within the legal academy. If this is popular constitutionalism, might it require a reconsideration of some of the assumptions that have driven scholarship on popular constitutionalism?

In this Article, I consider the lessons that the Tea Party offers for scholars of popular constitutionalism. Specifically, I argue that the experience of the Tea Party should spark a reconsideration of some assumptions that tend to drive much of the interest in popular constitutionalism. Some who have embraced popular constitutionalism seem to assume that popular constitutional mobilization is a vehicle particularly well suited for advancing progressive constitutional claims. Alternately, some have assumed that popular constitutionalism has no particular ideological or partisan valence—that it is basically a neutral vehicle for advancing constitution claims of all kinds. But the lessons of the Tea Party might require a rethinking of these assumptions. The Tea Party has shown that, at least on the modern American scene, popular constitutional mobilization is particularly effective at advancing causes much closer to the heart of the conservative or libertarian agenda. Part of the explanation for this has to do with the nature of constitutionalism as well as cultural assumptions prevalent in recent American history. But, more importantly, it has to do

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14. *See, e.g.*, TUSHNET, *supra* note 2, at 181 (defining "populist constitutionalism" as centered on the promotion of human rights);

> In a recent string of decisions invalidating federal civil rights legislation, the Supreme Court has repeated the simple but powerful message: 'The Constitution belongs to the courts'. . . . These decisions break with the judicial practice of the last half century, when the Court employed doctrines of deference to vindicate democratic values in constitutional interpretation, defining the scope of federal power in terms that gave great weight to Congress's judgments about the nation's needs and interests. No longer does the Court emphasize the respect due to the constitutional judgments of a coequal and democratically elected branch of government. Now it claims that only the judiciary can define the meaning of the Constitution.

Post & Siegel, *Juricentric Restrictions*, *supra* note 12, at 1. Most of the historically oriented works on popular constitutionalism have focused on moments in which popular movements advocated for the expansion of federal authority in the name of promoting social welfare and civil rights. *See* KRAMER, *supra* note 2, at 220; *cf.* L.A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855, 887 (2005) (suggesting that "Kramer sees popular constitutionalism only when he approves of the cause").

with the mechanism available for popular constitutional mobilization. These mechanisms serve certain causes better than others, and they serve demands for less government regulation particularly well. This, I suggest, has been the central lesson of the Tea Party for popular constitutionalism.

In Part I of this Article, I examine the basic project of popular constitutionalism, including its normative implications. I explore the challenges popular constitutionalists have had in defining their central concept, and I offer a working definition of popular constitutionalism that identifies what is unique about efforts of constitutional mobilization (as differentiated from social movements that lead to constitutional change). Part II describes the basic tenets of Tea Party constitutionalism. Here I explore the substance of the Tea Party's constitutional vision, the strategies of constitutional interpretation the Tea Party has embraced, and the predominantly extrajudicial processes by which the Tea Party has sought to advance its reading of the Constitution. Part III then considers whether popular constitutionalism advances certain claims on the Constitution better than others. Drawing on the lessons of the Tea Party, I look at those mechanisms that have proven particularly effective at mobilizing and advancing popular constitutional claims, and I question how different kinds of claims might be advanced through these mechanisms. I suggest that there is some evidence to support the hypothesis that popular constitutionalism may be most effective when it is used to advance a conservative-libertarian agenda, such as that of the Tea Party.

I. POPULAR CONSTITUTIONALISM DEFINED

A. The Fundamentals of Popular Constitutionalism

The great contribution of popular constitutionalism scholarship has been to draw our attention to the ideas and commitments of extrajudicial actors on questions of constitutional meaning. By challenging the idea that the Supreme Court is the only—or even the preeminent—authoritative interpreter of the Constitution, popular constitutionalism provides a more accurate description of American constitutional development. This is popular constitutionalism as a descriptive claim.

There is also a normative component to much of popular constitutional scholarship. For some popular constitutionalists, a better appreciation of the importance of the constitutional commitments of the American people and a more skeptical attitude toward the idea of judicial interpretive supremacy points toward an alternative framework for arguing how the constitutional system *should* work. Extrajudicial inputs are not only a fact of life in the American constitutional system, but, according to some advocates of popular constitutionalism, we are better off because of it. We should encourage more popular engagement with the Constitution and its history. Taking this one step further (and here is the most controversial element of popular constitutionalism), some advocates of

popular constitutionalism argue that the courts should do more to recognize and respect extrajudicial constitutional commitments, even when they diverge from judicially defined constitutional law.[15] In this critique of judicial interpretive supremacy, popular constitutional scholarship points toward a normative theory of judicial decision-making. On questions of constitutional interpretation, judges should view themselves in a dialogue with the people and their elected representatives. Some scholars have gone so far as to suggest that the proper attitude of the courts should be one of deference to certain extrajudicial claims on the Constitution.

B. A Working Definition of Popular Constitutionalism

A central challenge in defining popular constitutionalism is to locate something distinctly "constitutional" about social movements that engage in a variety of issues. Simply because a social movement claims that its agenda is supported or inspired by the Constitution or by constitutional principles cannot be enough to turn a social movement into a popular constitutional movement. Or, if this is enough, then the concept of popular constitutionalism has little to no analytical utility.

Drawing on the work of several leading scholars in the field, in this section I offer a working definition of popular constitutionalism. My goal here is not to come up with a categorical framework that conclusively identifies one movement as being properly a popular constitutional movement and another as outside the definition. Such an approach would be of limited utility. Rather, I undertake this definitional project so as to offer a framework by which we can compare different movements in terms most relevant to popular constitutional analysis. The concept, as I define it, is best understood as residing on a two-dimensional spectrum, with one axis representing the "popular" component of the movement, the other representing the "constitutional" component.

The relative "popularity" of a constitutional movement does not reference its level of popular support. Rather, it looks at the movement's relationship to the courts, particularly the Supreme Court. A movement that acts in ways that are largely autonomous from the courts and judicial doctrine would score highly on this scale. A movement that is more deferential to judicial interpretive authority on constitutional questions, such as a litigation-centered movement whose primary mission is to convince the Court to rule a certain way in a constitutional case, would score poorly.

Understood this way, then, a basic component of popular constitutionalism is some level of assumed interpretive autonomy from the judiciary. While a broad-based campaign aimed specifically at convincing

15. *See, e.g.*, Post & Siegel, *Juricentric Restrictions*, *supra* note 12; Post & Siegel, *Equal Protection*, *supra* note 4.

the justices of the Supreme Court to chart a new path of constitutional interpretation is a constitutional movement of a sort, it does not quite capture the essence of popular constitutionalism, at least as that concept has been developed over the past decade or so.[16] For such an approach would seem to grant to the courts the interpretive authority that is rightly that of the activists. The critical actors in this scenario are lawyers and judges, not the people themselves. In contrast, popular constitutionalism, according to Kramer, "does not assume that authoritative legal interpretation can take place only in courts, but rather supposes that an equally valid process of interpretation can be undertaken in the political branches and by the community at large."[17] Kramer, for one, has dismissed the popular constitutional bona fides of most contenders to this label of the past fifty years because they tend to frame their constitutional arguments as challenges "directed *at* rather than against the Court."[18]

I would argue that popular constitutionalism must contain a self-conscious move that is at the center of legal analysis: an effort to make a distinction between law from politics. Specifically, for purposes of defining a popular constitutional movement, an extrajudicial constitutional claim must include some effort to distinguish constitutionality from political or moral advisability—it must at least recognize the possibility that there is a difference between the decision of what makes good or just policy and the measure of a given policy's constitutional status.[19] In formulating their visions of popular constitutionalism, both Mark Tushnet and Larry Kramer have identified some recognition of the law-politics

16. *But see* Post & Siegel, *Popular Constitutionalism*, *supra* note 4, at 1029 ("In contrast to Kramer, we do not understand judicial supremacy and popular constitutionalism to be mutually exclusive systems of constitutional ordering."); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 351 (2001) ("A look at our constitutional history suggests that judicial supremacy is, in important respects, a collaborative practice, involving the Court in partnerships with the representative branches and the People themselves.").

17. Larry D. Kramer, *"The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 700 (2006).

18. KRAMER, *supra* note 2, at 221; *see also* Kramer, *supra* note 17, at 698 n.3 (arguing that recent anti-abortion activism has accepted the principle of judicial supremacy because the state-level legislative restrictions on abortions these activists have advanced have been designed not as assertions of "co-equal authority to say what the Constitution means," but as a way to get the Court to revisit its prior holding in *Roe*).

19. A common criticism of the theory of popular constitutionalism is that it is impossible to distinguish it from social and political activism generally. For example, James Fleming has written:

> All of Kramer's historical examples of popular constitutionalism provide answers to the question of *who* may interpret—and involve rejection of claims that courts rather than other departments or the people themselves are the ultimate or exclusive interpreters of the Constitution. None of them gives us any idea of *what* is the content of the constitutionalism in popular constitutionalism and how it binds and guides the people themselves. Thus, it is not clear that there is any particular content to popular constitutionalism that constrains the people themselves . . . . The upshot of all this is that it is not clear that there is a domain of popular constitutionalism as distinguished from the domains of ordinary politics and justice.

James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1377, 1392 (2005) (emphasis added) (footnote omitted).

divide as a necessary attribute of the concept.[20] In *Taking the Constitution Away from the Courts*, Tushnet insisted that his version of popular constitutionalism (which he labeled "populist constitutional law") must be understood as a *legal* concept.[21]

> The most problematic term here is *law*. How can constitution decisions made away from the courts, particularly by ordinary citizens, be law? . . . [I]t is law because it is not in the first instance either the expression of pure preferences by officials and voters or the expression of unfiltered moral judgments.[22]

Kramer further develops the point: "[P]opular constitutionalism is not mere politics, but is in fact a legal concept that treats the Constitution as 'law' in its proper sense."[23] The key distinction between law and politics is a sense that law "binds and limits" in ways that politics does not: "The law itself encumbers the field of available action."[24] The extent of this constraint is less important than a basic assumption "that applying law differs from doing politics because it includes constraints that do no exist in the political domain."[25]

If we put together these two necessary components of popular constitutionalism—an assumption that constitutional principles function differently from policy and a measure of autonomy from the courts—then it becomes clear that popular constitutionalism is best considered on a spectrum. This spectrum would have on one end an exclusively "juricentric"[26] or "legal constitutionalist"[27] or "catholic"[28] approach to constitutional interpretation, which would include reform efforts aimed exclusively at constitutional litigation. On the other end would be popular constitutionalism in its purest form—popular movements that mobilize around constitutional interpretations that either act as if the Supreme Court is irrelevant or act in direct opposition to existing constitutional

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20. TUSHNET, *supra* note 2, at x–xi; Kramer, *supra* note 17, at 699.

21. TUSHNET, *supra* note 2, at x.

22. *Id.* at x–xi. Tushnet adds that while he identifies "populist constitutionalism" as a legal concept, it still "accords a large place for politics, in two senses: Populist constitutional law gains its content from discussions among the people in ordinary political forums, and political leaders play a significant role in assisting the people [who] conduct those discussions." *Id.* at xi.

23. Kramer, *supra* note 17, at 699.

24. *Id.*

25. *Id.* at 699–700; *see also* KRAMER, *supra* note 2, at 30 (describing eighteenth-century constitutionalism, which serves as a model for Kramer's concept of popular constitutionalism, as "self-consciously legal in nature," albeit with a "notion of legality [that] was less rigid and more diffuse [than modern conceptions]—more will willing to tolerate ongoing controversy over competing plausible interpretations of the constitution, more willing to ascribe authority to an idea as unfocused as 'the people'").

26. Post & Siegel, *Juricentric Restrictions*, *supra* note 12, at 2 ("The juricentric Constitution imagines the judiciary as the exclusive guardian of the Constitution.").

27. Kramer, *supra* note 17, at 699 (distinguishing "popular constitutionalism" from "legal constitutionalism," defined as "the idea that constitutional interpretation has been turned over to the judiciary and, in particular, the Supreme Court").

28. SANFORD LEVINSON, CONSTITUTIONAL FAITH 27–30 (1988).

doctrine (with any modification of that doctrine only an incidental or secondary goal of the constitutional mobilization).

II. TEA PARTY CONSTITUTIONALISM[29]

Part II breaks down the elements of the Tea Party as a constitutional movement. I first offer a brief summary of the emergence of the Tea Party movement. Then I examine the core tenets of Tea Party constitutionalism. I give particular attention to the ways in which the Tea Party's ideas about how best to interpret the Constitution provide a platform for constitution mobilization. I then describe the major areas of activism and mobilization for the Tea Party's constitutional project.

A. The Emergence of the Tea Party Movement

The Tea Party was born in early 2009, when a series of scattered rallies denouncing the Obama Administration's stimulus program (a continuation and expansion of policy begun under the Bush Administration), coalesced into a loosely organized national movement flying the banner of the "Tea Party."[30] (This name always harkened back to the revolutionary protest against British authority, but in the early stages of the movement some supporters also promoted it as an acronym for "Taxed Enough Already.") The Tea Party gained media attention with nationwide protest rallies on tax day, April 15, 2009.[31] It was not clear at this point whether this was going to be a flash in the pan, a brief flurry of anger before people got back to their lives, or whether it had the potential for something more sustained.

By the following summer, with the Tea Party still gaining adherents and energy, its potential political force was put on display when the movement aimed its attention on President Obama's health care reform.[32] Local Tea Party groups, encouraged and guided by a number of national organizations that sought to capture and direct the energy of this growing movement, organized protests at town hall meetings members of Congress were holding around the country to discuss the pending health care legislation.[33] Health care provided a convenient and effective focal point for the second wave of Tea Party activism. When Congress went into its summer recess in August, many of its members held town hall meetings to talk to their constituents.[34] Tea Party leaders targeted these meetings as a way for the Tea Party to get itself heard. As one leader explained in

29. The following section draws on material examined at considerably more lenth in Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L. Q. (forthcoming, 2011).

30. Liz Robbins, *Protesters Air Views on Government Spending at Tax Day Tea Parties Across U.S.*, N.Y. TIMES, Apr. 16, 2009, at A16.

31. *Id.*

32. KATE ZERNIKE, BOILING MAD: INSIDE TEA PARTY AMERICA 83 (2010).

33. *Id.*

34. *Id.*

a strategic memo, Tea Partiers should follow the lessons of Chicago-based community organizer Saul Alinksy: "freeze it, attack it, personalize it, and polarize it."[35] There were two objectives at these meetings: to challenge the Representative and to draw the audience's attention to the fact that the Democratic leadership "is acting against our founders' principles."[36] Tea Partiers indeed attended these meetings in full force, often using disruptive tactics.[37]

September 12, 2009, saw the largest round of Tea Party rallies yet. These were organized in large part by FreedomWorks, a libertarian organization that has aligned itself with the Tea Party, and Glenn Beck, who was launching what he called a "9–12" project.[38]

In 2010, the Tea Party emerged a major force on the national political scene. The year began with Scott Brown's dramatic victory, on January 19, in the special election in Massachusetts to fill the senate seat of Edward Kennedy.[39] Massachusetts showed the Tea Party's ability to bring together grassroots activism and big-money support. The Brown victory foreshadowed the power of the Tea Party as a player in the mid-term elections the following fall. In the coming months, Tea Party-backed candidates would produce numerous upsets in the Republican primaries, and a number of them would go on to win in the November elections.[40]

Although early critics of the Tea Party dismissed it as a an artificial movement, as "Astroturf," as a movement with powerful backers but without real grassroots support, by 2010, the reality that this was a grassroots movement with widespread support became increasingly difficult to deny.[41] *Time* magazine reported in February 2010: "Across the country, from Muskegon, Mich., to Wetumpka, Ala., Tea Party meetings are being convened in restaurants and living rooms and libraries and office buildings—and online. Tea Party thinking has inspired hundreds of websites and Facebook pages."[42] By the spring of 2010, polls found almost one in five Americans identifying themselves as supporting the Tea Party, with four percent of the population saying they had given money to a Tea Party group or attended a Tea Party event.[43] Exit polling at the November 2010 mid-term congressional elections found forty percent of

35. *Id.*
36. *Id.* at 83–84.
37. *Id.* at 84–85.
38. *See id.* at 24–25, 85.
39. *Id.* at 88–92.
40. Alex Altman, *Primary Round-Up: A Tea Party Triumph (Or Two) Is a Win For Dems*, TIME, Sept. 15, 2010.
41. ZERNIKE, *supra* note 32, at 4.
42. David von Drehle, *Why the Tea Party Movement Matters*, TIME, Feb. 18, 2010, http://www.time.com/time/politics/article/0,8599,1964903,00.html.
43. Kate Zernike & Megan Thee-Brenan, *Poll Finds Tea Party Backers Wealthier and More Educated*, N.Y. TIMES, Apr. 15, 2010, at A1 (summarizing a New York Times/CBS News poll).

those who cast their votes saying they were sympathetic to the Tea Party movement.[44] The Tea Party closed 2010 by making the short list for *Time* magazine's "Person of the Year."[45]

B. The Fundamentals of Tea Party Constitutionalism

Attempting to make sense of the Tea Party is no easy task. Although there are a few national Tea Party-affiliated organizations,[46] and a number of national figures who are identified with the movement,[47] the Tea Party has been largely driven by local groups that have popped up around the country over the past two years.[48] Because of its decentralized organization, under its umbrella is a diverse collection of interests and agendas. The Tea Party, like any broad-based social movement, contains many contradictions. Nonetheless, when one focuses on the Tea Party's attitude toward the Constitution, a relatively coherent constitutional vision emerges.

Tea Party constitutionalism revolves around four fundamental assumptions. The first is that the solutions to the problems facing the United States today can be found in the words of the Constitution and the insights of its framers. The Founding period was a special moment, never to be replicated—the Founders were perhaps even divinely inspired. As Tea Party-backed candidate for U.S. Senate, Christine O'Donnell explained in a speech: "When our country's on the wrong track, we search back to our first covenant, our founding documents, and the bold and inspired values on which they were based."[49]

The second fundamental assumption is that the meaning of the Constitution and the lessons of history are readily accessible to American citizens who take the time to educate themselves. The Tea Party rejects hierarchical assumptions about authoritative constitutional interpretation in favor of more individualistic or community-based, decentralized ap-

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44. *Fox Hannity* (Fox News Network television broadcast Mar. 4, 2011).

45. David von Drehle, *2010 Time Person of the Year Runner-Up: Tea Party*, TIME, Dec. 15, 2010, http://www.time.com/time/specials/packages/article/0,28804,2036683_2037118_2037102,00.html; *see also TODAY Viewers Want Chilean Miners to Win TIME Title*, TODAY (Dec. 10, 2010, 3:37 PM), http://today.msnbc.msn.com/id/40609817/ns/today-today_celebrates_2010/#.

46. The most prominent of these include: Tea Party Patriots, Tea Party Nation, and FreedomWorks. Various local groups, such as the Chicago-based Sam Adams Alliance, have gained a level of national prominence. The Tea Party Express, which is basically a conservative Republican fund-raising group that targets certain electoral races, has also gain considerable influence. And there are also various political action committees—such as the Koch-backed Americans for Prosperity, that have effectively tapped into the Tea Party fervor. *See* von Drehle, *supra* note 44.

47. Glenn Beck is perhaps the most prominent single individual associated with the Tea Party. Other significant figures include Sarah Palin, Ron Paul, and Michelle Bachmann. *See* Lydia DePillis, *The Tea Party Glossary: Everything You Need to Know About the Movement, From Nuts to Nuts*, NEW REPUBLIC (Feb. 3, 2010, 11:50 PM), http://www.tnr.com/article/politics/the-tea-party-glossary.

48. *The Rise of the Tea Party*, THE WEEK (Feb. 10, 2010, 11:36 AM), http://theweek.com/article/index/106173/the-rise-of-the-tea-party.

49. Christine O'Donnell, Speech at the 2010 Values Voter Summit (Sept. 16, 2010), *available at* http://www.huffingtonpost.com/2010/09/17/christine-odonnell_n_721382.html.

proaches. Tea Party constitutionalism is premised on a commitment to citizen empowerment. "Because YOU are the Government" reads the motto of the Independence Caucus, a Utah-based group that has circulated a list of questions designed to be given to potential candidates for public office that tests their commitment to conservative constitutionalism.[50] A foundational premise of Tea Party constitutionalism is that individual citizens can read the document for themselves, come to conclusions about constitutional meaning based on this reading, and act upon these convictions.

The corollary of this belief in the accessibility of the Constitution, and the third basic assumption of the Tea Party's constitution vision, is a commitment to the idea that all Americans, not just lawyers and judges, have a responsibility to understand the Constitution and to act faithfully toward it. The Constitution is accessible. As Dick Armey, former House Majority leader and now Chairman of FreedomWorks, likes to tell audiences: "If you don't understand the Constitution, I'll buy you a dictionary."[51] A popular Tea Party bumper sticker reads: "I have this crazy idea that the Constitution *actually means something*."[52] One of the most notable aspects of Tea Party constitutionalism is the relatively minor place the Tea Party allows for the courts in discussing constitutional issues. The preferred battleground for the Tea Party's project of constitutional reconstruction is not the courts.[53] Rather, the Tea Party has made its efforts in the area of educational outreach, state-level political mobilization, and national electoral politics.

The fourth fundamental tenet of Tea Party constitutionalism involves the movement's substantive idea of what the Constitution actually means. At the heart of the Tea Party's vision is a belief that the overarching purpose of the Constitution is to ensure that the role of government, and particularly the federal government, is limited. Only by following constitutionally defined constraints on government can individual liberties be preserved. In the words of Tea Party favorite Senator Rand Paul of Kentucky, "belief in self-reliance, limited government and the Consti-

50. INDEPENDENCE CAUCUS, http://www.ourcaucus.com (last visited Apr. 15, 2011).

51. ZERNIKE, *supra* note 32, at 67; *see also* ANGELO M. CODEVILLA, THE RULING CLASS: HOW THEY CORRUPTED AMERICA AND WHAT WE CAN DO ABOUT IT 44 (2010) (all that is needed to understand the meaning of the Constitution is "the dictionary and grammar book").

52. *Political Bumper Stickers*, LIBERTY STICKERS, http://www.libertystickers.com/product/I_have_crazy_idea_the_constitution_MB (last visited Apr. 15, 2011).

53. The relative inattention to the courts reflects a general sense among Tea Party supporters that the Supreme Court is simply not on their side. *See, e.g.*, CODEVILLA, *supra* note 50, at 42–43 (attacking the courts as having a "[d]isregard for the text of laws, for the dictionary definition of words and the intentions of those who wrote them" and enforcing a "Constitution imagined by the judge and supported by the ruling class"); MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA 32 (2005).

tution hold the keys to fixing our problems and getting our nation back on track."[54]

Conservative columnist Charles Krauthammer neatly summarizes the assumptions underlying Tea Party constitutionalism:

> What originalism is to jurisprudence, constitutionalism is to governance: a call for restraint rooted in constitutional text. Constitutionalism as a *political* philosophy represents a reformed, self-regulating conservatism that bases its call for minimalist government—for reining in the willfulness of presidents and legislatures—in the words and meaning of the Constitution. . . . In choosing to focus on a majestic document that bears both study and recitation, the reformed conservatism of the Obama era has found itself not just a symbol but an anchor.[55]

Here are all the basic elements of the Tea Party's constitutional vision: the Constitution as a framework for "minimalist government"; the Constitution invites individual "study and recitation"; the Constitution's "words and meaning" are self-evident; the Constitution as "an anchor" holding the nation fast to its founding principles.

C. Constitutional Interpretation as Social Mobilization

Tea Party constitutionalism has also coalesced around a particular method of constitutional interpretation, namely originalism. This is a notable development because the most prominent arguments in defense of originalism have emphasized the ways in which it supposedly constrains judges. Originalism, this argument goes, relies upon tools of constitutional analysis that are particularly suited to judges. It insulates judges from relying upon their own value judgments when interpreting the Constitution better than any other interpretive approach. Yet the version of populist originalism that the Tea Party has embraced has detached the case for originalism from concerns with judicial restraint. For the Tea Party, originalism is a tool of extrajudicial constitutional mobilization.

Radio show host Mark Levin in his 2009 best-seller, *Liberty and Tyranny*, lays out the basic case for originalism as a tenet of movement conservatism:

> The Conservative is an *originalist*, for he believes that much like a contract, the Constitution sets forth certain terms and conditions for governing that hold the same meaning today as they did yesterday and should tomorrow. It connects one generation to the next by restraining the present generation from societal experimentation and

54. Rand Paul, *Rand Paul, Libertarian? Not Quite*, USA TODAY (Aug. 9, 2010, 6:13 PM), http://www.usatoday.com/news/opinion/forum/2010-08-10-column10_ST2_N.htm.

55. Charles Krauthammer, Op-Ed, *Constitutionalism*, WASH. POST, Jan. 7, 2011, at A19.

> government excess. There really is no other standard by which the Constitution can be interpreted without abandoning its underlying principles altogether.[56]

In various forms, this basic defense of originalism as an act of national fidelity and a call to arms echoes throughout the Tea Party movement. The Constitution "meant one thing when it was written, and it still means the same thing," declared a speaker at an April 2009 Tea Party rally in Athens, Texas.[57] "It's up to us to light a fire under our fellow citizens."[58]

Perhaps no major figure of the Tea Party has done more to insist that the Founders must be at the forefront of contemporary policy discussions than Glenn Beck. "In order to restore our country," he has said, "we have to restore the men who founded it on certain principles to the rightful place in our national psyche."[59] Beck has called for a "Refounding."[60] The Beck-inspired "9–12 Project" has identified nine principles for its followers, each supported with a quotation from Jefferson or Washington.[61] The group also calls on its followers to meet regularly with family and neighbors to discuss the importance of the Founders' design for America.[62] "When you read these guys [the Founders], it's alive," Beck once said on his show. "It's like, you know, reading the scriptures. It's like reading the Bible. It is alive today. And it only comes alive when you need it."[63]

This last point—that the Founders and the Constitution they drafted is "alive today"—is central to Tea Party ideology.[64] For the Tea Party, the Founders' ideas and personalities are present with us today. Their portraits, their words, even their modern avatars (in the form of historical re-enactors) are regularly found at Tea Party events. The Founders are also generally portrayed as comfortable companions. They are not only admirable and likable, but they also tend to agree with the Tea Party.[65]

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56. MARK R. LEVIN, LIBERTY AND TYRANNY: A CONSERVATIVE MANIFESTO 36 (2009).

57. Lauren Ricks, *Anyone for T.E.A.?: 300 Gather at County Courthouse to Protest More Taxes*, ATHENS DAILY REV., Apr. 16, 2009, *available at* Westlaw ATHENSDLY.

58. *Id.* "I came because I want our country restored to our founding principles," explained an attendee at the rally. *Id.*

59. JILL LEPORE, THE WHITES OF THEIR EYES: THE TEA PARTY'S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY 156 (2010) (quoting *The Glenn Beck Show* (Fox News television broadcast Apr. 30, 2010)).

60. *Glenn Beck Reveals the Plan*, GLENN BECK (Nov 26, 2009, 3:19 AM), http://www.glennbeck.com/content/articles/article/198/33398.

61. *9 Principles, 12 Values*, THE 9-12 PROJECT, http://the912-project.com/about/the-9-principles-12-values/ (last visited Apr. 15, 2011).

62. *Our Mission*, THE 9-12 PROJECT, http://www.the912project.com/2009/03/24/mission-statement-2/ (last visited Apr. 15, 2011).

63. LEPORE, *supra* note 59, at 157 (quoting *The Glenn Beck Show* (Fox News television broadcast May 7, 2010)).

64. *See* Adam Liptak, *Tea-ing Up the Constitution*, N.Y. TIMES, Mar. 14, 2010, at WK1.

65. *See, e.g.*, Adam Nagourney, *Tea Party Choice Scrambles in Taking on Reid in Nevada*, N.Y. TIMES, Aug. 18, 2010, at A1 (writing that Sharron Angle, in response to Harry Reid's criticism that she was too conservative, suggested that "they probably said that about Thomas Jefferson and George Washington and Benjamin Franklin. And truly, when you look at the Constitution and our

Furthermore, the Founders, by most Tea Party accounts, were in basic agreement on the key points. The Founders were remarkable not only for the force of their ideas, but also for their general agreement upon these ideas. "One of the most amazing aspects of the American story," wrote W. Cleon Skousen, the late ultra-conservative conspiracy theorist whose work has become widely influential in the Tea Party,[66] "is that, while the nation's Founders came from widely divergent backgrounds, their fundamental beliefs were virtually identical."[67]

Thus we can see in the Tea Party the transformation of originalism from a method of constitutional interpretation whose primary attribute was its claimed ability to limit judges into a method of constitutional interpretation that has become a focal point for a movement that has largely ignored the courts in promulgating its various constitutional claims. Originalism in its populist form has become an act of respect, even reverence, for the Founding generation. Populist originalists emphasize the accessibility of Founding Era history, offering clear and consistent answers to the most pressing dilemmas of modern America. This may not be good history, but it offers a powerful tool for constitutional mobilization.

D. The Process of Constitutional Mobilization

One of the most important contributions of the Tea Party movement for scholars of popular constitutionalism is that it has demonstrated the viability of various extrajudicial mechanisms of popular constitutional claim-making.[68] In this section, I examine the mechanisms by which the Tea Party has sought to inject its constitutional vision into popular consciousness and political practice. I categorize these mechanisms into three categories: (1) the Tea Party's promotion of its constitutional vision through educational outreach efforts; (2) state-level Tea Party activism, including lobbying for state "sovereignty" and nullification measures; and (3) national electoral politics, particularly the 2010 congressional elections, which provided the Tea Party a platform for pursuing its constitutional vision through the electoral process.

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founding fathers and their writings . . . you might draw those conclusions: That they were conservative. They were fiscally conservative and socially conservative").

66. On Skousen's influential role in the Tea Party, see generally Sean Wilentz, *Confounding Fathers: The Tea Party's Cold War Roots*, NEW YORKER, Oct. 18, 2010; see also Jeffrey Rosen, *Radical Constitutionalism*, N.Y. TIMES MAG., Nov. 26, 2010, at 34.

67. W. CLEON SKOUSEN, THE MAKING OF AMERICA: THE MEANING AND SUBSTANCE OF THE CONSTITUTION 10 (1985).

68. Various commentators have noted that the popular constitutionalists have been short on concrete descriptions of "the particular institutional mechanisms that would make their vision a reality in today's world." David L. Franklin, *Popular Constitutionalism as Presidential Constitutionalism?*, 81 CHI.-KENT L. REV. 1069, 1069 (2006); *see also* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2049–50 (2010); Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 WASH. U. L. REV. 313, 321 (2008).

1. Educational Outreach

Premised on the idea that the Constitution is a document that is readily accessible to all Americans and a belief that higher levels of constitutional consciousness will naturally support their cause, national and local Tea Party groups have sought to promote constitutional literacy among the citizenry. "We need to talk about and learn about the Constitution daily," said Jeff Luecke, a Tea Party organizer from Dubuque, Iowa, expressing a commonplace sentiment among the Tea Party faithful.[69] Glenn Beck regularly rails against the lack of schooling about the Constitution,[70] and he has called on his listeners to act as a "constitutional watchdog for America."[71] "Only citizens' understanding of and commitment to law can possibly reverse the patent disregard for the Constitution and statutes that has permeated American life," writes Angelo Codevilla, the author of a widely discussed recent populist conservative manifesto.[72] One Tea Party-affiliated campaign—called "Save the Constitution—Read It!"—promotes a six-point constitutional commitment plan:

> 1. Commit to reading the Constitution today and reviewing it often.
>
> 2. Make a goal and write it down.
>
> 3. Mark your calendar to review the Constitution on the 17th of each month.
>
> 4. Tell a friend about your goal.
>
> 5. Better yet, read it with a friend.
>
> 6. Place pocket Constitutions in your car or near your favorite chair.[73]

The Tea Party Patriots sell an "Official Tea Party Patriots' Coloring & Activity Book" for children.[74] According to their website, "[i]nspired by the principles of Freedom and Liberty immortalized in the United States Constitution . . . the book includes a simple and fun emphasis on funda-

69. Philip Rucker & Krissah Thompson, *Two New Rules Will Give Constitution a Starring Role in GOP-Controlled House*, WASH. POST (Dec. 30, 2010, 10:57 AM), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/29/AR2010122901402.html.

70. *See* Bradford Plumer, *The Revisionaries*, THE NEW REPUBLIC, Sept. 2, 2010, at 16.

71. Ian Millhiser, *Rally 'Round the True Constitution'*, AMER. PROSPECT, Aug. 25, 2009, http://prospect.org/cs/articles?article=rally_round_the_true_constitution.

72. CODEVILLA, *supra* note 51, at 84.

73. *Commit*, SAVE THE CONSTITUTION READ IT!, http://www.saveitreadit.org./page/ commit.php (last visited Apr. 15, 2011).

74. *Coloring Book*, TEA PARTY PATRIOTS, http://www.teapartypatriots.org/coloringbook.aspx (last visited Apr. 15, 2011).

mental freedoms and is part of a long term effort to educate the next generation of children on the basics of American liberty."[75]

Tea Party activists often compare their constitution classes to Catholic catechism[76] or Bible study.[77] They often proudly carry copies of the Constitution, and pocket copies are regularly distributed at Tea Party events.[78] A group called Let Freedom Ring holds public readings of the Constitution,[79] and some Tea Party groups have requested opportunities to go into schools to talk about the Constitution.[80]

2. State-Level Constitutional Mobilization

The second category of constitutional activity is state-level mobilization. This has included campaigns to get state legislatures to pass "sovereignty resolutions"—statements asserting a commitment to the principle of state sovereignty as recognized in the Tenth Amendment of the Constitution.[81] Some states have even gone so far as to declare the right to nullify federal policy that the state legislature deems unconstitutional.[82] Another element of state-level constitutional activism is efforts to mobilize support for certain Tea Party-favored amendments to the Constitution.

The mobilization of states' rights ideology and even the possibility of state nullification of federal policy has been one of the most controversial elements of the Tea Party's constitutional project. The Tea Party's embrace of these state-level projects of resistance to federal policy is significant not only because of the way they align with the movement's constitutional vision, but also because they provide an arena for constitutionally driven political mobilization that offers near-term, feasible targets, and the possibility of occasional victories. "We didn't get

75. *Id.*

76. ZERNIKE, *supra* note 32, at 79.

77. Rucker & Thompson, *supra* note 69 (describing Beth Mizell, a local Tea Party organizer, comparing weekend classes on the Constitution to a church Bible study); Jill Lepore, *The Commandments: The Constitution and Its Worshippers*, NEW YORKER, Jan. 17, 2011, at 76 ("Many people are now reading [the Constitution], with earnestness and dedication, often in reading groups mode[l]ed on Bible study groups.").

78. ZERNIKE, *supra* note 32, at 67; Bill Donahue, *The Calling Chuck Henthorn Led Ohio Tea Partiers to the Glenn Beck Rally: Can Their Vision Of Patriotism—Duty And God's Marching Orders—Reshape America?*, WASH. POST, Oct. 24, 2010, at W09; Mara Liasson, *Tea Party: It's Not Just Taxes, It's the Constitution*, NPR, (July 14, 2010), http://www.npr.org/templates/story/story.php?storyId=128517427; Plumer, *supra* note 70, at 17.

79. Plumer, *supra* note 70, at 16.

80. *Id.*

81. Kathy Kiely, *Some States Pass Sovereignty Measures*, USA TODAY (May 17, 2009, 5:05 PM), http://www.usatoday.com/news/nation/2009-05-14-secede_N.htm#; *see also The 10th Amendment Nullification Movement*, TENTH AMENDMENT CENTER, http://www.tenthamendmentcenter.com/the-10th-amendment-movement/ (last visited Apr. 15, 2011).

82. Jack Kenny, *N.H. House Asserts State's Right to Nullify Federal Laws*, THE NEW AMERICAN (Mar. 31, 2011, 7:30 PM), http://www.thenewamerican.com/usnews/constitution/6935-nh-house-claims-states-right-to-nullify-federal-laws.

involved just to scream and shout; we actually have things that we'd like to accomplish," explained a local Tea Party activist in Tennessee who came to his state's capital to demand that the legislature attend to the Tea Party's concerns.[83] Even if these campaigns are often dismissed as merely symbolic, the states nonetheless provide a powerful forum for ongoing popular mobilization of the Tea Party's constitutional agenda.

The Tea Party's promotion of state-level resistance to federal authority began in a rather haphazard, even farcical manner, but has since developed into a standard element of its larger constitutional project. Texas governor Rick Perry gained headlines when, at a Tea Party rally in the spring of 2009, he went so far as to suggest secession as a possible remedy for an overreaching federal government.[84] As talk of Texas seceding from the union died down, a basic pattern of Tea Party mobilization in the state legislatures developed. The first step was a round of generic "state sovereignty" resolutions. A popular model resolution has been promoted by the Tenth Amendment Center: the non-binding "10th Amendment Resolution."[85] It includes some rather prosaic Tea Partyesque rhetoric—a statement that sovereignty resides in the people, not the government; the text of the Tenth Amendment; a reference to unnamed federal "powers, too numerous to list for the purposes of this resolution, [which] . . . infringe on the sovereignty of the people of this state" and may be unconstitutional.[86] It also includes some stronger language—a demand that the federal government "cease and desist any and all activities outside the scope of their constitutionally-delegated powers"; a resolution to form a committee "to recommend and propose legislation which would have the effect of nullifying specific federal laws and regulations"; a call for the creation of a "committee of correspondence" to rally support for these principles in other states.[87]

The next step of the Tea Party's state-level constitutional project has been the passage of state laws aimed at nullifying specific federal regulatory policies. The primary target here has been the health care law, although federal policies relating to the regulation of guns and medical marijuana have also been challenged through nullification resolutions. Even before passage of the federal health care bill in early 2010, local Tea Party groups were calling upon their state legislatures to take a stand against the looming possibility of a national health care program. A January 2010 rally in Missouri saw numerous state officials expressing support for an amendment to the state constitution prohibiting enforce-

83. Cara Kumari, *Tea Partiers Tell Lawmakers To Deliver*, WSMV (Jan. 12, 2011, 9:40 PM), http://www.wsmv.com/politics/26471655/detail.html.

84. W. Gardner Selby & Jason Embry, *Perry Stands by Secession Idea, Says He Won't Push It*, AUSTIN AMERICAN-STATESMAN, Apr. 17, 2009, at A01.

85. *10th Amendment Resolution*, TENTH AMENDMENT CENTER, www.tenthamendmentcenter.com/10th-amendment-resolution/ (last visited Apr. 15, 2011).

86. *Id.*

87. *Id.*

ment of the individual mandate.[88] After the health care bill was signed into law, several states passed statutes expressing opposition to the law; some even went so far as to refuse to enforce the law.[89] Virginia was the first to do so, passing its nullification law on March 4, 2010.[90] At this time, thirty-six other states were considering similar legislation.[91] These nullification resolutions were based on a template being circulated by the American Legislative Exchange Council (ALEC), titled the "Freedom of Choice in Healthcare Act."[92] By the end of 2010, the model legislation had been introduced or announced in forty-two states; six states (Virginia, Idaho, Arizona, Georgia, Louisiana, Missouri), had passed versions of the bill; and two (Arizona and Oklahoma) had passed the bill as a constitutional amendment.[93] In early 2011, Tennessee passed a law that would allow residents to choose to opt-out of the health care mandate.[94]

When it comes to opposing the constitutionality of federal policy, nullification laws have obvious attractions from a movement mobilization perspective. "Nullification Begins With You," explains a Tenth Amendment Center brochure designed to promote its "Nullify Now Tour."[95]

> Nullification is not something that requires any decision, statement or action from any branch of the federal government. Nullification is not the result of obtaining a favorable court ruling.
>
> . . . .
>
> Nullification is not the petitioning of the federal government to start doing or to stop doing anything. Nullification doesn't depend on any

88. THOMAS E. WOODS, NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY 122 (2010).

89. Becky Bohrer, *Alaska Gov. Refusing to Enact Health Care Law*, MSNBC (Feb. 17, 2011, 5:44 PM), http://www.msnbc.msn.com/id/41651066/#.

90. Act of March 10, 2010, ch. 106, 2010 Va. Acts 106 (adding § 38.2-3430.1.1 to the Virginia Code: "No resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage . . . . .") (codified at VA. CODE ANN. § 38.2-3430.1.1 (2010)).

91. Chelsey Ledue, *Virginia is the First State to Pass National Healthcare Nullification Law*, HEALTHCARE FINANCE NEWS (Mar. 5, 2010), http://www.healthcarefinancenews.com/news/ virginia-first-state-pass-national-healthcare-nullification-law.

92. *ALEC's Freedom of Choice in Health Care Act*, AM. LEGISLATIVE EXCHANGE COUNCIL, http://www.alec.org/AM/Template.cfm?Section=FOCA&Template=/CM/HTMLDisplay.cfm&ContentID=15323 (last visited Apr. 3, 2011).

93. *Id.*; *see also* David Lightman, *All Over Map on Health Care*, CHI. TRIBUNE, Feb. 22, 2011, at C4.

94. *State House Passes Health Freedom Act*, THE CHATTANOOGAN.COM (Mar. 7, 2011), http://www.chattanoogan.com/articles/article_196197.asp. The newest state-level tactic being pursued is the creation of an interstate compact that, if it received congressional approval, would exempt member states from participation in the national health care program. *See* Fred Barnes, *Nullifying Obamacare*, THE WEEKLY STANDARD (Jan. 3, 2011), http://www.weeklystandard.com/articles/nullifying-obamacare_524862.html; *The Compact-Health Care Compact*, HEALTHCARE COMPACT, http://www.healthcarecompact.org/compact.

95. *Nullifying Federal Mandates*, TENTH AMENDMENT CENTER, http://www.tenthamendmentcenter.com/wp-content/uploads/brochures/Nullification-Brochure.pdf.

> Federal law being repealed. Nullification does not require permission from any person or institution outside of one's own State.[96]

One of the constant challenges of constitutional mobilization is keeping a sense of purpose and forward momentum to the cause. Constitutional change can be so slow, the realization of constitutional goals often seem impossibly distant. Lobbying state legislatures to stand up for their Tenth Amendment rights has proven a particularly effective way in which the Tea Party addressed this challenge.

3. National Politics

The third area of Tea Party constitutional activism I consider takes place in the arena of national electoral politics. The plan here is straightforward: to make fidelity to the Constitution a central qualification for elected office. The constitutional principle of limited federal power can be effectuated simply by demanding that members of Congress recognize their constitutional responsibilities—and voting them out of office if they fail to do so. One of the Tea Party's goals was to transform the elections into a debate over the appropriate scope of congressional power under the Constitution. Thus far, it is here, in congressional politics, that the Tea Party's constitutional agenda has had its most significant impact.

"It is becoming apparent to millions of voters the solution lies in electing officials who understand, respect and abide by the Constitution as much as we citizens are expected to follow the law," explained longtime conservative fundraiser Richard Viguerie.[97] FreedomWorks Chairman Dick Armey's basic advice to the newly elected Tea Party-supported members of Congress is quite simple:

> Look to the Constitution to govern your policy. You do not swear an oath to the Republican Party or the tea party—your pledge is to defend the Constitution. Let this govern your votes. The Constitution was designed to limit government power, so make sure your votes go only to bills that are right and necessary.[98]

The Independence Caucus, an organization that describes itself as a "national citizens organization" and has been aligned with local Tea Party groups, created a lengthy list of yes-or-no "vetting questions" for congressional candidates.[99] It is basically a test of Tea Party bona fides, designed to measure a candidate's commitment to the Independence

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96. *Id.*

97. Richard Viguerie, *Constitutionally, the Next Time*, WASH. TIMES (Nov. 23, 2009, 5:45 AM), http://www.washingtontimes.com/news/2009/nov/23/constitutionally-the-next-time/.

98. Dick Armey, *Stay True to Principle — and the Constitution*, POLITICO (Jan. 18, 2011, 04:25 AM), http://www.politico.com/news/stories/0111/47697.html.

99. *See The Process: Vetting Questions*, INDEPENDENCE CAUCUS, http://www.icaucus.org/vetting-process/the-questions (last visited June 29, 2011).

Caucus's mission of promoting limited government, fiscal responsibility, and "adherence to constitutional authority."[100]

Mike Lee, newly elected U.S. Senator from Utah and a Tea Party favorite, has been quite explicit in talking about the constitutional commitments he, as an elected representative, would feel compelled to follow, regardless of existing judicial doctrine. In a speech to the Federalist Society in November 2010, soon after his election victory, Lee stated, that the solution to federal overreach lies in focusing on the political branches. Members of Congress must take more responsibility for the Constitution, he explained. They must not forget the fact that

> under Article VI, each member of Congress is required to take an oath to uphold the Constitution. In my mind, that means more than doing that which you can get away with in court. . . . [M]embers of Congress need to be held accountable, and need to hold themselves accountable, to their oath, regardless of what the courts might be willing to enforce—that that needs to become part of the American political discourse.[101]

When the new Republican House majority was installed in early 2011, one of the most publicized changes was to require that all federal laws specify the constitutional basis for congressional authority.[102] This was a proposal the Tea party had advocated during the 2010 elections.[103] The reason this requirement gained so much traction has much to do with a moment in the fall of 2009 during the height of the debate over the federal health care bill. At a press conference held by House Speaker Nancy Pelosi, a reporter from a conservative news organization asked the Speaker where in the Constitution she found the basis for the individual mandate provision of the health care bill.[104] "Are you serious? Are you serious?" she asked.[105] When the reporter responded in the affirmative, she shook her head and moved on to another questioner.[106] This confrontation, and Pelosi's dismissive attitude toward the question of the law's

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100. *Mission Statement*, INDEPENDENCE CAUCUS, http://www.icaucus.org/index.php?option=com_content&view=article&id=51&Itemid=81 (last visited Apr. 19, 2011).

101. Senator-Elect Michael S. Lee, Address to 2010 National Lawyers Convention (Nov. 19, 2010), *available at* http://www.fed-soc.org/audioLib/LeeAddress-11-19-10.mp3.

102. *See, e.g.*, Rucker & Thompson, *supra* note 69.

103. *See About Us*, CONTRACT FROM AMERICA, http://www.thecontract.org/aboutus (last visited Apr. 19, 2011). The Contract From America was created by Ryan Hecker, an activist affiliated with the Houston Tea Party Society. The proposal was also included in the Republican Pledge to America, which the party rolled out during the 2010 elections. Republicans in Congress, *A Pledge to America: A New Governing Agenda Built on the Priorities of our Nation, the Principles We Stand For, & America's Founding Values*, http://pledge.gop.gov/resources/ library/documents/pledge/a-pledge-to-america.pdf ("We will require each bill moving through Congress to include a clause citing the specific constitutional authority upon which the bill is justified.").

104. Matt Cover, *When Asked Where the Constitution Authorizes Congress to Order Americans To Buy Health Insurance, Pelosi Says:'Are You Serious?'*, CNSNEWS.COM (Oct. 22, 2009), http://www.cnsnews.com/news/article/55971.

105. *Id.*

106. *Id.*

constitutionality, has been referenced again and again in Tea Party literature.[107] It is regularly cited as clear evidence that the Democratic leadership was playing fast and loose with the Constitution, ignoring conservative concerns that health care and other measures pushed beyond the boundaries of Congress's constitutionally enumerated powers.

The House Tea Party Caucus began a high-profile Constitution study group, not unlike the ones that have popped up around the nation with the encouragement of local Tea Party groups. Michelle Bachmann, U.S. Representative from Minnesota and founder of the Tea Party Caucus, organized a series of what she called "Conservative Constitutional Seminars" for members of Congress.[108] The class became a major news story before it even began, when Bachmann announced that Justice Scalia would lead the group's first meeting.[109]

There was also the highly publicized reading of the Constitution from the floor of the House of Representatives at the start of the term of the 112th Congress—the first time this had ever been done in the history of the House.[110] Republican Congressman Bob Goodlatte of Virginia, a fiscal conservative and staunch opponent of the health care bill,[111] initiated the idea. "One of the resounding themes I have heard from my constituents is that Congress should adhere to the Constitution and the finite list of powers it granted to the federal government," he said in a press release.[112] "As the written expression of the consent the American people gave to their government—a consent with restrictions and boundaries—the public reading of the Constitution will set the tone for the 112th Congress."[113] "Call it the tea party-ization of Congress," *Washington Post*

107. *See, e.g.*, CODEVILLA, *supra* note 51, at 45; WOODS, *supra* note 88, at 1; Ken Klukowski, *Letter to the Editor*, POLITICO (Oct. 28, 2009, 05:09 PM), http://www.politico.com/news/stories/1009/28787.html ("Yes, Madame Speaker, I'm serious. The individual mandate is unconstitutional. If Obamacare passes, we'll see you in court.").

108. *Justice Scalia to Address Conservative Constitutional Seminar*, CONGRESSWOMAN MICHELE BACHMANN (Dec. 15, 2010), http://bachmann.house.gov/News/DocumentSingle.aspx?DocumentID=217599; Gabriella Schwarz, *Congress To Be Schooled*, CNN.COM (Dec. 15, 2010, 11:24 PM), http://politicalticker.blogs.cnn.com/2010/12/15/congress-to-be-schooled-2/#more-139906.

109. Editorial, *Justice Scalia and the Tea Party*, N.Y. TIMES, Dec. 18, 2010, at WK7; Schwarz, *supra* note 108. On January 24, Scalia talked at the seminar. According to reports of some who attended, Scalia gave his trademark defense of originalism and urged the lawmakers to read the Federalist Papers and to follow the Constitution as it was written. David G. Savage & Kathleen B. Hennessey, *Scalia Gives Talk on Constitution to Members of House*, CHI. TRIBUNE, Jan. 25, 2011, at C12.

110. Felicia Sonmez, *Constitution Day: House Holds First-Ever Floor Reading of Founding Document*, WASH. POST (Jan. 6, 2011, 11:45 AM), http://voices.washingtonpost.com/44/2011/01/constitution-day-house-to-hold-1.html.

111. As Goodlatte wrote in defending his opposition to the health care bill: "All Americans should be worried anytime the federal government tries to trample on or ignore our Constitution . . . ." *The Wrong Prescription for America*, CONGRESSMAN BOB GOODLATTE (Mar. 26, 2010), http://goodlatte.house.gov/2010/03/the-wrong-prescription-for-america.shtml.

112. *Goodlatte to Lead Historic Reading of U.S. Constitution on House Floor*, CONGRESSMAN BOB GOODLATTE (Jan. 4, 2011, 02:33 PM), http://goodlatte.house.gov/2011/01/goodlatte-to-lead-historic-reading-of-us-constitution-on-house-floor.shtml.

113. *Id.*

reporters wrote about the newfound congressional fascination with the Constitution.[114] "After handing out pocket-size Constitutions at rallies, after studying the document article by article and after demanding that Washington return to its founding principles, tea party activists have something new to applaud. A pillar of their grass-roots movement will become a staple in the bureaucracy that governs Congress."[115]

By turning to congressional elections and lawmaking as an arena of constitutional contestation, the Tea Party has found a way in which everyday citizens can stake out constitutional claims and then demand, in a relatively direct manner, that government abide by these constitutional principles. This approach to constitutionalism is far more empowering and far more effective as a tool of movement mobilization than working through the courts. Although critics often dismiss these Tea Party-inspired episodes and reforms as little more than publicity stunts, they have been effective at keeping the Tea Party's constitution claims in the public eye. The Tea Party has achieved something considerable in creating a viable popular constitutional movement—a movement that has been able, for the most part, to avoid becoming dependent on the outcomes of constitutional litigation but at the same time has had considerable success in keeping its agenda focused on the Constitution's text and its history.

III. LESSONS FROM THE TEA PARTY

In its self-conscious commitment to extrajudicial constitutional interpretation, the Tea Party offers one of the clearest demonstrations of the dynamics of popular constitutionalism in modern American history. This still-unfolding movement might offer valuable lessons about the capacities and limitations of popular constitutional mobilization.

In this section, I will explore one possible lesson that emerges from the Tea Party case study. The hypothesis I will consider is that (1) popular constitutionalism is better suited to advancing certain kinds of constitutional claims over others, and that (2) the Tea Party experience suggests that popular constitutional mobilization can be particularly effective in advancing the small-government, anti-regulation agenda that is at the heart of the modern conservative-libertarian movement.

In pursuing this hypothesis, I am challenging an assumption prevalent within popular constitutional scholarship. Scholarship on popular constitution has had something of a leftward tilt. Most of the most enthusiastic proponents of popular constitutionalism in the legal academy self-identify as political liberals or progressives.[116] They envision popular

114. Rucker & Thompson, *supra* note 69.

115. *Id.*

116. This observation is explored in Lee J. Strang, *Originalism as Popular Constitutionalism?: Theoretical Possibilities and Practical Differences*, 86 NOTRE DAME L. REV. (forthcoming 2011),

engagement with the Constitution as an antidote to a Supreme Court that, for reasons having to do both with the ideological commitments of particular justices and the institutional constraints of the judiciary, has too often blocked progressive reforms favored by the elected branches and by popular movements.[117] Popular constitutionalism is thus assumed to offer an attractive oppositional force to a Supreme Court that today and perhaps more generally (with the Warren Court as an aberrational moment) is basically a conservative institution. In treating popularly based constitutional commitments as oppositional to a conservative judiciary, popular constitutionalists assume that popular constitutional mobilization is well suited to the kinds of claims favored by progressives. Or, at minimum, they assume that popular constitutionalism provides ideologically neutral mechanisms through which all kinds of constitution claims—those favored by progressives as well as those favored by conservatives—can be advanced. The Tea Party experience raises the question of whether unleashing the people themselves as autonomous claimants on constitution meaning results in predictably progressive constitution claims. More provocatively, the Tea Party experience might suggest that popular constitutionalism could in fact have a rightward tilt. At least in the modern American scene, it would seem that those mechanisms that are most readily available for advancing extrajudicial constitutional

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available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1658549. One need only look at the contributor list to a volume that emerged from a conference co-sponsored by the American Constitution Society and dedicated to strategizing the advancement of a progressive constitutional vision, to see the obvious overlap between liberal law professors and the leading proponents of popular constitutionalism and its variants. THE CONSTITUTION IN 2020 (Jack M. Balkin & Reva B. Siegel eds., 2009). One should not take this point too far, however. While it seems clear that the majority of the most important advocates of popular constitutionalism (at least in its most recent incarnation) have been liberal, two qualifications are necessary. First, some of the theory's most prominent critics are also liberal. *See, e.g.*, Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673 (2004). And some of the most prominent proponents of variations on the theory of popular constitutionalism are well-known conservatives. Advocacy of variants of extrajudicial constitutionalism can be traced back to Edwin Meese and are found in the scholarship of Michael Stokes Paulson and others. Second, popular constitutionalism, as a theory of constitutional development, does not call for any particular outcome, whether liberal or conservative. As David Pozen has written:

> Popular constitutionalists do not tend to claim that judicial supremacy has diminished social welfare or social justice, though they occasionally draw attention to the Court's propensity to thwart progressive legislation or to the fragility of constitutional commitments that lack a grounding in public support. The focus is on process and culture more than outcomes. As normative theorists, popular constitutionalists have stressed a nonconsequentialist point about the courts' ability to impede collective self- determination.

Pozen, *supra* note 1, at 2057.

117. *See, e.g.*, William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1772 (1994) ("[A]s the federal judiciary continues roughly on the course set in the 1980s, resuming its historic role as a largely conservative, sometimes reactionary force in American life, perhaps progressive constitutional thinkers can do more. The Constitution, after all, was not written solely for courts to interpret, nor does it mean only what judges say it means. On the contrary, the Constitution often has been the terrain for broad public debates. And until relatively recently, neither popular nor scholarly discussion of constitutional matters focused so narrowly on judicial doctrine. For most of United States history, when politicians, reformers-and scholars-debated the meaning of the Constitution, they far more often addressed the citizenry and the legislatures than the courts.").

claims tend to serve conservative and libertarian interests better than progressive ones. What follows is a provisional effort to sketch some of the factors that could be drawn upon to evaluate this claim.

A. The Conservative Constitution

A central factor in considering the possible ideological tilt of popular constitutional mobilization is the nature of the Constitution itself. Most of the Constitution's text is quite old. Although the Constitution can be read many ways, it is, first and foremost, a monument to a vision of governance from a past era. The "lessons" that can be easily extracted from this document, extracted without much intermediary direction (such as judicial doctrine), are not the kinds of lessons that tend to inspire those on the left today.

"The Framers' constitution, to a large degree, represented values we should abhor or at least reject today," Michael Klarman stated in his 2010 Constitution Day lecture.[118] "The Constitution was drafted over 200 years ago by people with very different concerns and values."[119] Not only is there the obvious point that the original Constitution actively supported the institution of slavery, but there is the point that "the Framers' constitution was mostly a conservative, aristocratic response to what they perceived as the excesses of democracy that were overrunning the states during the 1780s."[120] The Framers were skeptical of democracy, Klarman emphasizes, and they were fully accepting of limiting the vote to white male property owners.[121] Those provisions that would seem to prevent the government from doing what a majority of the people believe it should do are generally stretched or ignored. The idea of enumerated powers for Congress has largely been pushed aside; the administrative state is clearly problematic on separation of powers and nondelegation grounds, but it is here to stay; we now have an "imperial executive" that is a far cry from what the Founders envisioned for this office.[122] "The Framers would not recognize our system of government today," explains Klarman, "yet the idea that courts would strike it down as unconstitutional seems almost inconceivable. The original design of the Constitution has become almost completely irrelevant."[123]

This kind of skepticism was the central theme of Justice Thurgood Marshall's controversial remarks on the document's bicentennial:

> I do not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention. Nor do I find the wisdom, fore-

118. Michael Klarman, *A Skeptical View of Constitution Worship*, BALKINIZATION (Sept. 27, 2010), http://balkin.blogspot.com/2010/09/skeptical-view-of-constitution-worship.html.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*

> sight, and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today. When contemporary Americans cite 'The Constitution,' they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago.[124]

It would be hard to find a description of constitutional development more at odds with the Tea Party movement than Marshall's. For Marshall, the Founding Fathers were deeply flawed men, as was the Constitution they created. "[T]he true miracle was not the birth of the Constitution, but its life."[125]

What is important to note is that Marshall's speech is that it was a call for a kind of constitutionalism, but it was a constitutionalism based in a skepticism toward the original document and the history surrounding the framing of the document. It sought to demote the centrality of the text and of the late eighteenth century and to elevate the subsequent history of struggles to, in Jack Balkin's phrase, "redeem" the Constitution.[126] Not a miraculous moment in the summer of 1787, but subsequent struggles to overcome the limitations of the 1787 generation are at the heart of Marshall's constitutional vision and, more generally, contemporary progressive constitutionalism.

Justice Marshall had faith that his vision of the Constitution—a vision of the Constitution largely detached form its eighteenth century roots—aligned with that of "contemporary Americans." But, as demonstrated in opinion polls showing considerable support for originalism and in the successes of the Tea Party in pushing an originalist conception of the Constitution, this assumption appears questionable, at least in today's political environment. The case of the Tea Party indicates that, at least in the context of modern American political and constitutional culture, popular constitutionalism serves insurgent conservatism remarkably well. Most obviously, insisting, as the Tea Party has done, that the text and history of the Constitution play a role in debates over federal policy tends to provide added leverage to those who advocate more limited government. While resistance to federal regulatory authority can be found across the political spectrum (consider, for instance, the liberal-libertarian alliance that briefly blocked renewal of the Patriot Act in early 2011), it has been the centerpiece of the modern conservative agenda. As

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124. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

125. *Id.* at 5.

126. JACK BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011).

a matter of popular constitutional mobilization, demanding that Congress do *less* (or that it repeal what it has already done) because of constraints based in constitutional text and history is a powerful weapon. The unavoidable fact that the federal regulatory state has grown immeasurably since the nation's beginning means that the Founding Era contains plenty of material with which to challenge the proposed policy on originalist grounds. To insist that the Constitution be a central factor in the debate has tended to bolster the case of small-government opponents of new regulations more than its proponents. When it comes to political and social mobilization, the benefits of going constitutional, at least on the modern American scene, seem to favor the cause of small-government conservatism.

B. Populist Conservative Constitutionalism—The Historical Record

In using popular constitutional mobilization in the name of limiting the power of the federal government and mobilizing around states' rights principles, the Tea Party locates itself into a venerable tradition dating back to at least to the period of the American Revolution. Considered historically, many of the most powerful expressions of popular constitutionalism have been in the service of resistance to federal government authority.

In delineating this intellectual history of popular constitutionalism, Kramer identifies the eighteenth-century Anglo-American concept of "fundamental law" as "law created by the people to regulate and restrain government, as opposed to ordinary law, which is law enacted by the government to regulate and restrain the people."[127] Kramer elaborates that "[t]he object of fundamental law was to regulate public officials, who were thus in the position of ordinary citizens with respect to it and required to do their best to ascertain its meaning while going about the daily business of governing."[128] In defending the newly drafted Constitution against Anti-Federalist charges that it created a national government that would devour the states, Federalists emphasized the ways in which the people could protect themselves against federal over-reach.[129] In *Federalist* No. 46, James Madison famously recognized the importance of popular mobilization as a mechanism for resisting unconstitutional encroachments of federal authority.[130] When faced with a federal law that transcends the limits of constitutional authority, states, Madison insisted, retained considerable ability to mobilize opposition:

> The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union; the frowns of the

127. KRAMER, *supra* note 2, at 29.
128. *Id.* at 30.
129. *See id.* at 83–91.
130. *See* THE FEDERALIST NO. 46 (James Madison).

> executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.
>
> But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole.[131]

Many of the most conspicuous episodes of popular constitutional mobilization in American history have been aimed at standing up against federal power based on an originalist or fundamentalist reading of the Constitution.[132] This was the case when Jefferson and Madison sought to mobilize opposition within the states to the Alien and Sedition Acts of 1798.[133] This was also the case in the lead-up to the Civil War, when the South argued that the Constitution protected slavery against federal interference, while abolitionists who refused to enforce federal fugitive slave laws also claimed to be acting on constitutional principle.[134]

Moving into the twentieth century, we can see a similar pattern of social and political movements drawing on the text and history of the Constitution in order to protect against the growth of federal power. The Constitution became a powerful symbol of what was perceived to be a simpler and more principled time—it became, in essence, a rallying point for those who sought to slow the social and political changes of modern society. In his cultural history of the Constitution, *A Machine that Would Go of Itself*, historian Michael Kammen locates the first nationwide effort to mobilize the American people in order to specifically promote and defend the Constitution as taking shape in the 1910s and continuing through the 1930s.[135] Like today's Tea Party, this was a movement that was ideologically conservative, reacting against the trend toward the centralization of governmental power, increased federal regulations, and perceived encroachments by governing philosophies that were seen as

131. *Id.*

132. *See, e.g.*, Forbath, *supra* note 4, 167 n.10 (noting that prior to the New Deal, the tradition of the extrajudicial constitutional interpretation, which he terms the "political Constitution," "focused chiefly on the powers of state versus federal government and on interbranch allocations of power" and that "[i]ndividual rights arose more rarely as objects of direct congressional interpretation and enforcement").

133. JONATHAN ELLIOT, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528–29, 540–44 (1861).

134. Timothy S. Huebner, *Lincoln's Legacy: Enduring Lessons of Executive Power*, 3 ALB. L. REV. 615, 624 (2010).

135. *See* MICHAEL KAMMEN, A MACHINE THAT WOULD GO ITSELF 206–08 (2006).

dangerous and radical.[136] As a speaker at a 1934 Constitution Day celebration proclaimed, the Constitution is "a bulwark against communism and Fascism."[137] Constitution Day—an observance initiated by various patriotic groups in the late 1910s—became a regular platform for denunciations of Progressive and then New Deal policy.[138] Like the Tea Party, this movement adopted a quasi-religious language to describe its efforts. It was a "constitutional revival" that was called for, explained Senator William E. Borah in 1924.[139] This movement sought to increase popular understanding of the Constitution, sparking the creation of various organizations and citizens clubs, emphasizing constitutional fidelity as a particularly patriotic exercise.[140] In the 1920s, members of constitutionalist groups such as the National Security League, the National Association for Constitutional Government, the Constitutional League were described as "Constitution Worshippers" and "Professional Patriots."[141]

In the 1950s and 1960s, white southerners opposed to civil rights also sought to energize popular engagement with the Constitution and the history of the Founding. In their efforts to oppose *Brown v. Board of Education*[142] and the possibility of federally mandated school desegregation, southern segregationists took their stand on the Constitution. In 1956 almost all southern members of Congress put their names on a statement, soon to be known as the "Southern Manifesto," denouncing *Brown* as "unwarranted exercise of power by the Court, contrary to the Constitution."[143]

> The Founding Fathers gave us a Constitution of checks and balances because they realized the inescapable lesson of history that no man or group of men can be safely entrusted with unlimited power. They framed this Constitution with its provisions for change by amendment in order to secure the fundamentals of government against the dangers of temporary popular passion or the personal predilections of public officeholders.
>
> We regard the decisions of the Supreme Court in the school cases as a clear abuse of judicial power. It climaxes a trend in the Federal Judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people.

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136. *Id.*

137. *Wall St. Observes Constitution Day*, N.Y. TIMES, Sept. 19, 1924, at 23 (quoting comments of Professor William B. Guthrie, in a speech sponsored by the National Security League).

138. KAMMEN, *supra* note 135, at 219–23.

139. *Id.* at 219; *see also id.* at 225 (describing the emergence of "a constitutional cult . . . that manifested strong religious overtones").

140. *Id.* at 206–08, 220–21.

141. *Id.* at 224–25.

142. 349 U.S. 294 (1955).

143. 102 CONG. REC. 4459–60 (1956).

> The original Constitution does not mention education. Neither does the 14th Amendment nor any other amendment.[144]

The statement argued that the separate-but-equal principle, having been "restated time and again, [had become] a part of the life of the people of many of the States and confirmed their habits, traditions, and way of life."[145] "We reaffirm our reliance on the Constitution as the fundamental law of the land," the southern members of Congress wrote in conclusion.[146] "We decry the Supreme Court's encroachment on the rights reserved to the States and to the people, contrary to established law, and to the Constitution."[147] Writing of the advocates of "massive resistance," one contemporary observer noted: "In a sense they have become 'constitutional fundamentalists,' trying to restore the true faith that is alleged to have been corrupted by modernism."[148]

Extrajudicial claims on the Constitution have been pursued for causes of all kinds. Nonetheless, as these prominent examples suggest, efforts to inject constitutionalism into policy debate and to energize a social movement by highlighting constitutional principles and history have been particularly successful when pursued those promoting an agenda of anti-regulation, small government conservatism.

C. Progressive Constitutionalism

The current generation of liberals and progressives has sought to counter conservative claims on the Constitution's meaning by offering their own vision of the Constitution. There are certainly textual bases that progressives can look to in staking their claims on the Constitution. The Tea Party reading of the Constitution tends to focus its energies on Article I and the Bill of Rights (particularly the Tenth Amendment). In contrast, a progressive reading of the Constitution tends to focus on what comes before and after those sections. The Preamble contains what is easily the most stirring and empowering rhetoric of the Constitution:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[149]

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144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. Lewis M. Killian, *The Purge of an Agitator*, 7 SOC. PROBS. 152, 153 (1959). See Powe, *supra* note 14, at 866–70, for a discussion of Massive Resistance as fitting the mold of popular constitutionalism.
149. U.S. CONST. pmbl.

These words provide a powerful platform for claiming the need for more active government involvement in the lives of the American people, all in the service of "establish[ing] Justice" and "promot[ing] the general Welfare" and "secur[ing] the Blessings of Liberty."[150] These principles, based in the Declaration of Independence as well as the Preamble, are the essence of what Mark Tushnet calls the "thin Constitution"—the narrative of constitutional meaning that can function in the extrajudicial realm.[151]

Rather than demonizing the state as conservative populist constitutional tends to do, progressive constitutionalism, in both its judicial and extrajudicial forms, tends to embrace a positive vision of government power. This is a vision of federal power formulated, in tentative terms, during the period of Radical Reconstruction, then born anew through the struggles culminating in the New Deal and civil rights movement. It rejects the libertarian belief that liberty and power are invariably competing in a zero-sum game. Instead, progressives identify ways in which government authority can affirmatively act to protect rights. Government has the ability, perhaps even the constitutional responsibility, to uproot entrenched inequalities and ensure certain minimum benefits for its citizens without which freedom is impossible.[152] Progressive popular constitutionalism occurs when people mobilize around a vision of human equality and social justice, and do so in the name of fundamental principles contained in our Constitution and embodied in the nation's ongoing struggle to form a "more perfect union."[153] As Robin West has written, "Only by reconceptualizing the Constitution as a source of inspiration and guidance for legislation, rather than a superstructural constraint on adjudication, can we make good on its richly progressive promise."[154]

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150. *Id.*

151. *See* TUSHNET, *supra* note 2, at 9.

152. *See, e.g.*, Robin West, *The Missing Jurisprudence of the Legislated Constitution*, *in* THE CONSTITUTION IN 2020, *supra* note 116, at 89 (calling for an "understanding of the state as under a moral duty, a legal duty, and a constitutional duty to act in the interest of all, and not just a prohibition against acting in certain discriminatory ways"). This distinction between classical and modern liberal constitutional visions is nicely captured in Justice Jackson's famous opinion in *West Virginia State Board of Education v. Barnette*:

> [T]he task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls.

319 U.S. 624, 639–40 (1943).

153. *See* Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 708–10 (1990).

154. *Id.* at 651; *see* Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 84 CHI.-KENT L. REV. 1127, 1129 (2006).

William Forbath, one of the most powerful advocates of this constitutional vision, has traced the development of what he calls the "social citizenship tradition."[155] In contrast to the more commonly recognized court-centered egalitarian tradition based on *Brown* and its progeny, the social citizenship tradition "was a majoritarian tradition, addressing its arguments to lawmakers and citizens, not to courts. Aimed against harsh class inequalities, it centered on decent work and livelihoods, social provision, and a measure of economic independence and democracy."[156] Forbath explains, "In public political discourse, New Dealers cast the changes they sought as fundamental rights reinvigorating the Constitution's promise of equal citizenship by reinterpreting it."[157] What Forbath calls the "political Constitution"—in contrast to the "judicial Constitution"—was debated in Congress, in the executive branch, and in the public sphere, with the courts playing little role.[158]

> On the hustings, in radio addresses, and in more sustained debates, speeches, and writings, the lawmakers and the president argued not simply that Congress had the *power* under the Constitution, rightly understood or amended, to regulate agriculture, industry, and labor. They argued that citizens had fundamental economic and social rights under the Constitution, rightly understood or amended; and Congress, therefore, had the *duty* to exercise its power to govern economic and social life in a way that sought to secure those rights. . . . [T]he "social citizenship" tradition . . . . provided them not only a rights rhetoric, but also a constitutional narrative, modes of interpretation, and conceptions of the allocation of interpretive authority.[159]

The central institution for institutionalizing this constitutional vision, what President Franklin D. Roosevelt called the "general Welfare Constitution,"[160] was Congress. "[T]he New Dealers carried forward a long tradition of congressional constitutional argument, interpretation, rights recognition, and precedent-making."[161]

Not only do progressive legal scholars identify quite different substantive rights in the Constitution than do Tea Party constitutionalists, favoring most substantive visions of the equal protection principle and emphasizing the constitutional bases for active government involvement in advancing social welfare and justice, but the basic vision of the Constitution they tend to advance is in direct opposition to the Tea Party's vision of the Constitution. The Tea Party rallies around a vision of the

155. William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 1 (1998).
156. *Id.*
157. Forbath, *supra* note 4, at 182.
158. *Id.* at 167; *see* Robin West, *supra* note 152, at 79–91 (differentiating the "legislated Constitution" from the "adjudicated Constitution").
159. Forbath, *supra* note 4, at 176 (emphasis added).
160. Forbath, *supra* note 155, at 69.
161. Forbath, *supra* note 4, at 167.

Constitution as fundamentally a source of limits on government authority, as a bulwark against evolving standards of proper governance, as a way to keep the present-day Americans in touch with certain basic truths about liberty identified by a heroic generation of founding Americans. Progressive constitutionalists question each of these suppositions. They locate within the Constitution sources of government authority. They insist that constitutions have never been nor should they be static embodiments of a single past moment. They note that there have been heroic struggles over constitutional principles since 1787 that should also be part of our constitutional self-understanding. This is a living, responsive, democratic conception of constitutional development. "Constitutional politics involves reinterpreting and revising our fundamental commitments and arriving anew at considered popular judgments about the rights of citizens and the duties of government," Forbath explains.[162]

While the progressive claims about the core meaning of the Constitution are diametrically opposed to the Tea Party's claims, there are interesting parallels between the two constitutional projects. Indeed, in many ways they are mirror images of one another. Each challenges, in quite profound ways, the constitutional status quo. Each looks to past moments in American history as offering guidance for achieving their constitutional vision. Each sees the courts as basically antagonistic to their constitutional vision. Each takes seriously the value of extrajudicial constitutional engagement and interpretation. Each identifies Congress in particular as the institutional focal point for their constitutional projects. Thus we can see a good deal of overlap between Tea Party constitutionalism and modern progressive constitutionalism, both in terms of tactics of constitutional mobilization and assumptions about the construction of constitutional meaning. Both take seriously the constitutional responsibilities of Congress. Both recognize that members of Congress have an obligation to interpret the Constitution, without being necessarily constrained by judicial interpretation.

In response to the Tea Party's war for the Constitution, progressive legal scholars have fought back. Much of the counter-offensive has come in the form of taking issue with the Tea Party's reading of the Constitution and claims about its history.[163] "The Constitution belongs to all of

162. *Id.* at 176; *see* Post & Siegel, *supra* note 5, at 374 ("[T]raditions of popular engagement . . . authorize citizens to make claims about the Constitution's meaning and to oppose their government—through constitutional lawmaking, electoral politics, and the institutions of civil society—when they believe that it is not respecting the Constitution. Government officials, in turn, both resist and respond to these citizen claims. These complex patterns of exchange have historically shaped the meaning of our Constitution.").

163. *See* LEPORE, *supra* note 59, at 96–97; Sean Wilentz, *Confounding Fathers: The Tea Party's Cold War Roots*, THE NEW YORKER, Oct. 28, 2010, at 32; David H. Gans, *Rand Paul, the Tea Party, and Our Constitution*, CONSTITUTIONAL ACCOUNTABILITY CENTER, (May 21, 2010), http://theusconstitution.org/blog.history/?p=1696; Plumer, *supra* note 70.

us," writes Garrett Epps.[164] "It's time to take it back from those who are trying to steal it in plain sight."[165] Epps is critical of liberals for being unable or unwilling to deal with the Constitution in terms that resonate with the American people. "Scholars from top schools hold forth with polysyllabic theories of hermeneutics that ordinary citizens can't fathom."[166] Conservatives, on the other hand, "don't hesitate to speak directly to the public and, often, to dumb down the Constitution."[167] Yet, Epps contends that the Constitution is not a conservative document. He finds "precious little evidence" that the Constitution "was set up to restrain the federal government."[168] "[T]he document as a whole is much more concerned with what the government *can* do—not with what it can't. . . . [T]he Constitution allowed for a government adequate to the challenges facing a modern nation."[169] Those limits on government power that the Constitution does include, he argues "are mostly limits on state governments and corresponding increases in federal power."[170] By Epps' reckoning, "a careful reading of the Constitution" shows that the framers "wrote a document that in essence says, 'Work it out.'"[171]

Epps proposes to fight the Tea Party on their own terms. "To save our Constitution, we have to read it"—something he believes few people take the time to do.[172] He even becomes something of a cheerleader for the document and the experience of reading it:

> The Constitution as a whole takes effort to read; but once one puts in the effort—several readings, all the way through, and some serious thought about what one has read—it reveals a surprising, indeed sometimes dazzling, array of meanings. By turns political, legal, epic and poetic, it shows us a number of strategies for dealing with contemporary challenges.
>
> . . . .
>
> At its most basic level, reading the Constitution requires the tools that Vladimir Nabokov urged readers to bring to any text: imagination, memory, a dictionary and a willingness to use all three when the going gets tough.[173]

And he concludes his attack on the Tea Party with a call to arms:

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164. Garrett Epps, *Stealing the Constitution*, THE NATION (2011), *available at* http://www.thenation.com/article/157904/stealing-constitution.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*

> Read the Constitution and measure it against the absurd claims we hear every day. This is a matter of life and death for our Republic. We won't find the Tea Party manifesto there; nor will we find the agenda of progressive advocacy groups. What we will find is a set of political tools and a language that fair-minded citizens, progressive or conservative, can use to talk through our disagreements.
>
> . . . .
>
> Ordinary Americans love the Constitution at least as much as far-right ideologues. It's our Constitution too.
>
> It's time to take it back.[174]

The question for progressives like Epps who put their hopes in popular constitutional engagement is whether the principles of the thin Constitution can be effectively mobilized. Whether accurate or not, his description of the revelations to be found in the Constitution is hardly the kind of call to arms offered by the Tea Party. The only clear message Epps pulls from the text of the Constitution is that the Tea Party is wrong in its reading of the Constitution. But the best alternative he has for the Tea Party's libertarian constitutional vision is a call for talk. "Work it out" is hardly a rallying cry for a constitutional movement.

CONCLUSION

The question is, then, are certain constitutional arguments more sustainable in a popular arena? More specifically, is popular constitutionalism more effective—at least in our contemporary political climate—at advancing a conservative-libertarian agenda than a progressive one? The experience of the Tea Party suggests that this might very well be the case. One of the central issues that scholars of popular constitutionalism are going to have to assess in the wake of the emergence of the Tea Party is whether popular constitutionalism has an ideological tilt. This question has not been a central focus in scholarship on popular constitutionalism, but it deserves to be.

174. *Id.*

THE TEA PARTY'S CONSTITUTION

JARED A. GOLDSTEIN†

INTRODUCTION

Since its rather sudden emergence in March 2009, the Tea Party movement has garnered considerable attention as a rowdy group of anti-tax, anti-health reform, anti-stimulus, anti-bailout, anti-Obama activists. Tea Party supporters characterize the movement's central goal to be reclaiming the Constitution and returning the government to constitutional principles.[1] Tea Party groups express devotion to the Founding Fathers and declare their commitment to "stand[] up for what our Founding Fathers believed in"[2] and to "revive the spirit of the Founders . . . ."[3] At their rallies, Tea Party groups pass out pocket copies of the Constitution, men dress in colonial costumes, and speakers routinely demand the restoration of foundational constitutional principles.[4] The name "Tea Party" itself seeks to cast the movement as a modern day incarnation of the nation's founders.[5]

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1. A typical mission statement of a Tea Party group declares: "Our demands are simple: Return the role of the Federal government to the original design laid out in the U.S. Constitution[.]" TRUSSVILLE TEA PARTY (Mar. 19, 2010), http://www.trussvilleteaparty.com/; *see also, e.g.*, FORT WALTON BEACH TEA PARTY, http://fwbteaparty.com/ (last visited Apr. 1, 2011) ("Our core principles: 1. Support and defend the U.S. Constitution as the Supreme Law of the Land."); *North Alabama Patriots Tea Party*, TEA PARTY PATRIOTS, http://www.teapartypatriots.org/GroupNew/5cab6674-ae56-4477-8418-2258a6cd1936/North_Alabama_Patriots_Tea_Party (last visited Apr. 1, 2011) ("Mission Statement[:] Promote the return of our Government based on principles set forth in the US Constitution . . . ."); RAINY DAY PATRIOTS, http://www.rainydaypatriots.org/ (last visited Apr. 1, 2011) ("We the People Fighting to Restore our Constitutional Republic[.]").

2. ST. AUGUSTINE TEA PARTY, http://unitedamericanteaparty.ning.com/ (last visited Apr. 1, 2011).

3. *About the Brevard Tea Party*, BREVARD TEA PARTY, http://brevardteaparty.com/about.html (last visited Apr. 1, 2011); *see also About*, SHOALS2DC, http://shoals2dc.webs.com/about.htm (last visited Apr. 1, 2011) ("We want our country restored to the ideals of the Republic that our founding fathers created for us."); FIRST COAST TEA PARTY, http://firstcoastteaparty.org/ (last visited Apr. 1, 2011) ("The First Coast Tea Party's mission is to promote the principles of our founding fathers – individual liberty and responsibility, limited government and moral leadership."); FLORIDA TEA PARTY, http://floridateaparty.weebly.com/ (last visited Apr. 1, 2011) ("Our founding fathers wanted our government to be a limited government."); RAINY DAY PATRIOTS, *supra* note 1 ("We the People Fighting to Restore our Constitutional Republic.").

4. *See, e.g.*, Kate Zernike, *With Tax Day as Theme, Tea Party Groups Demonstrate*, N.Y. TIMES, Apr. 16, 2010, at A17; Mara Liasson, *Tea Party: It's Not Just Taxes, It's The Constitution*, NATIONAL PUBLIC RADIO (July 14, 2010), http://www.npr.org/templates/story/story.php?storyId=128517427.

5. Jill Leopore, *Tea and Sympathy: Who Owns the American Revolution?*, THE NEW YORKER (May 3, 2010), http://www.newyorker.com/reporting/2010/05/03/100503fa_fact_lepore?currentPage=all. Tea Party supporters characterize the historical Boston Tea

The sudden prominence and power of the Tea Party call for an examination of its constitutional vision. In a very short time, the Tea Party movement has succeeded in nominating and electing many of its preferred candidates to Congress and to state offices, and it now exercises considerable influence—by some accounts dominant influence—within the Republican Party.[6] Its power to implement its constitutional goals is growing rapidly. The constitutional principles advanced by the Tea Party also bear examination as an example of popular constitutionalism, the theory that ultimate authority over the meaning of the Constitution resides (or should reside) in the people themselves.[7] The central descriptive insight developed by scholars of popular constitutionalism is that political movements have frequently succeeded in changing constitutional law without amending the Constitution, transforming constitutional interpretations that appeared kooky or implausible yesterday into the settled doctrines of today.[8] Larry Kramer, proponent of a normative version of popular constitutionalism, has claimed that popular constitutionalism once was the norm, and he has lamented what he believes to be its death at the hands of judicial supremacy.[9] If nothing else, the Tea Party movement suggests that popular engagement with the Constitution is alive and well.

Although the Tea Party movement loudly proclaims its goal of restoring the government to constitutional principles, commentators have struggled to describe the movement's understanding of the Constitution.[10] That difficulty is understandable because the Tea Party movement

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Party as a protest against excessive taxation, rather than a protest against taxation without representation. As one writer put it, the Tea Party's depiction of the American history "is to history what astrology is to astronomy, what alchemy is to chemistry, what creationism is to evolution." *Id.*

6. *See, e.g.*, Kate Zernike, *For G.O.P., Tea Party Wields a Double-Edged Sword*, N.Y. TIMES, Sept. 6, 2010, at A1.

7. *See, e.g.*, Larry D. Kramer, *Undercover Anti-Populism*, 73 FORDHAM L. REV. 1343, 1344 (2005) ("The basic principle of popular constitutionalism can be briefly stated. It is, in a nutshell, the idea that ordinary citizens are our most authoritative interpreters of the Constitution . . . ."); *see also* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 183 (1999) ("Populist constitutional law . . . treats constitutional law not as something in the hands of lawyers and judges but in the hands of the people themselves.").

8. *See, e.g.*, STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 45 (1996) (arguing that "the meaning of most of the Constitution is determined through ordinary politics"); William E. Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967, 969–70 (2006) ("From the New Deal right down to the present, party politics and social movements . . . have been lively sites of popular involvement in—and popular influence over—the nation's constitutional development.").

9. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 228 (2004) ("Apart from a few academic dissidents, everyone nowadays seems willing to accept the Court's word as final—and to do so, moreover, regardless of the issue, regardless of what the Justices say, and regardless of the Court's political complexion.").

10. *See* Adam Liptak, *Tea-ing Up the Constitution*, N.Y. TIMES, Mar. 14, 2010, at WK1 ("The content of the movement's understanding of the Constitution is not always easy to nail down . . . ."); Liasson, *supra* note 4 ("Tea Party members are often vague about exactly how their constitutional rights are being denied. But they all believe the federal government has expanded far beyond what the Constitution intended.").

is comprised of hundreds of local groups with no coordinated leadership or official platforms.[11] Moreover, Tea Party supporters usually invoke the Constitution in rather vague terms without providing what lawyers would recognize as legal arguments. As a rule, Tea Party supporters do not invoke the Constitution as a text in need of interpretation but instead as a repository of what they consider the fundamental and unchallengeable values upon which the nation was founded.[12]

Perhaps the best sources for exploring the Tea Party's vision of the Constitution are two books written in the 1980s by W. Cleon Skousen that have been enthusiastically embraced by the Tea Party movement. *The Five Thousand Year Leap* is frequently characterized as the "bible" of the Tea Party movement.[13] Released in 1981, the book remained virtually unknown until conservative commentator Glenn Beck began touting it as offering "answers to the questions plaguing America."[14] Since its 2009 re-issuance, with a new introduction by Beck, the book has sold more than 300,000 copies.[15] It has been the nation's best-selling book on law and, for a few months, the best-selling book, period, according to sales on Amazon.com.[16] *The Making of America: The Substance and Meaning of the Constitution*, published by Skousen in 1985, purports to explain the Constitution clause-by-clause.[17] Hundreds of Tea Party groups have used the book as the basis for seminars devoted to educating their members and the public on the principles of the Constitution and to

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11. *See* Jonathan Kay, *Black Helicopters Over Nashville*, NEWSWEEK (Feb. 9, 2010), http://www.newsweek.com/2010/02/08/black-helicopters-over-nashville.html.

12. *See, e.g.*, *About Us*, THE SOUTHERN COLORADO TEA PARTY, http://www.socoteaparty.com/index.php?option=com_content&view=article&id=97&Itemid=73 (last updated Dec. 18, 2010) ("We believe that not only are 'We the People' not being listened to but that many of the actions taken by the government are unconstitutional."); Pony Soprano, Comment to *Why are the Tea Parties Being Called Astroturf Events and Not Grassroots?*, NON-VIOLENT ACTIVISM (Aug. 31, 2009, 10:36 PM), http://www.nonviolentactivism.info/grassroots/why-are-the-tea-parties-being-called-astroturf-events-and-not-grassroots ("We are citizens who want our government to return to its roots as a republic as our founding fathers intended."); *What is the Wetumpka Tea Party?*, WETUMPKA TEA PARTY, http://www.wetumpkateaparty.com/AboutUs.aspx (last visited June. 14, 2011) ("We believe in the principles that our country was founded upon: Faith, Honesty, Reverence, Hope, Thrift, Humility, Charity, Sincerity, Moderation, Hard Work, Courage, Personal Responsibility, Gratitude.").

13. W. CLEON SKOUSEN, THE FIVE THOUSAND YEAR LEAP: 28 GREAT IDEAS THAT CHANGED THE WORLD (2009); *see, e.g.*, David Von Drehle *Why the Tea Party Movement Matters*, TIME (Feb. 18, 2010), http://www.time.com/time/politics/article/0,8599,1964903,00.html ("Perhaps the most talked-about book of the [National Tea Party Convention] was *The 5,000 Year Leap* . . . . Speaker after speaker commended the volume . . . .").

14. Book jacket, SKOUSEN, *supra* note 13.

15. Lee Benson, *Glenn Beck Gives Skousen Book's Sales a 'Leap'*, DESERET NEWS (Mar. 21, 2010, 1:15 AM), http://www.deseretnews.com/article/700018281/Glenn-Beck-gives-Skousen-books-sales-a-Leap.html.

16. Sharon Haddock, *Beck's Backing Bumps Skousen Book to Top*, DESERET NEWS, at B01 (Mar. 21, 2009, 12:00 AM); David Weigel, *Glenn Beck's Book Club: What the Far Right is Reading*, WASHINGTON MONTHLY (Nov. 1, 2009), http://www.washingtonmonthly.com/features/2009/0911.tms.html.

17. W. CLEON SKOUSEN, THE MAKING OF AMERICA: THE SUBSTANCE AND MEANING OF THE CONSTITUTION vi–vii (1985).

show that the answers to America's problems can be found in the wisdom of the Founding Fathers.[18]

This Essay examines the Tea Party's vision of the Constitution in light of *The Five Thousand Year Leap* and *The Making of America*. As Part I discusses, Skousen's books are decidedly strange sources to inspire a contemporary political movement. They are the products of the paranoid edges of the radical right wing of the Cold War era, and their main thrust is that the principles embodied in the Constitution provide the only hope to save the United States from international Communism. Skousen presents the Constitution as a divinely ordained blueprint for government, which implements biblical principles. Skousen asserts that these principles made the United States the most free and prosperous nation in history, but international socialists and wealthy bankers duped the United States into abandoning its foundational principles. Today, nearly everything the federal government does is unconstitutional, including the issuance of paper money, the establishment of administrative agencies, the adoption of federal welfare programs like Social Security, the creation of national parks, and the enactment of environmental and labor laws.[19]

With the end of the Cold War, one might have expected Skousen's books to lose whatever appeal they once had, but the emergence of the Tea Party movement has given them a much larger and more enthusiastic audience. As Part II discusses, Skousen's books find widespread support among Tea Party supporters because they share with Skousen what can best be characterized as a fundamentalist vision of the Constitution. Like religious fundamentalist movements, the Tea Party movement arises out of opposition to modern developments that they believe conflict with foundational principles. Like fundamentalist movements, the Tea Party movement reaches back to a mythic past, the foundation of the nation, to find what the movement's supporters believe to be the nation's fundamental principles, principles that believers perceive to be under attack—belief in God, individualism, limited government, the free market, and the sanctity of private property. To Tea Party supporters, uncompromising adherence to the fundamental principles embodied in the Constitution serves to divide true believers in the constitutional faith from "anti-Americans" like President Obama and his supporters who would seek to undermine the nation's fundamental principles.

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18. Stephanie Mencimer, *One Nation Under Beck: In Which Our Reporter Learns About the Divine Origins of the Constitution at a Tea Party Seminar* MOTHER JONES, May/June 2010, at 21; Krissah Thompson, *Conservative Class on Founding Fathers' Answers to Current Woes Gains Popularity*, WASH. POST, June 5, 2010, at A04. As of August 2009, NCCS has been presenting several seminars each week based on Skousen's work to Tea Party groups around the country. *See Upcoming NCCS Seminars*, NATIONAL CENTER FOR CONSTITUTIONAL STUDIES, http://www.nccs.net/seminars/calendar.html (last visited Apr. 9, 2011); *see also* Thompson, *supra*.

19. See infra notes 71–75 and accompanying text.

I. SKOUSEN'S COMMIE-FIGHTING CONSTITUTION

Before describing the constitutional principles found in *The Five Thousand Year Leap* and *The Making of America*, it is worth discussing W. Cleon Skousen, who made a career of espousing religiously-themed communist conspiracy theories. Those theories are elaborated in *The Five Thousand Year Leap* and *The Making of America*, in which Skousen presented the Founding Fathers as devout Christians who discovered ancient principles for national success based on the Anglo-Saxons and the biblical Israelites.[20] A return to the Founders' principles, Skousen, advised, is the only way to save America.[21]

A. Cleon Skousen's Long Career in the Radical Right

After working for the FBI in the 1940s and as the Salt Lake City police chief in the 1950s, Skousen received national attention in 1958 with the publication of *The Naked Communist*, in which he claimed to reveal the secret truth of the international communist conspiracy.[22] The communists, Skousen warned, sought to lay the groundwork for collective government by discrediting the Constitution and the Founding Fathers, by prohibiting prayer in public schools, by encouraging public acceptance of homosexuality and masturbation, and by destroying the traditional family structure.[23] Although the FBI disavowed Skousen and declared that he had no expertise on Communism,[24] the success of *The Naked Communist*—it sold over one and a half million copies[25]—allowed Skousen to become a fixture on the anti-communist speaking circuit.[26]

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20. *See* SKOUSEN, *supra* note 13, at 73–77; SKOUSEN, *supra* note 17, at 41–62.

21. SKOUSEN, *supra* note 17, at 257.

22. *See* W. CLEON SKOUSEN, THE NAKED COMMUNIST, at Preface (3d ed. 1960).

23. Mr. Harley, *45 Goals of Communism in "The Naked Communist"—Replace "Communism" with "Dictatorship" and Things are Eerily Prescient with Regard to Today*, THE COMING CRISIS (Apr. 11, 2011, 6:00 PM), http://thecomingcrisis.blogspot.com/2011/04/45-goals-of-communism-in-naked.html. Mark Hemingway, a columnist for the conservative National Review, recently characterized *The Naked Communist* as "so irrational in its paranoia that it would have made Whittaker Chambers blush." Mark Hemingway, *Romney's Radical Roots: No Moderate*, NATIONAL REVIEW ONLINE (Aug. 6, 2007, 6:30 AM), http://article.nationalreview.com/323634/romneys-radical-roots/mark-hemingway.

24. *See* Memorandum from FBI Chief Inspector William Sullivan to A.H. Belmont (Jan. 2, 1963), http://sites.google.com/site/ernie124102/skousen (declaring that Skousen "was not regarded as any authority on communism while employed with the FBI").

25. Benson, *supra* note 15; Kevin Drum, *Recycled: The Tea Party Is a Revolutionary Force. Just Not in the Way You've Been Led to Believe*, MOTHER JONES, Sept/Oct. 2010, at 50 ("One of the most popular tracts among Birchers in the '60s was W. Cleon Skousen's *The Naked Communist*.").

26. *See, e.g.*, Jack Gould, *TV: Christian Anti-Communism Crusade Here*, N.Y. TIMES, Nov. 3, 1961, at 71 (discussing Skousen's appearance in anti-communist TV special); Bill Becker, *Right-Wing Groups Multiplying Appeals in Southern California*, N.Y. TIMES, Oct. 29, 1961, at 43 (discussing the Christian Anti-Communist Crusade run by Fred Schwarz and characterizing Skousen as a "regular on Dr. Schwarz's team of crusaders"); Roy Reed, *Birch Society Is Growing in the South*, N.Y. TIMES, Nov. 8, 1965, at 1 (discussing Skousen speech in Birmingham, Alabama, against the civil rights movement).

Skousen was an ardent defender of the John Birch Society and often spoke at events it sponsored.[27] In 1963, Birch founder Robert Welch declared that President Eisenhower was a "conscious, dedicated agent of the communist conspiracy," and Barry Goldwater and like-minded conservatives such as William F. Buckley broke with the Birchers, concluding that they were not fit members of the conservative movement.[28] Skousen, however, remained a vocal defender of Welch, asserting that attacks on the John Birch Society were themselves orchestrated by the international communist conspiracy.[29]

In 1970, Skousen published *The Naked Capitalist*, which declares that the international communist movement exposed in *The Naked Communist* was actually the product of an even larger conspiracy directed by the "dynastic families of the super-rich."[30] These families created and manipulated both Communism and fascism to carry out their plan to create a globalized New World Order.[31] The conspirators included a cabal of international bankers, the Council on Foreign Relations, the Rothchilds, Rockefellers, Kennedys, J.P Morgan, Henry Kissinger, John Dewey, and Albert Einstein, among countless others.[32] *The Naked Capitalist* continues to be cited as a leading authority by New World Order, Illuminati, and anti-Semitic conspiracy theorists.[33]

In addition to these political books, Skousen also wrote several overtly religious books, which purport to explain human history from a distinctly conservative Mormon point of view. Beginning with *The First 2000 Years* (1953), Skousen sought to explain the entirety of human history since the world's creation, which he believed occurred 6,000 years ago, continuing in *The Third Thousand Years* (1965), and *The Fourth Thousand Years* (1966). Skousen's religious beliefs informed his political views. Skousen believed

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27. *See* Alexander Zaitchik, *Meet the Man Who Changed Glenn Beck's Life*, SALON (Sept. 16, 2009, 6:18 AM) http://www.salon.com/news/feature/2009/09/16/beck_skousen.

28. Buckley recounted this episode in William F. Buckley, Jr., *Goldwater, the John Birch Society, and Me*, COMMENTARY MAGAZINE (Mar. 2008) http://www.commentarymagazine.com/article/goldwater-the-john-birch-society-and-me/.

29. *See* W. Cleon Skousen, *The Communist Attack on the John Birch Society* (1963), *available at* http://www.ourrepubliconline.com/OurRepublic/Article/27 (asserting that the John Birch Society had been "dishonestly ridiculed and smeared at the instigation of the international Communist conspiracy").

30. W. CLEON SKOUSEN, THE NAKED CAPITALIST (1970). Skousen presented *The Naked Capitalist* as a review of Carroll Quigley's *Tragedy and Hope: The History of the World in Our Time*, and claimed that Quigley's book supported his thesis. Quigley, however, disavowed Skousen, saying "[Skousen's] personal position seems to me perilously close to the 'exclusive uniformity' which I see in Nazism and in the Radical Right in this country. In fact, his position has echoes of the original Nazi 25 point plan." Carroll Quigley, *Roundtable Review*, DIALOGUE: THE JOURNAL OF MORMON THOUGHT, Autumn/Winter 1971, at 109, 110.

31. SKOUSEN, *supra* note 30, at Preface.

32. *Id.* at 17, 21, 33, 109–11.

33. *See* Simon Maloy, *Glenn Beck and the Paranoid Style*, MEDIA MATTERS, (Dec. 18, 2009, 9:16 AM), http://mediamatters.org/columns/200912180003.

that God himself had inspired and directed the adoption of the United States Constitution, and that the "Founders were merely instruments in the hands of the Lord."[34]

B. "The Founding Fathers' Phenomenal Success Formula"

The Making of America and *The Five Thousand Year Leap* share a singular goal: to save America from Communism by explaining the foundational principles of American government.[35] These principles are not based in any significant degree on the constitutional text, which the books largely ignore. Skousen instead finds the fundamental principles of American government in the writings of the Founding Fathers, which the books provide in hundreds of block quotes, along with many other sources, including the Bible, Cicero, Blackstone, de Tocqueville, and an assortment of Mormon and oddball theorists.[36]

1. The Creation Myth of the Constitution

The constitutional mythology found in Skousen's books is centrally focused on veneration for the Founders and what may be characterized as the creation myth of the Constitution. In this narrative, the "Founders"—a term Skousen uses to refer to both the leaders of the American independence movement of 1776 and the framers of the Constitution of 1789—were a group of God's chosen disciples who overcame great adversity and discovered God's secret formula for government, a formula based on what Skousen pronounces to be "ancient principles."[37]

In presenting the Founders as devout Christians who established the nation based on divinely ordained principles,[38] Skousen scoffs at conventional versions of American history that depict the Founders as relatively non-religious deists, stating that the Founders "continually petitioned God in fervent prayers, both public and private, and looked upon his divine intervention in their daily lives as a singular blessing."[39] Skousen likewise scoffs at conventional historical accounts that the constitutional framers were principally influenced by European philosophers of the

34. W. Cleon Skousen, *The Book of Mormon and the Constitution* (Jan. 14, 1990), http://www.latterdayconservative.com/articles/w-cleon-skousen/the-book-of-mormon-and-the-constitution-notes.

35. SKOUSEN, *supra* note 17, at ix.

36. Many of the quotations are taken quite far out of context. For instance, in support of the principle that the "core unit which determines the strength of any society is the family," Skousen quotes a letter from Benjamin Franklin attempting to persuade a friend not to take a mistress but to marry instead. SKOUSEN, *supra* note 13, at 202. Skousen omits the crucial and most famous passage of the letter in which Franklin advised that if his friend were to decide to take a mistress "then I repeat my former advice, that in all your amours you should prefer old women to young ones." *Id.* Franklin then listed eight reasons why older women made better mistresses, including that they have more experience, are more discrete, will not get pregnant, and are more grateful. *Id.* Traditional family values it is not.

37. SKOUSEN, *supra* note 13, at 17, 15, 225.

38. *Id.* at 75.

39. *Id.* at 76.

Enlighement era, including Hobbes, Locke, and Rousseau.[40] On the contrary, Skousen asserts that the Founders rejected all "European" theories.[41] Although socialism was unknown at the time of the Founders, Skousen equates eighteenth century European philosophies with socialism and declares that "the Founders [m]ade European [t]heories [u]nconstitutional."[42]

Rather than basing the new government on the "European fads" of Enlightenment philosophers, the Founders rediscovered certain "ancient principles" from the Bible and the Anglo-Saxons, which formed the basis for their political philosophy.[43] The Founders also made the surprising discovery that before the Norman invasion the Anglo-Saxons employed a system of government almost identical to the biblical Israelites.[44] Skousen repeatedly exhibits supremacist devotion to the Anglo-Saxons as a chosen people of God who may have descended from one of the lost tribes of Israel.[45]

Skousen's belief in Anglo-Saxon superiority is mirrored by his apologist history of slavery. Quoting historian Fred Albert Shannon, *The Making of America* asserts that slaves were "usually a cheerful lot, though the presence of a number of the more vicious type sometimes made it necessary for them all to go in chains."[46] In Skousen's history of slavery, brutality toward slaves was almost unheard of, and white schoolchildren envied "the freedom" of the slaves: "If pickaninnies ran naked it was generally from choice, and when the white boys had to put on shoes and go away to school they were likely to envy the freedom of their colored playmates."[47] Although the slaves were well-treated, ate well, and lived happily, white southerners lived in constant fear of slave rebellions instigated by abolitionists, making their lives "a nightmare."[48] In fact, Skousen suggests, "the slave owners were the worst victims of the system."[49] In 1987, these passages aroused controversy after a California state commission celebrating the bicentennial of the Constitution

40. *Id.* at 63, 80.

41. *Id.* at 63.

42. *Id.* at 86, 88–89, 118.

43. *Id.* at 17. ("When the time came for the United States of America to adopt a constitution, our forefathers modeled it after the perfect Israelite system of administration.") (quoting HOWARD B. RAND, DIGEST OF THE DIVINE LAW 130–31 (1943); *see also* SKOUSEN, *supra* note 17, at 3–4, 41–62.

44. SKOUSEN, *supra* note 13, at 14–18.

45. *Id.* at 225–31. Skousen relies on Howard B. Rand, who was the American leader of the Anglo-Israelite movement, which asserts that the Anglo-Saxons are the descendants of the biblical Israelites and are therefore God's chosen people. *Id.* at 17; *see generally* HOWARD B. RAND, PRIMOGENESIS: THE STORY THE BIBLE TELLS (1948). Anglo-Israelitism, in turn, provided the foundation for the white separatist Christian Identity movement espoused by Randy Weaver, who died in 1992 in a shootout with federal agents, who he believed were agents of a Zionist Occupational Government. *See* Leonard Zeskind, BLOOD AND POLITICS: THE HISTORY OF THE WHITE NATIONALIST MOVEMENT FROM THE MARGINS TO THE MAINSTREAM (2009).

46. SKOUSEN, *supra* note 17, at 731–32.

47. *Id.* at 733.

48. *Id.* at 735.

49. *Id.* at 734.

recommended *The Making of America* to the public, and the commission later apologized.[50] The latest edition of *The Making of America*, published in 2007, maintains these passages, although the word "pickaninnies" quoted above has been replaced with "[negro children]."[51]

2. The Founders' Principles Provide Protection Against Communism

The central thrust of Skousen's books is that the Constitution establishes eternal principles that can protect the nation against the spread of world Communism. The first and most important of these "ancient principles" is that natural law provides the only reliable basis for government.[52] For Skousen, natural law means God's laws and encompasses the necessity for "limited government," the right to bear arms, protections for the family and the institution of marriage, the sanctity of private property, and the avoidance of debt.[53] Such natural law principles, Skousen claims, are instituted eternally and are not subject to change by mortal legislators.[54] Legislation contrary to God's laws is a "scourge to humanity" and is therefore unconstitutional.[55]

Not only did the Founders believe that human laws must be consistent with God's laws, they also believed that republican government could only survive if the people and their leaders were virtuous, which requires religious training.[56] As a result, the Founders sought to inculcate religious values in American society, supported government-funded religious education, and broadly encouraged government support of religion.[57] The Founders, in their wisdom, thus gave the American people the means to resist atheism that would one day be advocated by Communists.

Natural law principles also prevent any programs that provide welfare benefits or redistribute wealth.[58] Skousen cites a debunked story that, when Davy Crockett was a congressman, he voted against a bill that would have provided financial support to a navy widow because of his conviction that the government has no right to take money from some taxpayers to give to others no matter how worthy the cause and how

50. Katherine Bishop, *Bicentennial Panel in California Assailed Over 'Racist' Textbook*, N.Y. TIMES, Feb. 16, 1987, at 9.

51. *See generally* SKOUSEN, *supra* note 17. Additional evidence that Skousen held white supremacist views is his vehement defense of the Mormon Church's refusal to allow African Americans to serve as church leaders, in which he claims that criticism of the Church's discriminatory policies was directed by international Communism. *See* Hemingway, *supra* note 23.

52. SKOUSEN, *supra* note 13, at 33–40; SKOUSEN, *supra* note 17, at 195.

53. SKOUSEN, *supra* note 13, at 40, 208.

54. *Id.* at 40, 103–04.

55. *Id.* at 38.

56. *Id.* at 41–46, 47–57, 59–71, 73–77.

57. *Id.* at 60, 70.

58. *Id.* at 87–91.

needy the recipients.[59] According to Skousen, Congress cannot provide support for military widows or any citizens who need it because natural law establishes the inviolability of property rights. Without property rights, mankind could not carry out God's command to have dominion over the earth.[60] Indeed by protecting property, the Founders sought to refute European philosophers who believed "that the role of government was to take from the 'haves' and give to the 'have nots.'"[61] The Founders disagreed and did "everything possible to make these collectivist policies 'unconstitutional.'"[62]

3. The Fall from Grace

According to Skousen, the Founders' establishment of the ancient principles of the Anglo-Saxons and Israelites ushered in a golden age that was nothing short of miraculous. It allowed humanity to make more progress in a short time than had been made in the previous 5,000 years of human history—hence the title, *The Five Thousand Year Leap*.[63] This miracle allowed the United States to become the most prosperous nation the world has ever known and made its people the most free.[64] Sadly, however, America has turned its back on the Founders' principles.[65] The result of the abandonment of the foundational principles has been disastrous and has wreaked havoc on American culture.[66]

For Skousen, the fall from grace began in the first decades of the twentieth century when socialists attacked the Constitution, attempting to debunk the Founding Fathers and foment revolution by arguing that the Constitution is out of step with an industrialized society.[67] In fact, Skousen asserts, the socialists were acting as agents of certain wealthy bankers and other members of the "dynastic rich," who sought to gain control of the government and grant themselves monopolies.[68] The capitalist-communist conspirators largely succeeded in duping the American people to abandon many of the ancient principles upon which the nation was

59. SKOUSEN, *supra* note 17, at 391–92. The story is widely quoted among conservatives but has no basis in fact. *See, e.g.*, 149 Cong. Rec. H465-08, H495 (2003) (statement of Cong. Ron Paul) ("In the words of the famous essay by former Congressman Davy Crockett, this money is 'Not Yours to Give.'"); Jim Boylston, *Crockett and Bunce: A Fable Examined*, THE CROCKETT CHRONICLE, Nov. 2004.

60. SKOUSEN, *supra* note 13, at 124, 126.

61. *Id.* at 86.

62. *Id.* at 341.

63. SKOUSEN, *supra* note 17, at 5.

64. Indeed, the Constitution paved the way for the industrial revolution, the machine revolution, the transportation revolution, the communications revolution, the energy resource revolution, and the computer revolution. *Id.* at 2–3.

65. *Id.* at ix.

66. *Id.*; SKOUSEN, *supra* note 13, at 4.

67. *Id.* at 114–18, 134.

68. SKOUSEN, *supra* note 17, at 216.

founded.[69] As a result, America lost its national identity, producing a "[g]eneration of lost Americans," and a nation of "un-Americans."[70]

The United States soon began to adopt one policy after another that conflicted with its foundational principles, and today, almost everything the federal government does is unconstitutional.[71] The primary transgression was the establishment of federal welfare programs like Social Security and Medicare, which violate the fundamental prohibition against redistribution of wealth.[72] The entirety of the monetary system likewise operates contrary to the Founders' formula because it is based on paper money not backed by gold.[73] The entire administrative state is also unconstitutional because Congress cannot create agencies with regulatory powers, and the President cannot issue executive orders or promulgate regulations.[74] In addition, it was unconstitutional for Congress to establish national parks, national monuments, national forests, and wilderness areas, to enact federal environmental and labor laws, and to provide foreign aid.[75]

Skousen remained an unapologetic isolationist who believed that American foreign policies, like its domestic policies, conflicts with the Founders' plan, which was founded upon America's pursuit of "manifest destiny" and "separatism" from international conflicts.[76] Skousen cites isolationist figures Charles Lindberg, Sr., and J. Reuben Clark, who opposed entry into World Wars I and II, positions that Skousen says "reflected the views of the Founders."[77] Discussing World War II, Skousen ponders "how much happier, more peaceful, and more prosperous the world would be if the United States had been following a policy of 'separatism' as the world's great peacemaker instead of 'internationalism' as the world's great policeman."[78]

Because the United States forgot, rejected, and abandoned the Founders' principles, the United States stands on the verge of succumbing to a collectivist world government. Yet "there is still time, but not much" to return to the Founders' eternal principles before "total disaster" overtakes America.[79] Again and again, he exhorts his readers to rediscover the Founders' principles, to reverse the tide, and restore the American government to its foundational roots.[80] Indeed, America owes

69. *Id.*
70. *Id.* at iii, 135, 217; SKOUSEN, *supra* note 13, at vi.
71. SKOUSEN, *supra* note 17, at 407.
72. *Id.* at 255, 387–92.
73. *Id.* at 423–26.
74. *Id.* at 252–54; SKOUSEN, *supra* note 13, at 343–44.
75. SKOUSEN, *supra* note 17, at 388, 458–59; SKOUSEN, *supra* note 13, at 352–53.
76. SKOUSEN, *supra* note 13, at 189–97, 215–19.
77. *Id.* at 195–97.
78. *Id.* at 197.
79. *Id.* at 337.
80. SKOUSEN, *supra* note 17, at 11–12; SKOUSEN, *supra* note 13, at 214.

it to humanity to restore its foundational principles because, if they were followed, these principles may provide "the key for the survival of the human family on the planet earth" and bring peace, freedom, and prosperity to all mankind.[81]

II. THE TEA PARTY'S FUNDAMENTALIST CONSTITUTIONAL VISION

Considering that Skousen's avowed purpose in writing *The Five Thousand Year Leap* and *The Making of America* was to protect the nation against international Communism by educating his readers about the "ancient principles" adopted by the Founding Fathers, one might have predicted at the end of the Cold War that his books would become merely curious relics of the paranoia of a bygone era. Yet the books have found a much larger and more receptive audience in the Tea Party movement than when they were first published.[82] What can explain the current enthusiasm for Skousen, the hundreds of thousands of new readers his books have attracted, who enthusiastically organize and attend seminars around the country to study and advance his vision of the Constitution? The vocal support of TV and radio personality Glenn Beck has obviously contributed, but such advertising would not have generated the current enthusiasm for Skousen if his books did not resonate with his new readers.

Skousen appeals to supporters of the Tea Party movement because they share what may be characterized as a fundamentalist vision of the Constitution. They both explain contemporary history through a common narrative in which the Founding Fathers adopted a Constitution that embodies a set of sacred and eternal principles for American government.[83] The principles adopted at the time of national creation encompass what Skousen and the Tea Party understand to be the central values and characteristics of American national culture—devotion to God, limited government, free markets, personal property, and individualism.[84] In recent

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81. *Id.* at 2, 12.

82. Benson, *supra* note 14 (estimating that *The Five Thousand Year Leap* sold 60,000 copies in the first 25 years after its publication but has sold more than 300,000 copies since the emergence of the Tea Party movement).

83. *See, e.g.*, *9/12 Project Mission Statement*, DEL NORTE TEA PARTY PATRIOTS, http://delnorteteapartypatriots.com/ncol0095/?page_id=92 (last visited Apr. 12, 2011) ("At the origin of America, our Founding Fathers built this country on 28 powerful principles.").

84. A typical Tea Party describes its mission "to promote the principles of our founding fathers—individual liberty and responsibility, limited government and moral leadership." FIRST COAST TEA PARTY, *supra* note 3; *see also Founding Principles*, LIBERTY CENTRAL, http://www.libertycentral.org/five-founding-principles (last visited Apr. 12, 2011) ("From its earliest stages, Liberty Central identified limited government, individual liberty, free enterprise, national security, and personal responsibility as the five principles that best capture the foundations we, as a nation, need to preserve."); *About*, SILICON VALLEY TEA PARTY PATRIOTS, http://siliconvalleyteaparty.com/about (last visited April 12, 2011) ("Silicon Valley Tea Party Patriots is a non-partisan movement aimed at bringing limited government, fiscal responsibility, and the free-market principles that our country was founded on back to government."); *Values*, VIDALIA TEA PARTY PATRIOTS, http://www.vidaliatpp.com/Values.html (last visited Apr. 12, 2011) ("The core values of the Tea Party are the same values upon which the United States of America was founded

years, so the Skousen-Tea Party narrative goes, these fundamental principles have come under attack by forces deeply antagonistic to American values, and the nation has lost sight of its foundational principles.[85] Skousen and the Tea Party movement offer the same solution to this perceived crisis—a return to the wisdom of the Founding Fathers.[86]

The narrative that lies at the heart of Skousen's books and the Tea Party movement bears a strong resemblance to the narratives propounded by religious fundamentalists. Although use of the term "fundamentalist" can be controversial because it is sometimes used pejoratively or dismissively, sociologists of religion have generally embraced the term to describe religious movements that arise in opposition to elements of modernity that believers perceive threaten their core identities.[87] Notwithstanding the many differences that exist among movements characterized as fundamentalist—Sunni fundamentalists, the Haredim, Shiite fundamentalists, and Protestant fundamentalists—they bear common traits, including: (1) the identification of a set of fundamental values that adherents believe are under attack or have been abandoned;[88] (2) the belief that these fundamental values originated in a mythic era and are embodied in a sacred text or tradition; [89] (3) the perception that the current at-

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and are rooted in our belief in Natural Law. They derive from a belief in free will, the primacy of individual and personal responsibility.").

85. *See, e.g.*, BRUCE BEXLEY, THE TEA PARTY MOVEMENT: WHY IT STARTED, WHAT IT'S ABOUT, AND HOW YOU CAN GET INVOLVED (2009) (explaining that the Tea Party movement arose because government spending threatened to "destroy the country" and deprive the people of their freedoms); *Mission Statement*, BOONE TEA PARTY, http://booneteaparty.org/mission.htm (last visited Apr. 12, 2011) ("Our government has strayed drastically from our nation's foundation . . . . We are now in grave danger of losing our fundamental rights and liberties as American citizens."); ELBERT COUNTY TEA PARTY, http://www.elbertteaparty.com (last visited April 12, 2011) ("We are . . . deeply concerned about the direction our government and our President are taking us as they continue to push policy and changes that are contrary to the will of the people and of our founding documents."); FIRST COAST TEA PARTY, *supra* note 3, ("[T]his just might be our and our Country's finest hour as we reclaim it from the Obama's, Pelosi's and Reid's and all the other politicians who have either forgotten or chosen to ignore our Constitution.").

86. As Glenn Beck declares in his introduction to *The Five Thousand Year Leap*, "The questions that we face were foreseen by the greatest group of Americans to ever live; our Founding Fathers. They knew we would be grappling with issues like the ones we face today at some point, so they designed a ship that could withstand even the mightiest storm. They also knew that we would eventually lose our way and that we would need a beacon to lead our way back." SKOUSEN, supra note 13, at 6.

87. The Fundamentalism Project is a five-volume study sponsored by the American Academy of Arts and Sciences, with contributions from historians, cultural anthropologists, and sociologists of religion. *See generally* FUNDAMENTALISMS OBSERVED (Martin E. Marty & R. Scott Appleby eds., 1991). In the introduction to first volume, the editors write that, notwithstanding misuse of the term "fundamentalism," the term captures a set of movements that fight back against challenges that they see as threats to their core identity. Martin E. Marty & R. Scott Appleby, *Introduction*, *in* FUNDAMENTALISMS OBSERVED, *supra*, at ix.

88. Martin E. Marty & R. Scott Appleby, *Conclusion: An Interim Report on a Hypothetical Family*, *in* FUNDAMENTALISMS OBSERVED, *supra* note 87, at 822 ("[I]n reviewing 'family traits' that recur frequently [among various fundamentalist groups], we have observed the fundamentalist quest for an irreducible basis for personal and communal identity.").

89. Marty & Appleby, *supra* note 86, at vii, ix ("Fundamentalists" movements are so named because "they reached back to real or presumed pasts, to actual or imagined ideal original conditions and concepts, and selected what they regarded as fundamental."); GABRIEL A. ALMOND ET AL., STRONG RELIGION: THE RISE OF FUNDAMENTALISMS AROUND THE WORLD 96 (2003) (describing a

tack on the group's fundamental values represents an existential crisis for the community of believers;[90] (4) a commitment to restoring the fundamental values as the movement's central goal;[91] and (5) a Manichean world view that pits supporters of the fundamental principles against demonized enemies.[92] These elements can readily be seen in Skousen's work and in the Tea Party movement.

Like religious fundamentalists, Skousen and Tea Party supporters believe that their fundamental values are under attack. Tea Party groups have declared that "the world is watching as the United States crumbles from within, enemies maneuver beyond our borders and the cornerstone of the country—the Constitution—is subverted in a political quagmire."[93] To Tea Party supporters, advocates of foreign, anti-American ideas have taken over the federal government, threatening to displace true American values, and the fate of the nation hangs in the balance.[94] Again and again, Tea Party supporters argue that the Obama Administration is "attacking" America, that he is "anti-American," and that he is seeking to undermine basic American values.[95] The vehemence which Tea Party members characterize the Obama Administration's agenda as "un-American," "socialist," or "communist"—or, perhaps even worse, "European"—easily matches Skousen's own anti-communism.[96]

Skousen, the Tea Party movement, and religious fundamentalists offer the same solution to the perceived crisis—a return to the fundamen-

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belief in the "absolutism and inerrancy" of sacred texts to be characteristics of fundamentalist movements).

90. Marty & Appleby, *supra* note 88, at 814, 822–23 ("Fundamentalisms arise or come to prominence in times of crisis, actual or perceived," which fundamentalist adherents construe as a "crisis of identity[.]").

91. *Id.* at 821–22 (discussing "missionary zeal" of fundamentalists to eradicate the "contamination of the unbeliever" and return the community to a state of purity).

92. *Id.* at 820 ("Fundamentalists name, dramatize, and even mythologize their enemies."); ALMOND ET AL., *supra* note 89, at 95–96 (characterizing "moral Manichaeanism" as characteristic of fundamentalist movements).

93. FIRST COAST TEA PARTY, *supra* note 3.

94. Make no mistake, Glenn Beck warns in the introduction to *The Five Thousand Year Leap*, "our Republic is at stake." SKOUSEN, *supra* note 13, at 7.

95. *See, e.g.*, CHARLY GULLETT, OFFICIAL TEA PARTY HANDBOOK: A TACTICAL PLAYBOOOK 12 (2009) ("In response to . . . all the Socialist intellectual and financial atrocities that have been implemented by the Federal Government since Obama took office, clear-thinking Americans (what remains of us) have taken to the streets . . . .").

96. *See, e.g.*, Drum, *supra* note 25 ("'Obama isn't a US socialist,' thundered Fox News commentator, Steven Milloy at a tea party convention earlier this year, 'he's an international socialist!'"); *Mission Statement*, NORTH ALABAMA PATRIOTS TEA PARTY, http://northalabamapatriotsteaparty.com/Home.php ("Stop Socialism Before It Destroys Our Country. Simply Put: Big Government IS Socialism, a Step towards Marxism, Then You Have Totalitarianism. Socialism is NOT compatible with our Constitution."). Indeed, the view that Obama espouses foreign, anti-American ideas (or that he himself is foreign) is widely proclaimed among conservatives. Rush Limbaugh proclaimed that Obama is the "first anti-American President." *See The Rush Limbaugh Show* (Premiere Radio Networks broadcast Aug. 18, 2010), *available at* http://mediamatters.org/mmtv/201008180035. And even normally levelheaded commentators like Steven Calabresi say that Obama is a "socialist" who "at some level does not really know America very well nor does he thoroughly identify with it." Steven G. Calabresi, *Steven G. Calabresi Bio*, POLITICO, http://www.politico.com/arena/bio/steven_g_calabresi.html (last visited June 16, 2011).

tal principles that adherents claim have been attacked, abandoned, or compromised.[97] *The Five Thousand Year Leap* contains a ready set of the twenty eight fundamental principles that Skousen believes constitute foundational American principles—the centrality of natural (i.e., God's) law and devotion to God, the necessity for limited government, and the virtue of isolationist foreign policy, among others.[98] In his introduction *The Five Thousand Year Leap*, Glenn Beck begs readers to "learn these 28 ideas, make them your own" and "teach them to your children, your neighbors, your friends."[99] Throughout the writings of the Tea Party movement, one finds the same goal of learning the Founders' principles and spreading the word.[100]

Like religious fundamentalists, Skousen and the Tea Party movement reach back to a mythic past, the time of the founding of the nation and the adoption of the Constitution, as the source of the fundamental principles they preach.[101] Just as fundamentalist Christians have asserted the inerrancy of the Bible, Skousen and Tea Party supporters profess to believe in the eternal wisdom of the Founding Fathers. In words that echo Skousen, Tea Party Patriots, a leading national Tea Party group, proclaims as its mission to "stand with our founders, as heirs to the republic, to claim our rights and duties which preserve their legacy and our own."[102] Tea Party groups uniformly seek to advance what they claim to be the Founders' principles, principles that they assert represent the true vision for America.[103]

Skousen and the Tea Party movement, like religious fundamentalists, see the world in Manichean terms, a world in which believers in the constitutional faith stand on one side and all others are demonized as enemies who seek to undermine American values. Skousen wrote in the

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97. *See* SKOUSEN, *supra* note 17, at 257.

98. *Id.* at ix; *see also* SKOUSEN, *supra* note 13, at vi.

99. SKOUSEN, *supra* note 13, at 7.

100. *See, e.g.*, *Our Mission*, HARTFORD TEA PARTY PATRIOTS (Jan. 28, 2010 11:08 AM), http://www.thehartfordteapartypatriots.com (follow "Our Mission" hyperlink) ("We are dedicated to educating, motivating, and activating our fellow citizens, using the power of the values, ideals, and tenets of our Founding Fathers."); *see also Take Action*, GEORGIA TEA PARTY http://www.thegeorgiateaparty.org/index.php/take-action/ (last visited June 16, 2011) ("Our purpose is to empower you with knowledge about the Constitution and to provide education about each American's civic obligation to be engaged in the political process.").

101. As sociologists of religion have explained, fundamentalist typically seek to support an identify they perceive to be at risk by "a selective retrieval of doctrines, beliefs, and practices from a sacred past." Marty & Appleby, *supra* note 90, at 835; *see also* ALMOND ET AL., *supra* note 89, at 96 (fundamentalist believe that sacred texts like the Torah, the Qu'ran, and the Bible "are of divine (inspired) origin and true and accurate in all particulars").

102. *Mission Statement*, TEA PARTY PATRIOTS, http://teapartypatriots.org/Mission.aspx (last visited June 16, 2011).

103. *See* Liptak, *supra* note 10 ("But if there is a central theme to [Tea Party supporters'] understanding of the Constitution, it is that the nation's founders knew what they were doing and that their work must be protected."); Matthew Continetti, *The Two Faces of the Tea Party: Rick Santelli, Glenn Beck, and the Future of the Populist Insurgency*, THE WEEKLY STANDARD (June 28, 2010) (describing one of the few unifying elements of the Tea Party movement that "draws its strength from the American founding [and] celebrates the Founders and their ideas").

1950s and 1960s that international Communism sought to undermine American values by promoting civil rights for African Americans, by promoting acceptance of homosexuals, and by persuading Congress to adopt welfare programs.[104] Proponents of such measures were not merely wrong on government policies; to Skousen, they were America's enemies. Tea Party supporters likewise believe that people who disagree with them on health care reform, tax policies, and immigration are not merely political adversaries with whom they disagree on the issues. Tea Party supporters view proponents of health care reform and other such measures to be deeply un-American.[105] Tea Party members believe that, at best, their opponents are ignorant of the fundamental principles upon which the country was founded or, at worst, they seek to undermine these principles.

Indeed, the vehemence with which Tea Party activists demonize their enemies is one of the movement's most remarkable traits. They characterize their opponents as socialists and communists; compare President Obama to Hitler, Stalin, and Saddam Hussein; and have a large percentage of members who believe that President Obama is a foreigner or a Muslim or at least someone who adheres to foreign views.[106] The Tea Party movement believes that Obama is radically anti-American.[107] The demonization of enemies follows from the fundamentalist nature of the Tea Party movement. Those who act contrary to what Tea Party supporters believe to be the fundamental American values are perceived to be undermining or attacking those values; they are not merely Americans who hold differing positions; they are anti-American, and they must be defeated in order to save America.[108]

The Tea Party view of the Constitution thus is the antithesis of Justice Holmes' notion that the Constitution was "made for people of fundamentally differing views"[109]—in other words, that the Constitution establishes a framework for resolving fundamental differences through political and legal processes. In Skousen's and the Tea Party's view, the

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104. *See* SKOUSEN, *supra* note 22, at 261–62.

105. *See, e.g.*, Matt Bai, *G.O.P. Uses Obama 'Otherness' as Campaign Tactic*, N.Y. TIMES, Sept. 15, 2010, at A23; Bookworm, *Is Barack Obama Anti-American?*, AMERICAN THINKER (Nov. 1, 2009), http://www.americanthinker.com/2009/11/is_barack_obama_antiamerican.html ("[B]ecause the overwhelming number of Barack Obama's desires and actions are antithetical to America's essence, he is in fact anti-American.").

106. *See, e.g., Growing Number of Americans Say Obama is a Muslim: Religion, Politics and the President*, PEW FORUM ON RELIGION & PUBLIC LIFE (Aug. 18, 2010), http://pewforum.org/Politics-and-Elections/Growing-Number-of-Americans-Say-Obama-is-a-Muslim.aspx.

107. Rush Limbaugh, for example, has characterized President Obama as "the first anti-American President." *See The Rush Limbaugh Show* (Premiere Radio Networks broadcast Aug. 18, 2010), *available at* http://mediamatters.org/mmtv/201008180035.

108. *See, e.g., Radicals or Slaves?*, ROGUE OPERATOR, (Nov. 11, 2010), http://rogueoperator.wordpress.com/2010/11/11/radicals-or-slaves/ (stating that "the United States is being taken over, by stealth, subterfuge, and outright socialism, by a radical cadre of elites" who are advancing a "process of de-Americanization").

109. Lochner v. New York, 198 U.S. 65, 76 (1905) (Holmes, J., dissenting).

Constitution itself establishes the fundamental values—the Founders' principles—which are eternal and to which the nation must adhere if it is to survive. The Tea Party's Constitution does not merely provide a framework for resolving differing political views; the Constitution itself resolves those differences.

CONCLUSION

The Tea Party movement's enthusiasm for W. Cleon Skousen's *The Five Thousand Year Leap* and *The Making of America* has brought into the mainstream radical notions about the Constitution born in the ultra-conservative right wing of the Cold War era. These notions focus on the need to restore the Founders' true vision of the Constitution, including the centrality of natural law, understood to mean God's laws; the necessity for limited government that may not undertake welfare programs, redistribution of wealth, or interference in any way with private property; and the embrace of manifest destiny at home and isolationism in foreign policy. With the growing prominence and growing power of the Tea Party movement, Skousen's influence has spread beyond Tea Party activists, and several prominent Republican leaders—Texas Governor Rick Perry, former Massachusetts Governor Mitt Romney, Senators Orrin Hatch and Mike Lee, among others—have openly endorsed Skousen's views.[110]

The Tea Party's Constitution poses a challenge to popular constitutionalism, the theory that the people themselves should have ultimate authority to interpret the Constitution.[111] Some academic supporters of popular constitutionalism have suggested that, although they question the positions taken by Tea Party supporters, they welcome the movement to the national dialogue because public engagement on the meaning of the Constitution strengthens constitutional democracy.[112] Yet there is nothing inherently good about public discussion about the Constitution, any more than public discussion of race or other charged issues is always good. Although some may discuss racial issues in ways that advance understanding, others may employ racial rhetoric to incite hatred, misunderstanding, and violence, and the same is true of discussions of the Constitution.

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110. Wayne Slater, *Perry Uses Glenn Beck Favorite as Election Ally*, DALL. MORNING NEWS, Oct. 1, 2009, at 3A; Marc Hansen, *Best Part of Romney Interview Was Off Air*, DES MOINES REGISTER, Aug. 9, 2007, at B1; Hemingway, *supra* note 23. Senator Hatch spoke at Skousen's funeral and read a poem he had written to honor Skousen. *Funeral Program for Willard Cleon Skousen*, W. CLEON SKOUSEN, (Jan. 14, 2006), http://www.skousen2000.com/funeral.htm. Russell Pearce, the chief sponsor of Arizona's recent immigration law, is a devoted follower of Skousen. *See Iron Will Drives Pearce, Agenda*, ARIZ. REPUBLIC, June 6, 2010, at A1.

111. Larry D. Kramer, *Undercover Anti-Populism*, 73 FORDHAM L. REV. 1343, 1344 (2005); *see also* TUSHNET, *supra* note 7, at 182 ("Populist constitutional law . . . treats constitutional law not as something in the hands of lawyers and judges but in the hands of the people themselves.").

112. Liptak, *supra* note 10; ANDREW E. BUSCH, THE CONSTITUTION ON THE CAMPAIGN TRAIL 8 (2007) ("All other things being equal, more constitutional rhetoric is better than less.")

The Tea Party's fundamentalist vision of the Constitution shows that invocations of the Constitution in popular politics can equally serve as a means of channeling nationalist and authoritarian impulses, just as it can promote popular democracy and human rights. As Sanford Levinson has argued, because the Constitution is a potent symbol of national values—the "sacred text" of our "civil religion"—invocations of the Constitution in popular democracy may emphasize shared values but just as easily may sow division and animosity.[113] Tea Party supporters project onto the Constitution the values they hold most sacred. Because they ascribe foundational and constitutional status to their most cherished values, Tea Party supporters believe that those who do not fully support these values are not simply wrong but are un-American or even anti-American. The use of constitutional rhetoric to divide "true Americans" from "anti-Americans" is not a trend to be welcomed but should be condemned as a danger to constitutional democracy.

113. SANFORD LEVINSON, CONSTITUTIONAL FAITH 17 (1988).

SUPREME COURT AVOIDS CRUSHING THE FIRST AMENDMENT: WHY THE DECISION IN *UNITED STATES V. STEVENS* WAS IMPORTANT FOR THE PRESERVATION OF FIRST AMENDMENT RIGHTS

INTRODUCTION

The United States Supreme Court often grants free speech protections to the types of speech that society deems unworthy of rights. Whether the Court is extending protection to hate speech advocates,[1] allowing pornographers to have less-restricted access to cable viewers,[2] or permitting Internet sites the freedom to publish virtual child pornography,[3] the Supreme Court has constantly faced criticism for preserving the First Amendment. The recent decision in *United States v. Stevens*,[4] invalidating a law prohibiting depictions of animal cruelty, will prove no different. Crusaders for animal rights are bound to blame the Supreme Court for setting back their cause. However, as this Comment demonstrates, the Supreme Court is not to blame. This Comment argues that the Supreme Court made the right decision in invalidating the statute on animal crush videos (§ 48),[5] and that the responsibility of halting the crusade against crush videos and animal cruelty should be placed on the statute itself.

Part I of this Comment examines the First Amendment, the circumstances leading to the enactment of § 48, and the case law that shaped the Court's interpretation of § 48. Part II summarizes the facts, procedural history, and opinions of *Stevens*. Part III commends the Supreme Court's decision to protect First Amendment rights and argues that it was Congress's failure to draft a proper statute that caused § 48 to fail judicial review. Finally, this Comment concludes that the Supreme Court's strict defense of the First Amendment is crucial to the preservation of the right to free speech.

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1. *See* Brandenburg v. Ohio, 395 U.S. 444, 444–45 (1969) (per curiam) (holding that the speech of a Ku Klux Klan member advocating violence toward minority groups constituted protected speech under the First Amendment).

2. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 806–07 (2000) (holding that requiring cable operators to scramble sexually explicit channels violated the First Amendment).

3. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 239–40 (2002) (finding that lack of a concrete connection between virtual child pornography and child abuse enabled virtual child pornography to enjoy First Amendment protections).

4. 130 S. Ct. 1577 (2010).

5. 18 U.S.C. § 48 (2006).

I. BACKGROUND

A. Freedom of Speech

The right to free speech is enshrined in the First Amendment's prohibition that "Congress shall make no law . . . abridging the freedom of speech."[6] The prerogative derived from this right, to freely express one's opinions, ideas, and criticisms, is often credited as the cornerstone to democracy and individual liberty in the United States.[7] However, free speech protections have not always been observed with such reverence.

Between the enactment of the First Amendment in 1791 and the beginning of the twentieth century, the concept of "free speech" did not pose a great barrier to government restriction.[8] For instance, it was not until 1845 that an explicit First Amendment challenge concerning free speech was entertained by the Supreme Court.[9] In the subsequent decades, the Court's opinions concerning the First Amendment right to free speech were, at best, "hostile" to speech interests.[10] By the turn of the nineteenth century the Court opined that government self-preservation justified regulation of speech in *United States ex rel. Turner v. Williams*.[11] The *Turner* Court upheld a statute preventing immigration into the United States, reasoning that certain political beliefs professed by immigrants may threaten the government.[12] The dangerous rationale of the *Turner* decision led the Court to validate "shockingly repressive" statutes during the 1920s.[13] Among its decisions during this era, the Court criminalized speech in support of socialism,[14] illegalized criticism

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6. U.S. CONST. amend. I.

7. Vickie S. Byrd, Reno v. ACLU—*A Lesson in Juridical Impropriety*, 42 HOW. L.J. 365, 365 (1999) ("[T]he First Amendment's guarantee to freedom of speech is the cornerstone of individual liberty and democracy."); *see also* Bridges v. California, 314 U.S. 252, 270 (1941) ("For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."); Stromberg v. California, 283 U.S. 359, 369 (1931) (describing the First Amendment as "a fundamental principle of our constitutional system").

8. Howard O. Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court from 1791–1930*, 35 EMORY L.J. 59, 89 (1986) ("[T]he Supreme Court during its first full century of operation . . . read the first amendment as a restatement of the English common law . . . which allowed government regulation of many areas of speech.").

9. *Id.* at 70; *see* Permoli v. City of New Orleans, 44 U.S. 589 (3 How.) (1845) (holding that the First Amendment did not apply to the States).

10. Hunter, *supra* note 8, at 127 ("[F]rom 1791 to 1930 . . . [t]he Court's opinions were sketchy and usually hostile to the speech interests that were asserted."). Before twentieth century case law concerning freedom of speech, the Court often placed the interests of the postal service above that of the First Amendment. *See Ex parte* Rapier, 143 U.S. 110, 134–35 (1892) (holding that congressional discretion to withhold lottery tickets from the mail did not infringe on the freedom of communication); *Ex parte* Jackson, 96 U.S. 727, 733 (1877) (holding that the exclusion of magazines and newspapers from the postal system was constitutional).

11. 194 U.S. 279, 284, 290 (1904).

12. *Id.* at 290.

13. Daniel Hildebrand, *Free Speech and Constitutional Transformation*, 10 CONST. COMMENTARY 133, 134 (1993).

14. Debs v. United States, 249 U.S. 211, 212, 216–17 (1919).

of American war efforts,[15] and held a newspaper in contempt for criticizing a local court.[16]

However, the Court changed its stance on free speech in 1931 with its decision that the display of a red flag symbolizing opposition to government constituted "free political discussion . . . essential to the security of the Republic."[17] Free speech, rediscovered as "a fundamental principle of our constitutional system,"[18] finally gained a foundation for the constitutional value it holds today.[19] While free speech continued to face difficult challenges throughout the twentieth century, such as overcoming the Smith Act[20] and advancing protestor's rights during the Vietnam War,[21] the hard-fought victories of the past have established extensive constitutional protections to contemporary speech.

Today, the First Amendment prohibits the government from restricting the content, message, or idea expressed within speech.[22] Expression need not be of any serious value to enjoy the shield of the First Amendment,[23] and regulations as to the time, manner, and location of speech must survive a "narrowly tailored" test to be deemed constitutional.[24] The First Amendment provides the strongest protections against content-based restrictions on speech, making such regulations presumptively invalid.[25]

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15. *Id.*

16. Toledo Newspaper Co. v. United States, 247 U.S. 402, 412, 420–21 (1918).

17. Stromberg v. California, 283 U.S. 359, 369 (1931).

18. *Id.*

19. *See* Hunter, *supra* note 8, at 137.

20. *See* Yates v. United States, 354 U.S. 298, 318–21 (1957) (ruling that the conviction of several Communist Parity leaders for advocating the overthrow of the American government was unconstitutional because advocacy of "evil ideas" was protected by the First Amendment so long as the advocacy was not coupled with an effort to instigate action designed to achieve governmental overthrow).

21. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (holding that in absence of demonstration of any facts which might reasonably have led school authorities to forecast substantial disruption of, or material interference with, school activities, or any showing that disturbances or disorders on school premises in fact occurred when students wore black armbands on their sleeves to exhibit their disapproval of Vietnam hostilities, regulation prohibiting wearing armbands and providing for suspension of any student refusing to remove armbands was an unconstitutional denial of students' right of expression of opinion).

22. Ashcroft v. ACLU, 535 U.S. 564, 573 (2002). "[A]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.* (quoting Bolger v. Youngs Drugs Prods. Corp., 463 U.S. 60, 65 (1983)) (alteration in original).

23. United States v. Stevens, 130 S. Ct. 1577, 1590 (2010) (describing how most speech protected by the First Amendment does not fall within a category of serious value).

24. Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 38 (2003) (discussing the standards for content-neutral speech regulations).

25. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

B. Presumptively Invalid Statutes

Statutes that regulate the content of speech are presumptively invalid[26] and the government bears the burden of rebutting this presumption.[27] The government may refute this presumption by demonstrating that the content-based restrictive statute can survive a strict scrutiny test or that the content under restriction belongs to a category of speech that does not warrant First Amendment protection.[28] The strict scrutiny test requires the government to establish that: (1) a statute prohibiting speech content seeks to achieve a compelling state interest; (2) the statute is narrowly tailored to achieve that interest; and (3) the means chosen to achieve that interest are the least restrictive means available.[29] Since the test's inception the Supreme Court has invalidated every statute subjected to strict scrutiny based on the content-based speech restrictions, proving strict scrutiny to be a nearly impassible test.[30]

The government may also overcome a presumption of invalidity by showing that a content-based restriction proscribes speech outside the realm of First Amendment protections.[31] Categories of unprotected speech share two common characteristics: (1) they have traditional roots in United States history as being beyond free speech safeguards, and (2) they are narrowly defined classes of speech.[32] Obscenity, defamation, fighting words, fraud, incitement to illegal action, and speech integral to criminal conduct are all beyond the purviews of free speech.[33] These groups of speech have never been afforded protection,[34] have faced prohibition since the founding of the United States,[35] or have historic foundations in Supreme Court decisions as early as the 1920s.[36] In addition, these classes of speech are specifically defined and narrowly construed.[37] For example, obscenity has a long legal history in America as being un-

26. *Stevens*, 130 S. Ct. at 1584 (quoting *City of St. Paul*, 505 U.S. at 382).

27. *Stevens*, 130 S. Ct. at 1580 ("Government bears the burden to rebut that presumption.").

28. *See* United States v. Stevens, 533 F.3d 218, 232 (3d Cir. 2008), *aff'd*, 130 S. Ct. 1577 (2010).

29. *See id.* (describing how § 48 fails the strict scrutiny test).

30. Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1365 (2006) ("In the twenty cases . . . where a majority of the Court has applied a strict scrutiny standard for reasons of [speech] content discrimination, it has found every one to be unconstitutional.").

31. *City of St. Paul*, 505 U.S. at 382–83.

32. *Stevens*, 130 S. Ct. at 1584.

33. *Id.* (listing obscenity, defamation, fraud, incitement, and speech integral to criminal conduct as unprotected speech); *see also* United States v. Stevens, 533 F.3d 218, 233–34 (3d Cir. 2008) (listing fighting words as unprotected speech), *aff'd*, 130 S. Ct. 1577 (2010).

34. *Cf.* Va. Bd. of Pharmacy v. Va. Citizens Council, Inc., 425 U.S. 748, 771 (1976) ("Untruthful speech . . . has never been protected for its own sake.").

35. *See* Roth v. United States, 354 U.S. 476, 482–83 (1957) (pointing out that 10 states had statutes prohibiting libel at the time the Constitution was ratified; that obscenity had been prohibited as early as 1712).

36. Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (referring to a case in the 1920s which instructed that advocacy of violent acts, without more, did not warrant First Amendment protection).

37. *Stevens*, 130 S. Ct. at 1584.

protected by the First Amendment and it proscribes very specific speech-content.[38] Moreover, even though child pornography has a relatively new legal history of being beyond First Amendment protection, its content-based proscriptions are grounded in age-old doctrine and it also proscribes a particularly narrow category of speech.[39]

1. *Miller v. California*[40]

Early in American history, obscenity defined a wide class of speech including depictions of violence.[41] Now, under *Miller v. California*, obscenity extends only to a narrow category of content involving prurient interests and illegal sexual conduct.[42] In *Miller*, the Court addressed the issue of whether sexually explicit material distributed through the mail constituted obscenity.[43] Deciding that the publications were obscene, the Court defined obscenity as either depictions that, when taken as a whole, violate prurient interests according to contemporary community standards, or as depictions of patently offensive sexual acts that violate specific state laws.[44] However, the *Miller* Court went on to narrow the definition by including an exceptions clause affording First Amendment protections to sexual deceptions having serious literary, artistic, political, or scientific value.[45] As a result, obscenity forbids only a very specific class of speech.

2. *New York v. Ferber*[46]

In 1982, the Supreme Court declared a new narrowly defined category of unprotected speech with its decision in *New York v. Ferber*.[47] The *Ferber* Court was faced with a statute that prohibited all depictions of child pornography, even those that did not rise to the level of obscenity.[48] Unable to prohibit the speech as obscene because the Court recognized that some child pornography may have literary, artistic, political or scientific value,[49] the *Ferber* Court determined that child pornography

38. Miller v. California, 413 U.S. 15, 18, 24 (1973).
39. New York v. Ferber, 458 U.S. 747, 760–65 (1982).
40. 413 U.S. 15 (1973).
41. Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL RTS. J. 107, 176–77 (1994).
42. *See* Winters v. New York, 333 U.S. 507, 508, 519 (1948) (holding that violent criminal reports do not appeal to prurient interests and are not considered obscene); *see also* Emma Ricaurte, Comment, *Son of Sam and Dog of Sam: Regulating Depictions of Animal Cruelty Through the Use of Criminal Anti-Profit Statutes*, 16 ANIMAL L. 171, 191–92 (2009).
43. *See Miller*, 413 U.S. at 18.
44. *Id.* at 24.
45. *Id.*
46. 458 U.S. 747 (1982).
47. *See id.* at 764–65.
48. *Id.* at 749 (referring to a New York criminal statute that prohibits people from knowingly promoting sexual performances by children under age sixteen).
49. *Id.* at 760–61 (explaining that child pornography need not be 'patently offensive' in order to physically and psychologically harm the children involved, and whether the work has serious

was an entirely unprotected class of speech under the First Amendment despite its lack of a historical foundation as unprotected speech.[50]

The Court reasoned that even if some value could be derived from using children in pornographic productions, it was so minimal as to be de minimus.[51] Moreover, the Court viewed the production of child pornography as constituting child abuse, finding a compelling state interest in protecting children from abuse.[52] Ultimately, the Court decided that prohibiting the distribution of child pornography was an effective way to control the production of child pornography.[53] While child pornography had no history of being beyond First Amendment protection, this reasoning employed by the Court entrenched child pornography in a historical category of unprotected speech—speech integral to criminal conduct.[54]

Child pornography's role as an integral component to the criminal conduct of child abuse enabled the Supreme Court to characterize it as a category of proscribed speech.[55] However, the Court limited the governmental restrictions on child pornography to visual depictions of sexual conduct involving children under a specific age.[56] Additionally, the visual depictions had to be specific, involving live performances or visual reproductions of live performances concerning the sexual conduct of children.[57] The Court crafted child pornography's exception to the First Amendment as a very narrow category of unprotected speech, demonstrated with the Court's decision that virtual child pornography was within the confines of free speech.[58]

C. Overbreadth Doctrine

Even if a law regulating speech content passes the strict scrutiny test or regulates an unprotected category of speech, it may still be rendered

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literary, artistic, political or scientific value is irrelevant to the children who are harmed in the making of child pornography).

50. *See id.* at 763–64.

51. *Id.* at 762 ("The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*.").

52. *Id.* at 756–57 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'").

53. *Ferber*, 458 U.S. at 760 ("[T]he only practical method of law enforcement [of child pornography laws] may be to dry up the market for this material . . . .").

54. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) ("It has rarely been suggested that . . . freedom for speech . . . extends its immunity to speech . . . used as an integral part of conduct in violation of a valid criminal statute.").

55. Ricaurte, *supra* note 42, at 189 (describing how child pornography is intrinsically related to child abuse).

56. *See Ferber*, 458 U.S. at 764 & n.17 (leaving to the states the authority to define at what age a person is considered a child, and providing that under federal law, the age is under sixteen years).

57. *Id.* at 764–65.

58. *See* Ashcroft v. ACLU, 535 U.S. 564, 573 (2002).

unconstitutional where the scope of the law is too broad.[59] As described in *United States v. Williams*,[60] the overbreadth doctrine seeks to invalidate statutes that, while permissibly proscribing unprotected speech, also restrict speech protected under the First Amendment.[61] The overbreadth doctrine invalidates a law when a substantial number of its applications are unconstitutional in relation "to the statute's plainly legitimate sweep."[62] In order to make this determination, the Court must ascertain not only that speech the statute is *actually* designed to restrict, but those other types of speech the statute may *potentially* restrict.[63]

The Court utilizes the doctrine when a challenger claims that a statute is facially invalid.[64] Typically when asserting a facial challenge, a challenger must show that the statute is unconstitutional in all circumstances.[65] In the context of overbreadth, however, the challenger need only show that a substantial number of the statute's applications are unconstitutional.[66] In effect, the doctrine allows a party to challenge a statute that violates the rights of others without necessarily having to show infringement on the party's own rights.[67]

Precedent suggests that the overbreadth analysis ought to be undertaken only after determining the validity of a statute as applied to the challenging party.[68] This coincides with typical constitutional proceedings because courts prefer to exercise judicial restraint, addressing specific questions as opposed to determining expansive constitutional issues.[69] However, the analysis the Court employs in evaluating a content-based restrictive statute depends on the manner in which the parties involved present the issue to the Court.[70]

D. Prohibiting Depictions of Animal Cruelty

Depictions of animal cruelty have no historical foundation in America as being unlawful; however, cruelty against animals has long been

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59. Chen, *supra* note 24, at 39–40 (describing an overbreadth analysis as being concerned with the scope of a regulation as opposed to whether the law regulates content).

60. 553 U.S. 285 (2008).

61. *See id.* at 292.

62. *Id.* at 292–93.

63. United States v. Stevens, 130 S. Ct. 1577, 1587 (2010) (quoting *Williams*, 533 U.S. at 293) ("[T]he first step in overbreadth analysis is to construe the challenged statute . . . .").

64. *Stevens*, 130 S. Ct. at 1586–87 ("Stevens challenged § 48 on its face . . . . [T]his Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad . . . .").

65. United States v. Salerno, 481 U.S. 739, 745 (1987).

66. *Williams*, 533 U.S. at 292.

67. *Stevens*, 130 S. Ct. at 1593 (Alito, J., dissenting).

68. *Id.* at 1593–94 (quoting Bd. of Trs. v. Fox, 492 U.S. 469, 484–485 (1989)) ("[I]t is not the usual judicial practice . . . to proceed to an overbreadth issue . . . before it is determined that the statute would be valid as applied.").

69. Chen, *supra* note 24, at 43–45.

70. *Stevens*, 130 S. Ct. at 1587 ("As the parties have presented the issue . . . the constitutionality [of the statute] hinges on how broadly it is construed.").

considered illegal in the United States.[71] Dating back to the mid-1600s, laws enacted by various states made criminal offenses out of beating, maliciously killing, or torturing animals.[72] Today, every state maintains laws governing animal cruelty, including prohibitions against dogfighting and cockfighting, and the majority of states provide felony penalties for certain animal cruelty offenses.[73]

Current animal cruelty laws are ineffective against a particular type of animal cruelty found in crush videos.[74] Crush videos usually entail a small animal, a kitten or hamster, constrained to the floor of a room.[75] Unable to escape, the animal is then horrifically tortured by a woman, who crushes the animal to death with her feet while wearing high heeled shoes.[76] This type of animal cruelty is hard to prosecute and prevent due to the camera angle used to capture the cruelty.[77] The video typically portrays only a knee-down frame of the woman mutilating the animal, keeping her and the producer's identities secret.[78] In addition, the limited angle of the shot makes it difficult to determine where such videos are produced, allowing any producers who have been identified to successfully challenge a court's jurisdiction.[79]

Congress enacted 18 U.S.C. § 48 with the purpose of impeding crush video animal cruelty.[80] The language of the statute criminalized the creation, sale, or possession of depictions of animal cruelty[81] when illegal federally or within the state where the creation, sale or possession occurs, regardless of whether the animal cruelty took place in that state.[82] However, because of the difficulty in stopping crush video production, § 48 was primarily aimed at preventing the distribution of crush videos.[83] By prohibiting depictions of animal cruelty § 48 enabled the government to pursue distributors of crush videos.[84] Congress's intent in targeting

71. *See* Ricaurte, *supra* note 42, at 176–77 (describing one of the earliest animal cruelty laws dating back to 1641 in Massachusetts).

72. *Id.* at 177.

73. *Id.* ("Forty-three of the states make certain acts of animal cruelty a felony.").

74. *Stevens*, 130 S. Ct. at 1583 ("[C]rush videos rarely disclose participants' identities, inhibiting prosecution of the underlying conduct.").

75. *Id.*

76. *Id.*

77. *Id.*

78. *See* Michael Reynolds, Note, *Depictions of the Pig Roast: Restricting Violent Speech Without Burning the House*, 82 S. CAL. L. REV. 341, 344 (2009).

79. *Id.* (describing how it is impossible to discern the location or date of production from the video content alone).

80. *See Stevens*, 130 S. Ct. at 1583 ("The legislative background of § 48 focused primarily on the interstate market for 'crush videos.'").

81. 18 U.S.C. § 48(a).

82. *See* § 48(c).

83. Reynolds, *supra* note 78, at 344 ("The bill was introduced . . . to combat the distribution of 'crush videos' . . . .").

84. *See Stevens*, 130 S. Ct. at 1598 (Alito, J., dissenting).

distributors was to dry up the market for crush videos[85] in order to discourage production and in turn help end the associated animal cruelty.[86]

However, Congress drafted § 48 to encompass far more than crush video content. The Statute defines depictions of animal cruelty as "any visual or auditory depiction . . . in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed."[87] Additionally, § 48 contains limited exceptions for depictions that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value."[88] While enabling authorities to pursue and prevent a variety of animal cruelty, the statute's broad scope beyond crush videos exposed it to judicial review. Moreover, since § 48 proscribes speech content, the statute's restrictions are presumptively invalid.[89]

II. *UNITED STATES V. STEVENS*

Following its enactment in 1999, § 48 went unchallenged in court until Robert J. Stevens was indicted under the statute in 2004.[90] Stevens was not charged for violating the main aim of § 48 by having created, possessed, or depicted crush videos.[91] Rather, he was responsible for distributing videos of a different type of animal cruelty—dog fighting.[92] Stevens' challenge of § 48 as being facially invalid would lead to six years of subsequent litigation resulting in the Supreme Court's opinion that § 48 was too broad of a restriction on speech.[93]

A. Facts

Dogfighting is outlawed as a form of animal cruelty in all fifty states and the District of Columbia, and "has been restricted by federal law since 1976."[94] In the spring of 2003, federal investigators and Pennsylvania law enforcement agents discovered that Robert J. Stevens had been advertising dogfight videos and other merchandise in an underground publication.[95] The investigators uncovered that Stevens' business, "Dogs of Velvet and Steel," maintained a website through which videos of dogfighting were sold.[96] Based on this information, law enforcement

85. *Id.* ("Congress concluded that the only effective way of stopping the underling criminal conduct was to prohibit the commercial exploitation of the videos . . . .").

86. *Id.* at 1600 ("[T]he criminal acts shown in crush videos cannot be prevented without targeting the . . . creation, sale, and possession for sale of depictions of animal torture . . . .").

87. § 48(c).

88. § 48(b).

89. *Stevens*, 130 S. Ct. at 1584.

90. Reynolds, *supra* note 78, at 345 (noting that the first prosecution to come to trail under § 48 was Stevens' indictment in 2004).

91. *Stevens*, 130 S. Ct. at 1590.

92. *Id.*

93. *Stevens*, 130 S. Ct. at 1592.

94. *Id.* at 1583 (describing how dogfighting is illegal in the United States).

95. United States v. Stevens, 533 F.3d 218, 220–21 (3d Cir. 2008), *aff'd*, 130 S. Ct. 1577 (2010).

96. *Stevens*, 130 S. Ct. at 1583.

officers purchased three videos from the website and discovered depictions of gruesome dogfights upon review.[97]

On April 23, 2003 the investigators executed a search warrant for Stevens' Virginia residence and found several copies of the three dog fighting videos.[98] The supply of videos, coupled with the advertisements and distribution network on his website, formed the basis for the government's multiple indictments against Stevens.[99]

B. Procedural History

On March 2, 2004, a grand jury indicted Stevens with three counts of "knowingly selling depictions of animal cruelty with the intention of placing those depictions in interstate commerce for commercial gain, in violation of 18 U.S.C. § 48."[100] Stevens moved to dismiss his indictments asserting that § 48 was facially invalid under the First Amendment.[101] The District Court for the Western District of Pennsylvania denied Stevens' motion to dismiss, finding that the depictions subject to § 48 were "categorically unprotected by the First Amendment."[102] The District Court upheld the constitutionality of § 48 based on the statute's exceptions clause.[103] According to the District Court, the clause narrowed the content-based restrictions of § 48 to speech that had no "serious" value, avoiding overly broad limitations on speech.[104] The jury found Stevens guilty on all counts,[105] and he was consequently sentenced to thirty-seven months imprisonment, followed by three years of supervised release.[106]

On appeal, the Third Circuit, sitting *en banc*, declared § 48 facially invalid and vacated Stevens' conviction on the grounds that § 48 did not create a new category of unprotected speech.[107] The court of appeals reasoned that to circumvent the free speech protection afforded by the First Amendment, § 48 had to achieve a compelling state interest similar to the statute in *Ferber*.[108] The Third Circuit held that § 48's purpose, to protect animals against cruelty, was not a compelling state interest.[109]

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97. *Stevens*, 553 F.3d at 221 (describing the videos to include dogfights in the United States and Japan, and an instructional hunting video displaying horrific images of pit bulls attacking wild pigs).

98. *Id.* (highlighting that the law enforcement agents found "other dogfighting merchandise" as well).

99. *See id.*

100. *Id.*

101. *Stevens*, 130 S. Ct. at 1583.

102. *Id.*

103. *Id.*; *see also* 18 U.S.C. § 48(b) (2006) (permitting any depictions of animal cruelty that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value").

104. *See Stevens*, 130 S. Ct. at 1582–83.

105. *Id.* at 1583.

106. *Id.*

107. United States v. Stevens, 533 F.3d 218, 232 (3d Cir. 2008) ("In sum, the speech restricted by 18 U.S.C. § 48 is protected by the First Amendment."), *aff'd*, 130 S. Ct. 1577 (2010).

108. *See id.*

109. *Id.* at 226–28.

Moreover, the Third Circuit discussed the history of categories of unprotected speech, pointing to the absence of any precedent suggesting that a statute restricting free speech in order to protect animals constituted a compelling interest.[110] The Third Circuit was critical of the link between § 48's restriction of depictions of animal cruelty and prevention of animal cruelty altogether.[111] The disconnect between § 48's restriction on all depictions of animal cruelty and its alleged purpose of preventing crush video animal cruelty further convinced the Third Circuit that it did not serve a compelling state interest.[112]

Finding that § 48 did not create a new category of unprotected speech, the Third Circuit evaluated the statute under a strict scrutiny analysis.[113] Having determined that § 48 did not contain a compelling state interest, the court held that § 48 was not tailored narrowly enough to survive strict scrutiny.[114] First, § 48 was underinclusive because it prohibited depictions of animal cruelty only for interstate commercial use, yet did nothing to prevent intrastate sale and use.[115] Second, § 48 was overinclusive because it made selling a depiction of a legal activity in one state illegal in another state based on variances in state law.[116] As a result, and because of the lack of a compelling state interest and the lack of narrowly tailored means of preventing animal cruelty, the Third Circuit found § 48 to be facially invalid.[117]

C. The United States Supreme Court Opinion

The United States Supreme Court affirmed the judgment of the Third Circuit, but relied on the reasoning that § 48 was too broad.[118] The Court based its opinion on the fact that § 48 had the potential to proscribe speech well beyond crush videos.[119] Invalid under the overbreadth doctrine, the Court felt no need to address whether or not crush videos could

110. *Id.* at 227–28 ("Nothing in these cases suggests that a statute that restricts an individual's free speech rights in favor of protecting an animal is compelling.").

111. *Id.* at 228–29 ("While this justification is plausible for crush videos, it is meaningless when evaluating § 48 as written. By its terms, the statute applies without regard to whether the identities of individuals in a depiction, or the location of a depiction's production, are obscured.").

112. *Id.* ("Preventing cruelty to animals . . . simply does not implicate interests of the same magnitude as protecting children . . . .").

113. *Id.* at 232 ("Because the speech encompassed by § 48 does not qualify as unprotected speech, it must survive a heightened form of scrutiny.").

114. *Id.* at 233–34 ("The Supreme Court routinely strikes down content-based restrictions on speech on the narrow tailoring/least restrictive means prong of strict scrutiny.").

115. *Id.* at 233.

116. *Id.* at 233–34 ("If the government interest is to prevent acts of animal cruelty, the statute's criminalization of depictions that were legal in the geographic region where they were produced makes § 48 overinclusive.").

117. United States v. Stevens, 130 S. Ct. 1577, 1584 (2010).

118. *Id.* at 1592 (holding that § 48 is "substantially overbroad, and therefore invalid under the First Amendment.").

119. *Id.* at 1590 (explaining that most hunting videos could likely fall within the confines of § 48's restrictions).

ever constitute a class of speech unworthy of First Amendment protection.[120]

1. Depictions of Animal Cruelty Are Protected Speech

Like the Third Circuit, the Supreme Court was unwilling to categorize depictions of animal cruelty as unprotected speech.[121] The Court reasoned that only historically unprotected speech, or speech restrictions grounded in previously recognized categories of unprotected speech, warranted unprotected categorization.[122] The government offered only a value balance test, weighing the social costs of depicting animal cruelty against the social benefits, and the Court reasoned that the government had not done enough to establish depictions of animal cruelty as a new category of unprotected speech.[123]

The Court contrasted the government's argument with the holding in *Ferber* to demonstrate that a new category of unprotected speech requires more than a balancing of competing interests.[124] *Ferber* declared child pornography categorically unprotected speech by demonstrating that the market for child pornography was an integral part of the production of such materials, which were illegal.[125] By showing an intrinsic relationship between child pornography and child abuse, the Court grounded the holding in *Ferber* with the integral part of criminal conduct doctrine,[126] a previously-recognized category of unprotected speech.[127]

2. 18 U.S.C. § 48's Overly Broad Restriction on Speech

Subjecting § 48 to First Amendment analysis, the Court utilized the overbreadth doctrine to determine the statute's constitutionality.[128] Stevens asserted a general claim challenging the constitutionality of § 48, rather than challenging the applicability of the statute to his case,[129] and the government had similarly construed Stevens' claim as a general chal-

120. *Id.* at 1592.

121. *Id.* at 1586 (noting that "depictions of animal cruelty" does not constitute a new category of unprotected speech).

122. *Id.* at 1585–86 (holding that animal cruelty is not a new category of unprotected speech because the Court is "unaware of any similar tradition excluding *depictions* of animal cruelty from the freedom of speech") (internal quotation marks omitted).

123. *Id.* at 1585 ("[F]ree speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.").

124. *Id.* at 1586 ("When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis.").

125. *Id.* (highlighting that the decision in *Ferber* did not rest solely on the balance of competing interests, those of protecting children against the value of child pornography to society).

126. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) ("It rarely has been suggested that . . . freedom [of] speech . . . extends its immunity to speech . . . used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.").

127. *Stevens*, 130 S. Ct. at 1586 ("*Ferber* thus grounded its analysis in a previously recognized, long-established category of unprotected speech . . . .").

128. *Id.* at 1587 & n.3.

129. *Id.* ("Whether or not [an overbreadth analysis is premature], here no as-applied claim has been preserved.").

lenge to § 48.[130] Therefore, the Court determined that the overbreadth analysis was warranted by the parties' presentation of the case.

Relying on the test from *United States v. Williams*, the Court construed § 48 widely to determine the full reach of the statute.[131] Reviewing the text of the statute, the Court determined that it did not require the depicted conduct to be cruel,[132] and while requiring that the depicted conduct be illegal under the state's laws, illegality did not equate to cruelty.[133] Moreover, the Court reasoned that depicted conduct may be illegal in one state but legal in another.[134] The differences in law from state to state concerned the Court that confusion as to the legality of depictions might vary depending on jurisdiction.[135]

The Court neglected to extend the canon of *noscitur a sociis* in order to resolve the discrepancies of cruelty because the phrase "wounded . . . or killed" contained little ambiguity.[136] The Court pointed out that the words should retain their normal meaning and they do not include cruelty or a degree of cruelty in their definition.[137] Additionally, the Court gave extensive examples of hunting laws and agricultural regulations that vary from state to state to demonstrate how broad § 48 could be interpreted, making conduct illegal in jurisdictions where such conduct is not considered cruel.[138]

Unlike the district court, the Supreme Court did not find that the exceptions clause[139] narrowed § 48 enough to save it from invalidation.[140] For one, § 48(b) required any depiction of animal cruelty worthy of exemption to have serious value in one of the named categories of exempted speech.[141] The Court explained that most speech protected by the First Amendment did not have serious value in education, science, journalism, or any other category included in the exemption clause.[142] Accordingly, the Court held that § 48(b) did little to limit the statute.[143] In

130. *Id.* at 1587 n.3 (highlighting that the Government did not construe Stevens' briefs as adequately developing a separated attack on a defined subset of the statute's applications).

131. *Id.* at 1587–88.

132. *Id.* at 1588 (noting that nothing about wounding or killing requires cruelty).

133. *Id.* (highlighting how the humane killing of endangered species is illegal but may not constitute cruelty).

134. *Id.*

135. *Id.* at 1588–89 ("A depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same conduct is unlawful.").

136. *Id.* at 1588 (alteration in original) (highlighting that the cannon of *noscitur a sociis* is appropriate only when terms are ambiguous).

137. *Id.*

138. *Id.* at 1589–90.

139. 18 U.S.C. § 48(b) (2006) (permitting any depictions of animal cruelty that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value").

140. *Stevens*, 130 S. Ct. at 1592.

141. *Id.* at 1590.

142. *Id.* ("Most speech does not [fall into one of the enumerated categories].").

143. *Id.* ("There is simply no adequate reading of the exceptions clause that results in the statute's banning only the depictions the Government would like to ban.").

addition, the Court rejected the idea that since the exceptions clause was drafted after *Miller*,[144] it sufficiently narrowed § 48.[145] The Court reasoned that *Miller* applies only to obscenity speech and not speech in general.[146]

In response, the government declared that § 48, while broad, would not be enforced to the detriment of the First Amendment and § 48 would only be used combat wanton animal cruelty.[147] The Court thought the idea of executive discretion in the application of § 48 was a merit-less argument.[148] The Court argued that it would not uphold an unconstitutional statute merely based on the government's promise to use it responsibly.[149] Moreover, the Court hesitated to construe the statutory language to avoid serious constitutional doubts because of fears of legislative infringement.[150]

D. Justice Alito's Dissent

The sole dissenter, Justice Alito, contended that the Court should not have utilized the overbreadth doctrine.[151] Instead, Justice Alito argued for an as-applied analysis of § 48 to Stevens' dogfighting videos.[152] The dissent suggested that such an analysis would render § 48 constitutional when applied to dogfighting videos rather than in addition to the unusual hunting or agricultural situations suggested by the majority.[153] Justice Alito further argued that § 48 was also valid under the overbreadth analysis.[154] Reiterating *Williams*, Justice Alito focused on the substantiality of a statute's breadth relative to its plainly legitimate sweep.[155] Since the suggested hunting and agricultural practices that the majority relied on to construe the statute as overly broad were rare situa-

144. Miller v. California, 413 U.S. 15, 34 (1973) (noting that obscene speech with serious value in scientific, political, or artistic realms would be deemed protected speech).

145. *Stevens*, 130 S. Ct. at 1591 (noting the Government's contention that the exception clause is sufficient to avoid First Amendment objection because it was drafted after the *Miller* decision).

146. *Id.* ("We did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place.").

147. *Id.*

148. *Id.* ("This prosecution [of Stevens] is itself evidence of the danger in putting faith in government representations of prosecutorial restraint.").

149. *Id.*

150. *Id.* at 1592 ("We will not rewrite a . . . law to conform it to constitutional requirements . . . for doing so would constitute a serious invasion of the legislative domain . . . .") (first alteration in original) (citations omitted) (internal quotation marks omitted).

151. *Id.* at 1594 (Alito, J., dissenting).

152. *Id.* at 1593 & n.1 ("A party seeking to challenge the constitutionality of a statute generally must show that the statute violates the party's own rights.").

153. *Id.* at 1602 ("[Section] 48 may validly be applied to . . . dogfighting videos. . . . Moreover . . . the record does not show that § 48, properly interpreted, bans a substantial amount of protected speech in absolute terms.").

154. *Id.*

155. *See id.* at 1594 ("In determining whether a statute's overbreadth is substantial, we consider a statute's application to real-world conduct, not fanciful hypotheticals.").

tions, Alito argued that they did not constitute a substantial amount of protected speech.[156]

Next, Justice Alito looked to *Ferber* to argue for the addition of crush videos and dogfighting videos to the realm of unprotected speech.[157] Comparing the case to the child pornography in *Ferber*, Justice Alito reasoned that crush videos and dogfighting videos followed the same logical course to unprotected status.[158] Justice Alito highlighted the *Ferber* Court's focus on the integral relationship between child pornography and child abuse, the lack of effective prevention of child abuse without prohibiting child pornography distribution, and the value of child pornography being de minimus.[159] While Justice Alito noted that the prevention of child abuse was more important than the prevention of animal cruelty, he claimed that crush and dogfighting videos could be classified as unprotected speech because each of these *Ferber* factors applied to these videos.[160]

III. ANALYSIS

The Supreme Court's choice to invalidate § 48 was not only the correct decision, but it was also important for the preservation of First Amendment rights. Rather than trying to reconstruct a statute that had thus far proven useful for government authorities, the Court recognized the overbreadth of § 48 and its potential to restrict protected speech. By forcing Congress to redraft a narrow statute proscribing only crush video content, the Court foreclosed on any opportunity, however slight, for the government to abuse § 48 and infringe on speech worthy of First Amendment protections. In light of the hard fought history of free speech rights, any opportunity to encroach on the First Amendment should be countered, and by invalidating § 48 the *Stevens* Court has assured that rescissions of free speech will not easily happen.

A. Proper Decision by the Supreme Court

The issue in *Stevens* encompassed far more than whether depictions of crushing animals to death deserved unprotected status under the First Amendment.[161] The Supreme Court was presented with the question whether "depictions of animal cruelty, as a class, are categorically unpro-

156. *Id.* at 1595–97 (criticizing hypotheticals involving illegal crossbow hunting, depicting humane slaughter of cows, and other acts that happen to be illegal for reasons that have "nothing to do with the prevention of animal cruelty").

157. *Id.* at 1598–99, 1601–02.

158. *Id.* (arguing that crush video creation is a crime, the acts within the video cannot be prevented without targeting the distribution of the videos, and the harm caused by the videos adds little value, if any, to society).

159. *Id.* at 1599–1600 (highlighting that in *Ferber*, the production of the work, not its content, was the target of the statute).

160. *See id.* at 1599–1602 ("[P]reventing the abuse of children is certainly much more important than preventing the torture of the animals used in crush videos.").

161. *See id.* at 1582, 1584 (majority opinion).

tected."[162] This wide range of content-based restricted speech was justified by the government on the ground that this speech is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[163]

While the government's reasoning has been reiterated throughout First Amendment case law,[164] it has never been classified as a test in determining whether a certain type of speech deserves protection under the First Amendment.[165] Rather, this idiom has served as a description of speech already determined to be without protection.[166] The *Stevens* Court rightfully declined to recognize the use of the government's reasoning as a test, thereby declining to empower the government beyond permissible means.

As a test, the government would have had the power to censor a speaker by balancing the value of expression against the indefinable standards of both order and morality.[167] Determinations of social value would no doubt vary due to the subjectivity of such a test, and any measure devised to establish when the benefits of speech outweighed order and morality would be arbitrary.[168] The *Stevens* Court's determination reminds us that the purpose behind the First Amendment is to prevent arbitrary governmental restrictions on speech when speech is classified as "not worth [First Amendment protections]."[169]

1. Neglecting to Recognize a New Category of Unprotected Speech

Balancing speech against order and morality may enable the government to utilize helpful laws, but the First Amendment cannot be circumvented at the connivance of the government statutes that has thus far proved useful.[170]

Notwithstanding apparent faults in a balancing test, some scholars argue that a categorical weighing of speech value against social harms is

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162. *Id.* at 1584.

163. *Id.* at 1585 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992)).

164. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 358–59 (2003); *City of St. Paul*, 505 U.S. at 383; Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

165. *Stevens*, 130 S. Ct. at 1585–86 (distinguishing between descriptions of historically protected speech and historically unprotected speech).

166. *See, e.g.*, *Chaplinsky*, 315 U.S. at 571–72 ("It has been well *observed* that such utterances [unprotected by the First Amendment] are . . . of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.") (emphasis added).

167. *See Stevens*, 130 S. Ct. at 1585–86 (suggesting that, under a cost benefit analysis test, free speech could be proscribed when the cost of protecting it "tilts in a statute's favor").

168. *See id.*

169. *Id.* at 1585 ("Our Constitution forecloses any attempt to revise [the First Amendment guarantee to free speech] simply on the basis that some speech is not worth it.").

170. *See id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803)) ("The Constitution is not a document 'prescribing limits, and declaring that those limits may be passed at pleasure.'").

the preferable method of distinguishing between protected and unprotected speech.[171] For example, it is argued that applying a balancing test consisting of the factors articulated in Ferber would increase transparency and provide a more predictable outcome when determining whether speech fell within the protections of the First Amendment.[172] While a balancing test might resort to an arbitrary cost-benefit calculation, it would provide a clearer standard for litigators than the case-by-case adjudication centered on strict scrutiny or the comparisons to existing unprotected categories of speech.[173] Admittedly, a balancing test would empower the Court to differentiate between free speech and recognized unprotected speech with greater ease.[174] However, recognizing a simple balancing test as a measure of the protected status of speech has dangerous consequences.[175] While such a test might work to easily discern depictions of animal cruelty or even crush videos as unprotected speech, the general nature of a balancing test would enable future litigants to argue for its applicability in other realms of free speech contests.[176] Recognizing a "highly manipulable"[177] balancing test in order to assure predictability in free speech litigation would lead to a deterioration of the hard fought and rigid restrictions on governmental censorship central to American notions of liberty.[178] Therefore, the *Stevens* Court appropriately rejected a free speech balancing test presented by the government under the veil of animal cruelty.

In addition to its balancing test, the government attempted to proscribe depictions of animal cruelty as categorically unprotected speech by pointing to the long history associated with the prohibition of animal cruelty in the United States.[179] While categories of unprotected speech in

171. *The Supreme Court, 2009 Term—Leading Cases*, 124 HARV. L. REV. 239, 248 (2010) [hereinafter *Leading Cases*].

172. *Id.* at 248–49 (explaining that the *Ferber* factors provided a clear framework for a balancing test; that this test was preferable to the *Stevens* Court's redefinition of *Ferber* as anchored in historical unprotected speech; and that the balance test provides a clearer standard than case-by-case analyses of speech contests).

173. *Id.* ("While definitional balancing may sometimes approximate a cost-benefit calculus instead of the more speech-protective method of weighing First Amendment values, it provides a clearer standard than case-by-case strict scrutiny analyses . . . .").

174. *Id.* ("[T]he Court's recharacterization of *Ferber* [away from the balancing test] . . . provides fewer doctrinal tools to distinguish speech closely analogous to previously recognized unprotected categories.").

175. United States v. Stevens, 130 S. Ct. 1577, 1585 (2010) (describing a balancing test as "startling and dangerous").

176. *See id.* at 1586 ("[A balancing test] do[es] not set forth a test that may be applied as a general matter . . . .").

177. *Id.*

178. Elizabeth L. Kinsella, Note, *A Crushing Blow:* United States v. Stevens *and the Freedom to Profit from Animal Cruelty*, 43 U.C. DAVIS L. REV. 347, 353 (2009); *see also* Hunter, *supra* note 8, at 70, 87–89, 127 (describing the long history of government restriction on speech during early American history).

179. *Stevens*, 130 S. Ct. at 1585 (highlighting that animal cruelty laws have existed since colonial times in the United States).

the United States have historical foundations,[180] the Supreme Court correctly distinguished between historically illegal conduct and illegal depictions, finding that illegal conduct did not make the depictions of such conduct illegal.[181] Illegalizing speech because of the illegality of the conduct displayed in the speech would open a flood gate of issues concerning the depiction of illegal conduct, best demonstrated by speech meant to entertain, such as films depicting murder.[182] Without any information establishing that *depictions* of animal cruelty have a history of being illegal in the United States,[183] the Supreme Court rightly decided to keep depictions of animal cruelty as protected speech.

Although the *Stevens* Court failed to grant depictions of animal cruelty unprotected status, it did not specifically rule that crush video content or dogfighting video content will always be protected speech.[184] Rather, the *Stevens* Court noted that it was "not foreclos[ing on] the future recognition of such additional categories [of unprotected speech]."[185] The dissent provided a substantial framework for future litigators and prosecutors to establish crush video and dogfighting video content as unprotected categories of speech, in accordance with the *Ferber* decision.[186] While the government tried to employ the *Ferber* rationale to § 48 as a whole, it failed to demonstrate any intrinsic criminal relationship between animal abuse and depictions of animal cruelty beyond crush videos and dogfighting videos.[187] As a result, the majority did not evaluate crush videos apart from § 48 according to *Ferber*.[188] The majority's scant dismissal of the government's attempt to entrench § 48 in prior doctrine,[189] coupled with the Court's acknowledgement that other types of speech may become proscribed,[190] suggests that crush videos by themselves may one day be classified as unprotected speech.

The Court made the right move staying within its judicial realm instead of wildly interpreting § 48 to proscribe crush and dogfighting videos. Interpreting § 48 in such a way would have allowed the Court to infringe upon the legislative duties of Congress[191] which specifically

180. *Id.*

181. *Id.* ("[W]e are unaware of any similar tradition excluding *depictions* of animal cruelty from 'the freedom of speech' . . . .").

182. *Id.* at 1590 (highlighting that hunting videos for pure entertainment purposes would be considered illegal for not having "serious" value).

183. *Id.* at 1585.

184. *See id.* at 1585–86.

185. *Id.* at 1586.

186. *See id.* at 1599–1602 (Alito, J., dissenting).

187. *Id.* at 1592 (majority opinion).

188. *Id.*

189. *Id.* (discussing the failure of the government to establish that the obscenity or intrinsic criminal relationship categories of unprotected speech extend to other areas of speech proscribed by § 48 other than crush and dogfighting videos).

190. *Id.* at 1586.

191. *Id.* (quoting United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 479 n.26 (1995)) ("[F]or doing so would constitute a 'serious invasion of the legislative domain.'").

drafted § 48 to apply to content other than just crush videos.[192] Moreover, the Court should not be inclined to take up the responsibility entrusted to executive prosecutors when they fail to provide any defense to § 48 beyond crush and dogfighting videos.[193]

2. Overbreadth Analysis

While the overbreadth analysis was appropriate because of the facial challenge to the content-based First Amendment restrictions imposed by § 48,[194] the use of the doctrine before considering the constitutionality of § 48 as applied to Stevens is contentious.[195] However, the Court's divergence from general practices[196] was warranted because of the nature of the statute's restriction and the way the issue was presented to the court.

First, § 48 restricted the type of speech that most appropriately warrants an overbreadth analysis. Pure speech challenges warrant evaluation under the overbreadth doctrine more so than other expressive concerns under the First Amendment.[197] Prohibiting depictions of animal cruelty restricts pure speech; therefore, § 48 was more deserving of an overbreadth analysis than cases involving the prohibition of expressive political conduct[198] or strict regulation of commercial speech.[199]

Overbroad analyses have typically been prefaced by as-applied analyses where the challenger brings a broad challenge along with an as-applied challenge.[200] In *Board of Trustees v. Fox*,[201] the overbreadth analysis was considered after the challengers brought a specific claim regarding their commercial speech in addition to a claim asserting a broad non-commercial restriction on speech.[202] In *Broadrick v. Okla-*

192. 18 U.S.C. § 48(a) (2006) (including all depictions of animal cruelty).

193. *See Stevens*, 130 S. Ct. at 1591–92 ("[T]he Government makes no effort to defend the constitutionality of § 48 as applied beyond crush videos and depictions of animal fighting.").

194. *Id.* at 1587 n.3 (arguing that an overbreadth analysis was appropriate because an as-applied challenge had not been preserved).

195. *Id.* at 1593 (Alito, J., dissenting) ("[O]verbreadth invalidation need not and generally should not be administered when the statute under attack is unconstitutional as applied . . . .").

196. Bd. of Trs. v. Fox, 492 U.S. 469, 484–85 (1989) ("It is not the usual judicial practice . . . to proceed to an overbreadth issue . . . before it is determined that the statute would be valid as applied.").

197. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("[O]verbreadth adjudication . . . attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct . . . .").

198. *Id.* at 616–18 (reviewing a statute that prohibits political expressive conduct under the overbreadth doctrine).

199. *Fox*, 492 U.S. at 483–85 (discussing the applicability of the overbreadth doctrine to commercial speech).

200. *Id.* at 484–85 ("It is not the usual judicial practice, however, nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied.").

201. 492 U.S. 469 (1989).

202. *Id.* at 483–86 (declining to determine if the statute was overbroad because a proper as-applied analysis had yet to be completed).

homa,[203] the overbreadth analysis was considered after the challengers had conceded that the statute in question was valid when applied to them.[204] Unlike these prior cases constructing the precedent, Stevens did not bring a claim against the statute as it applied to him, nor did he stipulate that it would be valid as applied to him.[205]

Despite the fact that courts typically prefer to conduct as-applied analysis prior to an overbreadth analysis no precedent suggests that the Court has to conduct an as-applied analysis prior to engaging in an overbroad analysis.[206] As-applied analyses are merely encouraged where they would increase judicial ease and efficiency.[207] Since the Court assumed that § 48 was valid as-applied to the content at issue in *Stevens*, it properly continued with an overbreadth analysis, and thereby effectuated efficient justice by preventing future litigation concerning the same issues.[208]

The Court's interpretation of § 48 as overbroad was proper for several reasons. First, a non-literal interpretation of statutory text creates opportunities for congressional lethargies.[209] Such a practice is dangerous for any realm of law, but especially in respect to the sacred nature of the First Amendment,[210] this cannot be encouraged. The Court's refusal to recognize *noscitur a sociis* or other canons of construction[211] was therefore appropriate.

Second, the Court's sweeping interpretation of § 48 to encompass unusual hunting practices and agricultural regulations[212] was necessary to satisfy the requirements of the overbreadth doctrine as described in *Williams*.[213] Furthermore, the majority of content subjected to § 48 restric-

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203. 413 U.S. 601 (1973).

204. *Id.* at 612–18 (considering the overbreadth doctrine, and holding the statute not overbroad).

205. United States v. Stevens, 130 S. Ct. 1577, 1587 n.3 (2010) ("The sentence in Steven's appellate brief mentioning his unrelated sufficiency-of-the-evidence challenge hardly developed a First Amendment as-applied claim.").

206. *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008) (discussing the Court's hesitancy in applying the "strong medicine" of overbreadth analyses); *see also Fox*, 492 U.S. at 484 (noting that courts do not find it "generally desirable" to consider an overbreadth analysis prior to an as-applied analysis); *Broadrick*, 413 U.S. at 613 (discussing how the overbreadth analysis has historically been employed "sparingly" by the Court).

207. *Fox*, 492 U.S. at 485.

208. *Stevens*, 130 S. Ct. at 1594 (Alito, J., dissenting) ("[T]he Court tacitly assumes for the sake of argument that § 48 is valid as applied to [crush video and deadly animal fight] depictions . . . .").

209. *Id.* at 1592 (majority opinion) ("[To] 'rewrite a . . . law to conform it to constitutional requirements' . . . would . . . sharply diminish Congress's 'incentive to draft a narrowly tailored law in the first place.'" (first alteration in original) (citations omitted)).

210. Kinsella, *supra* note 178, at 353 ("Americans generally believe free speech is a national right central to notions of liberty.").

211. *Stevens*, 130 S. Ct. at 1588, 1592 (declining to consider alternate canons of construction).

212. *Id.* at 1596 (Alito, J., dissenting) (discussing hunting methods involving a crossbow, hunting rare birds, and agricultural practices such as docking the tails of dairy cows).

213. *Id.* at 1587 (majority opinion) (quoting United States v. Williams, 553 U.S. 285, 293(2008)) ("[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers.").

tions were regular hunting practices from videos or magazines which,[214] as the Court correctly argued, overwhelmingly outnumbered depictions of animal cruelty in the commercial market.[215] The purpose of the overbreadth analysis, to preserve free speech at the expense of allowing some impermissible forms of speech,[216] was properly carried out by the *Stevens* Court's invalidation of § 48.

B. Congressional Drafting

The invalidation of § 48 should be attributed to Congress rather than to the Supreme Court because the statute was bound to infringe upon the First Amendment from its enactment.[217] Rather than constrain § 48 to only crush video content, Congress acted against minority concerns and drafted a sweeping law with substantial breadth.[218] Since § 48's invalidation, Congress has constructed a new law to combat crush videos,[219] and this time Congress did what it should have done in the first place: create a narrow law that both prevents crush videos and respects the First Amendment.

1. Inherent Faults of 18 U.S.C. § 48

Worries about the constitutionality of § 48 were abundant during the House debate on § 48 as a bill.[220] House Representative Robert Scott, of Virginia, highlighted constitutional concerns by declaring that the bill restricted speech content, and that because § 48 did not wholly qualify as obscenity it would be subjected to strict scrutiny review.[221] Relying on the same case law as the Third Circuit did in its *Stevens* decision,[222] Representative Scott informed the House that § 48 would likely fail the strict scrutiny test because animal rights were not compelling enough to supersede human constitutional rights.[223] Representative Ron Paul, of Texas, also expressed concern regarding the statute's constitutional inadequacy, arguing that the proposed statute was broadly written and that animal

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214. *See, e.g., id.* at 1596 (Alito, J., dissenting) (discussing the predominantly tolerant views regarding hunting and listing activities commonly perceived to be normal, such as fishing).

215. *Id.* at 1589 (majority opinion) ("The demand for hunting depictions exceeds the estimated demand for crush videos or animal fighting depictions by several orders of magnitude.").

216. *Id.* at 1587 (recognizing that the focus of the overbreadth doctrine hinges on the substantiality of unconstitutional applications when compared to the legitimate sweep of the statute).

217. Reynolds, *supra* note 78, at 345 ("Possible First Amendment troubles were pointed out immediately by opponents of the bill [that would become § 48].").

218. *See, e.g.*, 145 CONG. REC. H10268 (daily ed. Oct. 19, 1999) (statement of Rep. Robert Scott).

219. Bill Mears, *Obama Signs Law Banning 'Crush Videos' Depicting Animal Cruelty*, CNN POLITICS, (Dec. 10, 2010), http://articles.cnn.com/2010-12-10/politics/animal.cruelty_1_dog-fighting-videos-crush-videos-animal-cruelty?_s=PM:POLITICS.

220. *See, e.g.*, 145 CONG. REC. H10268 (daily ed. Oct. 19, 1999) (statement of Rep. Robert Scott).

221. *Id.*

222. United States v. Stevens, 553 F.3d 218, 226 (3d Cir. 2008), *aff'd*, 130 S. Ct. 1577 (2010).

223. 145 CONG. REC. H10268.

cruelty was not well defined.[224] He went on to point out that regardless of the intention of the statute—preventing crush video animal cruelty—the broad drafting of the statute provided an opportunity for misinterpretation of the law.[225]

Proponents of the bill seemed less concerned with constitutional problems and more concerned with preventing crush video animal cruelty.[226] Some legislators assured protestors that § 48 would pass constitutional muster, pointing to the exceptions clause as properly narrowing the statute.[227] In fact, one legislator went so far as to say that § 48 would "only prevent the interstate trafficking of videos that feature people crushing small animals to death with their feet."[228]

Although § 48 passed in Congress with overwhelming support, worries about § 48's unconstitutionality were so well noticed that President Bill Clinton issued a signed statement addressing the matter.[229] President Clinton acknowledged congressional apprehensions that, if applied in certain contexts, § 48 would violate the First Amendment.[230] In an effort to prevent unconstitutional applications, President Clinton ordered prosecutions to be limited to depictions of wanton cruelty to animals designed to appeal to prurient interests in sex.[231] The President's efforts, as well as congressional assurances that § 48 would apply only to crush videos, proved fruitless, as § 48's first prosecution to reach trial concerned dogfighting.[232]

2. Alternatives Under the Son of Sam Laws

As demonstrated by the result in *Stevens*, Congress should have drafted § 48 differently. One recommendation is that an attempt at a new restriction on crush videos should be enacted under the Son of Sam laws.[233] These laws prevent criminals from utilizing free speech to collect profit by depicting the conduct of their previously-committed crimes.[234] Some argue that a statute enacted under the Son of Sam laws would be narrower, and thus more likely subjected to a lower level of

224. 145 CONG. REC. H10270 (daily ed. Oct. 19, 1999) (statement of Rep. Ron Paul).
225. *Id.*
226. *Id.* at H10271–73.
227. *Id.* at H10267 (statement of Rep. Bill McCollum) ("These exceptions would ensure that an entertainment program . . . or a news documentary . . . would not violate the new statute.").
228. *Id.* at H10268 (statement of Rep. Lamar Smith).
229. *Presidential Statement on Signing Legislation to Establish Federal Criminal Penalties for Commerce in Depiction of Animal Cruelty*, 35 WKLY. COMP. PRES. DOC. 2557 (Dec. 9, 1999).
230. *Id.* at 2557–58.
231. *Id.* at 2558.
232. Reynolds, *supra* note 78, at 345 (noting that the first prosecution to come to trail under § 48 was Stevens' indictment in 2004).
233. Ricaurte, *supra* note 42, at 195 (arguing that Son of Sam laws may be constitutionally applied to depictions of animal cruelty).
234. *Id.* ("Son of Sam, or criminal anti-profit laws, are based on the general principle that criminals should not profit from their crimes. The laws typically seek to prevent criminals from profiting based on their notoriety from previously committed crimes." (footnote omitted)).

judicial scrutiny, because speech infringements would have to relate specifically to crush videos.[235]

However, such a law would be ineffective in the crush video context. The primary reason for the enactment of § 48 was the difficulty in apprehending and convicting the producers of crush videos.[236] Any Son of Sam law looking to prohibit the distribution of crush videos could apply only to persons convicted or accused of the animal cruelty crime conducted in the crush video.[237] While narrowing the speech restriction to survive judicial scrutiny, a crush video Son of Sam law would give prosecutors an impassible obstacle: having to prove that the detained distributor is the producer of the crush video. As a result, such a statute would do little to prevent the production and distribution of crush videos.

3. An Improved Crush Video Statute

Rather than a broad prohibition on animal cruelty depictions or an ineffective Son of Sam law concerning crush videos, Congress has now created an effective crush video statute that will prove constitutional. On December 9th, 2010, President Barack Obama signed into law a narrowly drafted crush video statute,[238] designed to solely prohibit the creation and distribution of animal crush videos.[239] Crush videos are now described as "any photograph, motion-picture film, video or digital recording, or electronic image that depicts actual conduct [of one] or more non-human mammals, birds, reptiles, or amphibians [being] intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury."[240] Moreover, the new statute excludes agricultural husbandry, animal slaughter for food purposes, and hunting and fishing depictions from criminality.[241] The specific focus of the new statute addresses the weight of the Supreme Court's overbreadth analysis in *Stevens*, the substantiality of the market of hunting and agricultural videos as against crush videos.[242] Additionally, the well-defined description of animals precludes the new statute from reaching other forms of protected

235. *Id.* at 199 (arguing that a Son of Sam law relating to depictions of animal cruelty "would apply to a narrower category of speech," be less underinclusive and overinclusive restrictions on speech, and would face a lower level of scrutiny because of the content-neutral restriction imposed on speech).

236. United States v. Stevens, 130 S. Ct. 1577, 1583 (2010) ("[C]rush videos rarely disclose the participants' identities, inhibiting prosecution of the underlying conduct.").

237. Ricaurte, *supra* note 42, at 202 (admitting that third parties, not involved in the animal abuse, could still sell depictions of the dog fighting and animal cruelty videos).

238. Mears, *supra* note 219.

239. 156 CONG. REC. S8202 (daily ed. Nov. 19, 2010).

240. *Id.* at S8203.

241. *Id.*

242. United States v. Stevens, 130 S. Ct. 1577, 1589 (2010) ("The demand for hunting depictions exceeds the estimated demand for crush videos or animal fighting depictions by several orders of magnitude.").

speech, such as insect extermination advertisements.[243] The new statute's narrow applicability will likely survive an overbreadth analysis since its potential reach extends only to crush videos.[244]

While addressing a properly narrow scope of speech, the new statute prohibits content-based speech and must survive strict scrutiny or qualify as unprotected speech to survive judicial review.[245] The new statute will likely face difficulty passing a strict scrutiny analysis. The Supreme Court's focus on the overbreadth doctrine in *Stevens* provides little insight, but the prior Third Circuit decision may.[246]

Survival of strict scrutiny under the First Amendment is dependent upon a finding that the statute at issue aims to achieve a compelling state interest with the least restrictive means possible.[247] The Third Circuit determined that protecting animals did not amount to a compelling state interest.[248] However, this determination was made in regards to the broad range of cruelties encompassed in § 48 and not specifically regarding crush videos.[249] Moreover, the only Supreme Court decision considering the matter argues that animal interests do not supersede the rights guaranteed by the Free Exercise Clause.[250] While this instruction does not rule out the chance that crush animal cruelty may constitute a compelling state interest when weighed against free speech, the bleak history of content-based speech restrictions surviving strict scrutiny suggests that, if subjected to strict scrutiny, the new statute would fail.[251]

Despite this drawback, the new statute prohibits speech that falls outside the protections of the First Amendment since by definition animal crush videos must be obscene in order to be criminalized.[252] Following the directions of the *Stevens* Court, Congress grounded this new crush video statute in obscenity, a narrowly defined and historically unprotected category of speech.[253] While obscenity determinations are de-

243. *Compare* 156 CONG. REC. S8203 (daily ed. Nov. 19, 2010), *with* 145 CONG. REC. H10269 (daily ed. Oct. 19, 1999) (statement of Rep. Paul).

244. 156 CONG. REC. S8203.

245. *Id.*

246. *See* Kinsella, *supra* note 178, at 374–75 (highlighting that the Third Circuit found that § 48 did not satisfy the compelling interest prong of a strict scrutiny analysis).

247. *See id.* at 372–73; *see also* United States v. Stevens, 533 F.3d 218, 232 (2008), *aff'd*, 130 S. Ct. 1577 (2010) (discussing the presumptive invalidity of content-based restrictive statutes, which must pass strict scrutiny by showing a compelling state interest and a narrow tailoring to achieve that interest to survive a facial challenge).

248. Kinsella, *supra* note 178, at 372 (arguing that the Third Circuit was incorrect when finding that preventing animal cruelty was not a compelling interest).

249. *Id.* at 369–70.

250. *Id.* at 375 ("The [Supreme] Court recognized a compelling government interest in preventing animal cruelty, but ultimately determined the legislature's actual motive was to suppress religion.").

251. 156 CONG. REC. S8202–03 (daily ed. Nov. 19, 2010).

252. *Id.* at S8203 (statement of Sen. Leahy) (defining animal crush videos as obscene depictions).

253. *Id.*

pendent upon "contemporary community standards,"[254] the statute will likely prove effective because the specific prurient sexual nature and patently offensive content of crush videos will likely violate nearly all contemporary community standards.[255]

In addition, the new specific crush video statute may also be grounded in another category of unprotected speech: speech integral to criminal conduct. Commentators suggest that if the government can demonstrate that the animal abuse taking place in crush videos is created only for the purpose of making the videos, then the videos can be classified as integral to criminal conduct.[256] The Court's declination to evaluate crush videos as integral to criminal conduct centered on the inadequacy of the government's argument as to § 48 as a whole, not on whether evidence substantiated a connection between animal abuse and crush videos.[257] The Court's reservation of such an analysis leaves open the path for crush video content to be intrinsically tied to animal abuse, and the *Stevens* dissent provides clear instructions on how to navigate that path.[258] The only hindrance noted by the *Stevens* dissent is the fact that preserving the rights of humans is much more important that preserving the rights of animals.[259]

CONCLUSION

The Supreme Court will face criticism for striking down a law described by Justice Alito as an entirely valuable statute meant to prevent the horrific acts of animal cruelty portrayed in crush videos.[260] Evidence suggests that 18 U.S.C. § 48 effectually combated the crush video industry, and that after the Third Circuit's invalidation of § 48, the crush video market was reborn.[261] However, § 48 was written and executed to effect a

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254. Miller v. California, 413 U.S. 15, 24 (1973).

255. *See* 156 CONG. REC. S8203 (daily ed. Nov. 19, 2010) (statement of Sen. Leahy) ("Indeed, these animal crush videos . . . can be banned consistent with the Supreme Court's obscenity jurisprudence.").

256. Nadine Strossen, United States v. Stevens*: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 67 CATO SUP. CT. REV. 68, 102 (2010) ("If the government could support this contention through empirical evidence, that could be enough to encompass crush videos within the historic, traditional First Amendment exception for expression that is an integral aspect of criminal conduct." (footnote omitted)).

257. United States v. Stevens, 130 S. Ct. 1577, 1586 (2010) ("We need not foreclose the future recognition of such additional categories [of unprotected speech] . . . .").

258. *Id.* at 1599–1602 (Alito, J., dissenting).

259. *Id.* at 1600 ([P]reventing the abuse of children is certainly much more important than preventing the torture of the animals used in crush videos."); *see also* Julie China, *Animal Welfare vs. Free Speech*, 57-Jun FED. LAW. 4 (2010) ("[T]he time is not ripe . . . to recognize a new unprotected category of speech that extends protections to animals, because animals . . . are still considered personal property under the law.").

260. *Stevens*, 130 S. Ct. at 1592 (Alito, J., dissenting) ("The Court strikes down . . . a valuable statute . . . that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty . . . .").

261. *Id.* at 1598 ("[A]fter the Third Circuit's decision [facially invalidating the statute], crush videos are already back online." (second alteration in original)).

broader category of speech than just crush video content.[262] This overbreadth caused § 48 to fail.

Long standing principles embodied in our constitution demand that Congress, not the Supreme Court, draft the law.[263] Interpreting § 48 contra to the clear language of the statute would infringe upon this principle and discourage Congress to write clear laws altogether.[264] Such practices would endanger more than just the rights of animals; it would threaten the notion of American liberty in its entirety. The Supreme Court's decision forced Congress to do what it should have done over ten years ago—draft a narrowly defined statute that specifically prevents crush video creation and distribution.[265] This new statute should have the same effect on the crush video industry as the invalidated § 48,[266] and it avoids threatening other realms of speech that clearly enjoy First Amendment protections.[267]

The United States Government should not be able to restrict a large portion of speech on the basis that some smaller portion of speech is grotesque.[268] Moreover, the First Amendment protects citizens against the government; it does not allow the government to choose at its will which speech it will censor.[269] These hard fought ideas necessitate the preservation of the First Amendment's integrity against the evils § 48 sought to prevent. The Supreme Court made the right decision in *Stevens*.

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262. *Id.* at 1591 (majority opinion) (noting that §48 "presumptively extends to many forms of speech").

263. U.S. CONST. art. I, § 1 ("All legislative Powers . . . shall be vested in a Congress of the United States . . . .").

264. *Stevens*, 130 S. Ct. at 1592 (arguing that to interpret § 48 narrowly would equate to rewriting it, and doing so would encourage Congress to write broad laws).

265. 156 CONG. REC. S8203 (daily ed. Nov. 19, 2010).

266. *Stevens*, 130 S. Ct. at 1598 ("[A]fter the Third Circuit's decision [facially invalidating the statute], crush videos are already back online." (second alteration in original)).

267. 156 CONG. REC. S8203 (daily ed. Nov. 19, 2010) (statement of Sen. Leahy).

268. Broadrick v. Oklahoma, 413 U.S. 610, 612 (1973) ("[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . because of the possible inhibitory effects of overly broad statutes.").

269. *Stevens*, 130 S. Ct. at 1591 (arguing that the First Amendment does not leave us at the mercy of noblesse oblige).

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SALAZAR V. BUONO: A BLOW AGAINST THE ENDORSEMENT TEST'S CORE PRINCIPLE

INTRODUCTION

The First Amendment of the United States Constitution declares, in part, that "Congress shall make no law respecting an establishment of religion."[1] In the past half-century, the Establishment Clause's deceptively simple words have ignited an intense philosophical and jurisprudential debate over the requisite distance between religion and government. In *Lemon v. Kurtzman*,[2] the United States Supreme Court offered guidance in the form of a three prong test used to determine whether church and state have become unconstitutionally intertwined.[3] But *Lemon* was far from the final word on Establishment Clause interpretation, and since that case, a spectrum of conceptualizations have competed for dominance within the Court. Although the concept of an impermeable "wall of separation" between church and state is a dead ideal in the current Court,[4] two other broad Establishment Clause interpretations have remained relevant. The first refines the *Lemon* test into an inquiry invalidating state action that endorses or discourages religion in the eyes of a reasonable observer or is intended to do so (endorsement test).[5] The other resists *Lemon*, viewing religion's significance in American history as vindication of a permissive interpretation allowing the government to accommodate religion so long as it does not exert government force to coerce religious practice (coercion test).[6]

The recent Supreme Court case of *Salazar v. Buono*[7] captured the attention of commentators hoping the Supreme Court would finally resolve whether and when displays of religious icons violate the Establishment Clause.[8] Disappointingly, the case's procedural quagmire prevented the Court from reaching its most compelling doctrinal questions.[9]

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1. U.S. Const. amend. I.

2. 403 U.S. 602 (1971).

3. The three prongs are (1) "the statute must have a secular legislative purpose"; (2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and (3) "the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

4. Frederick Mark Gedicks, *Undoing Neutrality? From Church-State Separation to Judeo-Christian Tolerance*, 46 WILLAMETTE L. REV. 691, 706 (2010).

5. *See* Lynch v. Donnelly, 465 U.S. 668, 687–89 (1984) (O'Connor, J., concurring).

6. Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part); *see also* Van Orden v. Perry, 545 U.S. 677, 686–88 (2005).

7. (*Buono*), 130 S. Ct. 1803 (2010).

8. The Supreme Court, 2009 Term—Leading Cases, 124 HARV. L. REV. 219, 225 (2010) [hereinafter *Leading Cases*].

9. *See id.*

Instead, the Court remanded the case to the district court to conduct a so-called endorsement inquiry.[10] However, the analytical framework the Court provided to the district court embodied values adverse to those that the endorsement test was designed to protect. By blurring the distinction between the endorsement test's independent prongs, injecting incongruous principles into the test, and calling the test's "reasonable observer" standard into question, the Court effectively hollowed out the endorsement test and replaced its core with that of the coercion test.

This Comment argues that *Buono* endangers a worthwhile value embedded in the endorsement test—the principle that government may not make "adherence to a religion relevant in any way to a person's standing in the political community."[11] Although displays of religious iconography do not technically compel citizens to religious observance, they potentially threaten religious liberty by conveying the message that the government favors a particular religion. Such a message exerts pressure on individual citizens to adhere to the favored religion so that they may benefit from government favoritism.[12] On remand, the district court should be conscious that this rationale brought about the Court's initial development of the endorsement test and should strive to preserve it.

Part I of this Comment presents a line of Supreme Court Establishment Clause cases, highlighting the tension between the endorsement and coercion tests. Part II summarizes *Buono*'s facts, procedural history, and opinions. Part III defends the endorsement test as the best means for preventing the government from dividing the community into favored and disfavored members on the basis of religion, explores how *Buono*'s distortion of the endorsement test threatens the principle of separation of church and state, and suggests how the district court's analysis on remand could follow the Supreme Court's framework while still keeping that principle alive. This Comment concludes that while *Buono* stopped short of definitively repudiating the endorsement test, it undeniably jeopardized the test's core value.

I. BACKGROUND

A. The Endorsement Test's Origin

The First Amendment of the Constitution secures some of the most fundamental rights recognized by free societies. Specifically, the Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion."[13] This language

10. *Buono*, 130 S. Ct. at 1820–21.

11. Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

12. *See* Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1160 (10th Cir. 2010) (invalidating state displays of crosses because they may lead non-Christians to believe they could receive benefits for becoming Christian).

13. U.S. CONST. amend. I.

poses interpretive difficulties because the definition of "establishment" is contentious and because the word "respecting" indicates that the government's religious involvement must stop at some point short of full establishment.[14]

1. *Lemon v. Kurtzman*

In *Lemon v. Kurtzman*, the Court resolved the clause's interpretive difficulties through a case law synthesis. Drawing upon past Establishment Clause decisions, the Court developed three requirements the government must meet when its actions become associated with religion: (1) the action must have a secular purpose (purpose prong); (2) the action's principal effect must "neither advance[] nor inhibit[] religion" (effect prong); and (3) the action must not foster excessive government entanglement with religion (entanglement prong).[15] These three prongs appear to correspond with each of "three main evils" identified by the *Lemon* Court as the primary harms against which the Establishment Clause was intended to protect: (1) state sponsorship of religion; (2) state financial support of religion; and (3) state involvement in religious activity.[16]

In *Lemon*, the Court applied the above test to invalidate two state statutory programs that allocated public funds to religious private schools.[17] Both programs were held to be unconstitutional despite the fact that public assistance could only be used to fund secular instruction under the statutes.[18] In its analysis, the Court found that the legislature's express intention to enhance the secular components of parochial education was a valid secular purpose under the purpose prong.[19] However, the Court found that in order to implement the programs in accordance with their secular purpose, the states would need to engage with religion in a manner that constituted excessive entanglement.[20] First, the fact that the government would need to institute a "comprehensive, discriminating, and continuing . . . surveillance" of religious private schools and supervise teachers to ensure the public funds were used only for non-ideological education.[21] The surveillance would necessitate perpetual entanglement between the state governments and religious schools.[22] Second, a danger of excessive government entanglement with religion stemmed from the programs' politically divisive nature.[23] The Court reasoned that the need for annual appropriations would incentivize parochial

14. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
15. *Id.* at 612–13.
16. *Id.* at 612.
17. *See id.* at 615–22.
18. *Id.* at 613–14.
19. *Id.* at 613.
20. *Id.* at 619–22.
21. *Id.* at 619.
22. *Id.*
23. *Id.* at 622.

schools to use political action to secure greater appropriations.[24] Fearing that voters, presented with the choice of whether or not to allocate more funds to religious schools, would align with their individual sects,[25] the Court recognized the potential of creating a "political division along religious lines," which the Court noted was "one of the principal evils against which the First Amendment was intended to protect."[26] Therefore, both the surveillance that was required to ensure that the schools used the public funds for nonreligious instruction and the potential for political divisiveness along religious lines constituted excessive government entanglement with religion.[27] Having resolved the case under the entanglement prong, the Court lacked occasion to analyze the programs under the effect prong.[28]

Lemon has become a seminal case in Establishment Clause jurisprudence, but not a universally accepted one. In future decisions, the Court became divided between critics and supporters of *Lemon*'s underlying themes of government neutrality in religious matters and limited involvement between church and state.

2. *Lynch v. Donnelly*

In *Lynch v. Donnelly*[29], the Court validated a city-owned display featuring a crèche,[30] among several secular objects associated with Christmas, under the Establishment Clause.[31] In doing so, the majority undermined the authority of the *Lemon* test as merely useful considerations based on the context of the case.[32] Refusing to subscribe to a single rule, the Court characterized the line between permissible and impermissible government involvement with religion as blurred and unfixed, and declared that attempting to erect an unwavering wall between church and state would contradict American historical traditions.[33]

Consequently, the Court took into consideration what it called America's "unbroken history of official acknowledgement" and accommodation of religion.[34] In doing so, the Court pointed to governmental acts such as Congress's enactment of "legislation providing for paid chaplains to the House and Senate" the same week it approved the Estab-

24. *Id.* at 622–23.
25. *Id.* at 622.
26. *Id.* at 622 (citing Paul A. Freund, Comment, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969)).
27. *Id.* at 613–14, 620–22.
28. *Id.* at 613–14.
29. 465 U.S. 668 (1984).
30. A crèche, also called a Nativity scene, is described as consisting of "traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals." *Id.* at 671.
31. *Id.* at 680–86.
32. *Id.* at 679.
33. *Id.* at 678–79.
34. *Id.* at 674.

lishment Clause.[35] The Court also noted several other historical examples of the United States affirmatively accommodating and acknowledging religion, including: President George Washington's religiously-influenced declaration of Thanksgiving as a national holiday with religious overtones; the motto "In God We Trust" on our currency; and the phrase "One Nation, under God" in the Pledge of Allegiance.[36] The Court reasoned that if such overt government advancements of religion were acceptable under the First Amendment, then a "passive" crèche display in the context of the Christmas season could not violate the Establishment Clause.[37]

3. Development of the Endorsement Test

Justice O'Connor wrote an influential concurring opinion in *Lynch* introducing the endorsement test to clarify the Court's Establishment Clause doctrine.[38] Justice O'Connor reasoned that the Establishment Clause's primary purpose is to prevent the "government from making adherence to a religion relevant in any way to a person's standing in the political community."[39] According to Justice O'Connor, the state could violate this prohibition in two ways: (1) through excessive entanglement with religion or (2) through endorsement or disapproval of religion.[40] Under Justice O'Connor's rationale, endorsement affected citizens' political standing by designating adherents and nonadherents as insiders and outsiders, and thus divided them into favored and disfavored political community members.[41] The division frustrated religious liberty by pressuring citizens to adhere to the favored religion in hopes of preferential treatment. Although most government actions send some sort of message encouraging or discouraging certain behavior, the Establishment Clause created a constitutional mandate that the government withhold from exerting this type of influence over matters of religion.

Some commentators have described the endorsement test as a revision of the three prong *Lemon* test into a test with two parts.[42] *Lemon*'s entanglement prong remained unaffected, but its purpose and effect prongs were combined into a single test inquiring whether the government had the purpose or effect of endorsing religion.[43] It is important to emphasize that, although the purpose and effect prongs are "combined" in the sense that they both now focus on endorsement, Justice O'Connor

35. *Id.*
36. *Id.* at 674–77.
37. *See id.* at 686.
38. *Id.* at 687 (O'Connor, J., concurring).
39. *Id.*
40. *Id.* at 687–88.
41. *Id.* at 688.
42. *See e.g.*, Paul Forster, Note, *Separating Church and State: Transfers of Government Land as Cures for Establishment Clause Violations*, 85 CHI.-KENT L. REV. 401, 405 (2010).
43. *Id.*

explicitly preserved them as distinct subparts of the overall analysis. [44] In applying the endorsement test, Justice O'Connor found that the Establishment Clause was violated *either* where the government subjectively intended to endorse or disapprove of religion, thus infringing on the purpose prong, *or* when it ran afoul of the purpose prong by "objectively" conveying a message that would in fact endorse or disapprove of religion in the eyes of a reasonable observer.[45] The four *Lynch* dissenters also applied the endorsement test,[46] making it the standard agreed upon by a five-Justice majority.

B. Tension Between Endorsement and Coercion

1. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*[47]

In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, the Court again considered whether city-owned displays associated with religious holidays violated the Establishment Clause.[48] There were two displays at issue, both in downtown Pittsburgh.[49] The first was a crèche located on the county courthouse steps.[50] The second was a Chanukah menorah placed alongside a Christmas tree and a "sign saluting liberty" located outside a building jointly owned by the City of Pittsburgh and the County of Allegheny.[51]

In evaluating the constitutionality of these displays, the majority adopted the endorsement test.[52] The Court defined "endorsement" as government action that conveys or attempts to convey "a message that religion or a particular religious belief is *favored* or *preferred*."[53] The Court elaborated that it would evaluate the message conveyed by public religious displays through the eyes of a hypothetical "reasonable observer."[54]

Applying this standard, the Court found that the crèche display violated the Establishment Clause.[55] The crèche failed the endorsement test's effect prong because it had "the effect of endorsing a patently Christian message."[56] Unlike the display at issue in *Lynch*, the crèche was not surrounded by secular symbols to offset its religious message.[57]

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44. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (reasoning that Pawtucket did not intend a message of endorsement of Christianity or disapproval of non-Christian religions).
45. *See id.*
46. *Id.* at 695 (Brennan, J., dissenting).
47. 492 U.S. 573 (1989).
48. *Id.* at 578.
49. *Id.*
50. *Id.*
51. *Id.*
52. *See id.* at 592.
53. *Id.* at 593 (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)).
54. *Id.* at 620.
55. *Id.* at 579.
56. *Id.* at 601.
57. *See id.* at 598-99.

The menorah, on the other hand, survived the Court's scrutiny because it was displayed alongside a Christmas tree and a sign saluting liberty, and the menorah was seen as a symbol of Chanukah, which has "religious and secular dimensions."[58] The Court determined that these objects displayed together created an "overall holiday setting" that would lead a reasonable observer to interpret the display as a secular recognition of various traditions with no favoritism or preference on the part of the State.[59]

Justice Kennedy wrote separately in *Allegheny,* stating that the majority's approach "reflect[ed] an unjustified hostility toward religion."[60] He reasoned that the endorsement test was "flawed in its fundamentals and unworkable in practice[,]" and that if applied consistently, would invalidate longstanding traditions of accommodating, acknowledging, and supporting religion.[61]

According to Justice Kennedy, under the Establishment Clause, the government is limited in recognizing and accommodating religion by two principles: (1) the government may not coerce its subjects to practice religion,[62] and (2) the government may not confer direct benefits upon religion so substantial that they would tend to establish a national faith.[63] Justice Kennedy's test became known as the coercion test,[64] under which religious displays were found to be acceptable passive accommodations because a passersby may freely ignore them.[65]

2. The Ten Commandments Cases

For the two decades since the *Allegheny* decision, the endorsement test has been the touchstone Establishment Clause test; however, not all Justices on the Court have agreed that it is the proper test to use.[66] The tension between the Justices' widely varying views on the Establishment Clause recently led the Court toward seemingly contradictory rulings regarding permanent Ten Commandments displays on public property.[67]

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58. *Id.* at 613–14.

59. *See id.* at 614, 20.

60. *Id.* at 655 (Kennedy, J., concurring in part and dissenting in part).

61. *See id.* at 669–70.

62. *Id.* at 659. Examples of legal coercion include compulsory "participation or attendance at a religious activity, requiring religious oaths to obtain government office or benefits, or delegating government power to religious groups." *Id.* at 660 (citations omitted).

63. *Id.* at 659. Examples of sufficiently substantial direct benefits to religion include "taxation to . . . sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing." *Id.* at 659–60.

64. *See* Forster, *supra* note 42, at 410.

65. *Allegheny*, 492 U.S. at 664.

66. Leading Cases, supra note 8, at 219.

67. *Compare* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 881 (2005) (upholding the Sixth Circuit's ruling on a preliminary injunction finding that the government's purpose was to emphasize the Ten Commandments' religious message in violation of the Establishment Clause), *with* Van Orden v. Perry, 545 U.S. 677, 691–92 (2005) (ruling that a monument inscribed with the Ten Commandments on the Texas State Capitol grounds did not violate the Establishment Clause).

In *Van Orden v. Perry*[68] and *McCreary County v. ACLU of Kentucky*,[69] the Justices were again divided between those asserting that the government may not express favoritism toward particular religions[70] and those preferring to accommodate religious government displays.[71]

The Justices favoring the constitutionality of government "acknowledgement" of religion prevailed in *Van Orden*. The display at issue was a six-foot high stone monument depicting the text of the Ten Commandments and incorporating an eagle, an American flag, stone tablets, two Stars of David, and the Greek characters Chi and Rho signifying Christ.[72] The monument was located on public land near the Texas State Capitol building.[73] Although the plurality opinion did not articulate a bright-line test, it emphasized the history of religious accommodation and acknowledgement in America and emphasized the monument's passive nature.[74] The Court's analysis is therefore consistent with the coercion test formulated in Justice Kennedy's *Allegheny* dissent, which upholds passive displays that citizens may easily turn away from because they do not constitute compulsion to religious adherence.[75] Justice Stevens's dissent decried the Ten Commandments display as an "official state endorsement" of the monotheistic religions.[76]

However, the Court reached the opposite result in *McCreary*.[77] There, the displays at issue were framed copies of the Ten Commandments hung in the courthouses of two Kentucky counties.[78] One of the displays had been hung in a ceremony presided over by a person holding the public office of "Judge-Executive" accompanied by his pastor, who testified to the existence of God.[79] After the American Civil Liberties Union of Kentucky requested an injunction prohibiting the display, but before the district court responded to the request, the Counties' legislatures authorized the displays' expansion.[80] The expansion included passages from the Declaration of Independence, the Preamble to the Constitution of Kentucky, the motto "In God We Trust," a Congressional Re-

68. 545 U.S. 677 (2005).

69. 545 U.S. 844 (2005).

70. *See McCreary*, 545 U.S. at 859–62; *Van Orden*, 545 U.S. at 718 (Stevens, J., dissenting).

71. *See McCreary*, 545 U.S. at 894 (Scalia, J., dissenting); *Van Orden*, 545 U.S. at 686–88; *see also* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1139 (2009) (Scalia, J., concurring) (opining that there are "very good reasons" to believe a permanent Ten Commandments monument in a public park did not violate the Establishment Clause).

72. *Van Orden*, 545 U.S. at 681.

73. *Id.*

74. *See id.* at 686, 691.

75. *See Allegheny*, 492 U.S. at 664 (Kennedy, J., dissenting) (stating that "purely passive" monuments are not coercive, and therefore, not inconsistent with the Establishment Clause because passersby are free to avert their eyes from them).

76. *Van Orden*, 545 U.S. at 712 (Stevens, J., dissenting).

77. *Id.* at 703 (Breyer, J., concurring).

78. *McCreary*, 545 U.S. at 850.

79. *Id.* at 851.

80. *Id.* at 852–53.

cord proclaiming 1983 as the Year of the Bible, and other documents containing phrases alluding to religion.[81] The only commonality among the documents was that each had a "religious theme or [was] excerpted to highlight a religious element."[82] After the district court granted the ACLU's request for an injunction, the counties again revised the display.[83] The third display incorporated secular and religious political documents[84] alongside the Ten Commandments and was labeled "The Foundations of American Law and Government Display."[85]

In invalidating the third display, the Court stated that its guiding principle was neutrality between religion and non-religion.[86] Although the Court did not explicitly apply the endorsement test, it referenced its rationale and reaffirmed the aspect of the test prohibiting a state from intentionally preferring religion.[87] In response to Justice Scalia's dissent,[88] the Court noted that governmental approval of the core tenants of a favored religion "should trouble anyone who prizes religious liberty" because such beliefs should be "reserved for the conscience of the individual."[89] The Court thus had the endorsement test's central concerns well in mind. The Court ruled that the previous overtly religious displays clearly indicated to any reasonable observer that the third display, though containing secular elements, was a ploy "to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality."[90]

Justice Breyer was the only swing vote between *McCreary* and *Van Orden*. To explain the difference between the cases, Justice Breyer's concurrence in *Van Orden* pointed to the *McCreary* displays' "stormy history" rife with religious motive as demonstrating the county governments' religious objectives.[91] Justice Breyer then distinguished the dis-

81. *Id.* at 853–54.

82. *Id.*

83. *Id.* at 854–55.

84. These documents were the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the motto "In God We Trust," the Preamble to the Kentucky Constitution, and a picture of Lady Justice. *Id.* at 856.

85. *Id.* at 855–56.

86. *Id.* at 860.

87. *See id.* ("By showing a purpose to favor religion, the government sends the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members . . . ." (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000)) (alterations in original) (internal quotation marks omitted)).

88. Justice Scalia's dissent asserted that the Constitution permits government acknowledgement of a single creator and "disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists" in governmental acknowledgment of a single creator. *McCreary*, 545 U.S. at 893 (Scalia, J., dissenting).

89. *See id.* at 880–81 (majority opinion).

90. *Id.* at 872–73.

91. Van Orden v. Perry, 545 U.S. 677, 703 (2005) (Breyer, J., concurring).

play at issue in *Van Orden* as having no such history clearly underscoring an impermissible religious purpose.[92]

These cases demonstrate that the Court is split almost down the middle between Justices who see an Establishment Clause allowing governmental acknowledgement, accommodation, and even favoritism of religious sects in the absence of coercion, and Justices who interpret the Establishment Clause to demand neutrality and prohibit government endorsement of religion. The most recent development in this conflict is seen in *Salazar v. Buono*, in which the principles of "accommodation" invade the endorsement test.

II. *SALAZAR V. BUONO*

A. Facts

The Mojave National Preserve (Preserve) sits in the Mojave Desert of Southeastern California.[93] The federal government owns ninety percent of the Preserve's roughly 25,000 square miles, including a granite outcropping known as Sunrise Rock.[94] In 1934, a private organization known as the Veterans of Foreign Wars erected an eight-foot tall Latin cross on Sunrise Rock, as a memorial to fallen World War I soldiers.[95] The cross was visible from a small nearby road and the site came to host periodic Easter gatherings.[96] The cross was initially accompanied by plaques declaring "The Cross, Erected in Memory of the Dead of All Wars" and "Erected 1934 by Members of Veterans of Fore[ign] Wars, Death Valley post 2884." [97] However, at the time of the litigation, the cross stood without any markers.[98]

In 1999, the National Park Service denied a request to place a Buddhist shrine near the cross.[99] As an alternative to allowing equal access to Sunrise Rock for all religious groups, the National Park Service announced that it would remove the cross.[100] Shortly before litigation com-

92. *Id.*
93. Salazar v. Buono (*Buono*), 130 S. Ct. 1803, 1811 (2010).
94. *Id.*
95. *Id.* at 1811–12.
96. *Id.* at 1812.
97. *Id.* (quoting Buono v. Kempthorne, 527 F.3d 758, 769 (9th Cir. 2008), *rev'd*, 130 S. Ct. 1803 (2010)). Since this case was decided, the cross has been stolen off of Sunrise Rock. A metal replacement cross was placed on the rock by an anonymous party. The National Park Service has since removed the replacement cross. Mary Jean Dolan, Salazar v. Buono*: The Cross Between Endorsement and History*, 105 NW. U. L. REV. COLLOQUY 42, 43–44 (2010), http://www.law.northwestern.edu/lawreview/colloquy/2010/21/LRColl2010n21Dolan.pdf.
98. *Buono*, 130 S. Ct. at 1812.
99. Lisa Shaw Roy, Salazar v. Buono*: The Perils of Piecemeal Adjudication*, 105 NW. U. L. REV. COLLOQUY 72, 73 (2010), http://www.law.northwestern.edu/lawreview/colloquy/2010/23/LRColl2010n23Roy.pdf.
100. *Id.*

commenced, Congress responded by enacting a statute "forbidding the use of governmental funds to remove the cross."[101]

Frank Buono is a retired National Park Service employee who regularly encounters the cross.[102] Buono first became aware of the cross while working as the assistant superintendent of the Preserve in 1995.[103] While driving down the nearby road, he saw the cross affixed to Sunrise Rock.[104] Buono took offense to the cross's presence on public land because he believed it was wrong for the government to display the symbol of one religion in an area not open to displays of symbols representing other religions.[105] He was not, however, offended by the cross itself and did not claim that it personally excluded or coerced him.[106] Buono claimed that he would take less convenient routes to traverse the preserve in order to avoid the cross.[107]

B. Procedural History

Buono filed suit in the United States District Court for the Central District of California, alleging that the cross's presence on federal land violated the Establishment Clause.[108] While the case was pending, Congress designated the cross and the land upon which it stood as a national memorial.[109]

In a July 2002 ruling, the district court found that Buono had standing to challenge the cross's display on public lands.[110] The parties agreed that the court should settle the dispute's merits under the *Lemon* test.[111] The court did not consider *Lemon*'s purpose or entanglement prongs because it found that the case could be resolved under the effect prong.[112] The court ruled that the cross had an effect of advancing religion because the reasonable observer would perceive the cross as a governmental endorsement of religion.[113] The district court issued a permanent injunction forbidding the government "from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."[114]

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101. *Buono*, 130 S. Ct. at 1813 (citing Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 133, 114 Stat. 2763, 2763A-230 (2000)).
102. *Id.* at 1812.
103. Buono v. Norton (*Buono II*), 212 F. Supp. 2d 1202, 1207 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004).
104. *Id.*
105. *Id.*
106. *Buono*, 130 S. Ct. at 1814.
107. *Buono II*, 212 F. Supp. 2d at 1207.
108. *Buono*, 130 S. Ct. at 1812.
109. *Id.* at 1813 (citing Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137(a), 115 Stat. 2230, 2278).
110. *Id.* at 1812.
111. *Id.*
112. *Buono II*, 212 F. Supp. 2d at 1214–16.
113. *Id.* at 1216.
114. *Buono*, 130 S. Ct. at 1812.

After the district court's decision, Congress passed a second statute forbidding government spending to remove the cross.[115] While the Government's appeal was pending, Congress passed yet another statute providing for the transfer of the cross and the adjoining land to the Veterans of Foreign Wars. In exchange, the government was to receive land in the preserve owned by a Veterans of Foreign Wars member.[116] The parcel of land to be transferred to the Veterans of Foreign Wars was one acre in area.[117] This statute provided that the land would revert back to the government if it ceased to be a World War I memorial.[118]

The United States Court of Appeals for the Ninth Circuit affirmed the district court's ruling in its entirety.[119] In doing so, the Ninth Circuit declined to consider the potential impact of the pending land transfer on the suit.[120] Although the Government urged the Ninth Circuit to declare the case moot because the land transfer would end any state action that could violate the Establishment Clause, the court refused to consider whether the land transfer affected the cross's constitutionality.[121] The court provided three reasons for not reaching the issue of the land transfer. First, the court noted that the pending land transfer might have taken years to actually complete, meaning that the constitutionality of the cross before the transfer was not necessarily moot now, nor would it be anytime soon.[122] Second, Sunrise Rock might still ultimately fall into government ownership if the transfer's reversionary clause came into effect.[123] Third, the court cited precedent from the Seventh Circuit suggesting that transfers of property containing religious iconography to private holders do not necessarily cure Establishment Clause violations, so mootness in the event of the transfer was not a foregone conclusion.[124] The Government did not appeal the Ninth Circuit's ruling to the Supreme Court. Therefore, the judgment that the cross violated the Establishment Clause while it stood on federal land became final and unreviewable.[125]

Buono then brought action to prevent the land transfer under an enforcement or modification of the 2002 injunction.[126] The district court ruled that Congress had enacted the land transfer statute with the explicit purpose of circumventing the injunction to permit continued display of

115. *Id.* at 1813 (citing Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8065(b), 116 Stat. 1519, 1551 (2002)).

116. *Buono*, 130 S. Ct. at 1813 (citing Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121(a), 117 Stat. 1054, 1100 (2003)).

117. *Buono*, 130 S. Ct. at 1829 (Stevens, J., dissenting).

118. Department of Defense Appropriations Act, 2004 § 8121(e).

119. Buono v. Norton, 371 F.3d 543, 546–50 (9th Cir. 2004).

120. *Id.* at 545–46.

121. *Id.* at 545–46.

122. *Id.* at 545.

123. *Id.* at 546.

124. *Id.* (citing Freedom From Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 496 (7th Cir. 2000)).

125. *Buono*, 130 S. Ct. at 1813.

126. *Id.* at 1813–14.

the cross on Sunrise Rock. Consequently, the court invalidated the land transfer statute in order to protect Buono's rights under the 2002 judgment.[127] The court of appeals affirmed and the United States Supreme Court granted certiorari.[128]

C. United States Supreme Court Plurality Opinion

Justice Kennedy wrote the opinion of the Court, joined by Chief Justice Roberts, and joined in part by Justice Alito.[129] After addressing Buono's standing to sue and the merits of his claim, the Court remanded the case to the district court without answering whether Congress could evade the Establishment Clause through a transfer of land.[130]

First, addressing Buono's standing, the Court set forth the general rule that a plaintiff must allege a sufficient personal stake in a case's outcome to invoke federal court jurisdiction.[131] The Court ruled that Buono had standing to seek enforcement of the injunction against the land transfer because he had a personal stake in the Government's compliance with the judgment in his favor.[132] The Government could not challenge Buono's standing to obtain the original injunction because the Government's failure to seek Supreme Court review of the 2002 judgment foreclosed reconsideration of the original injunction.[133]

Next, the Court considered the merits of the case. The Court criticized the district court's scrutiny of Congress's purpose in enacting the land transfer statute. Justice Kennedy argued that the analysis ignored three contextual considerations of Congress's decision to transfer the land.[134] First, the cross's initial placement on Sunrise Rock was an effort to memorialize soldiers, rather than to endorse Christianity.[135] Second, the cross's existence on the Preserve for seven straight decades had cemented it in the public consciousness.[136] Third, in enacting the land transfer statute, Congress reconciled a dilemma between violating the injunction and conveying disrespect for the memorialized soldiers.[137] In doing so, Congress chose "a policy of accommodation" to avoid conveying disrespect and stewing "the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."[138] According to the

127. *Id.* at 1814 (citing Buono v. Norton, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005)).
128. *Buono*, 130 S. Ct. at 1814.
129. *Id.* at 1808.
130. *Id.* at 1820–21.
131. *Id.* at 1814 (quoting Horne v. Flores, 129 S. Ct. 2579, 2592 (2009)).
132. *Id.* at 1814–15.
133. *Id.* at 1814.
134. *Id.* at 1816.
135. *Id.* at 1816–17.
136. *Id.* at 1817.
137. *Id.*
138. *Id.* at 1817, 1820 (quoting Van Orden v. Perry, 545 U.S. 677, 704 (2005) (Breyer, J., concurring)).

Court, the context at hand suggested a sincere congressional attempt "to balance opposing interests."[139]

Finally, grudgingly assuming the 2002 injunction's propriety,[140] the Court asserted that the district court should not have evaluated the injunction's applicability to the land transfer under a purpose inquiry.[141] Rather, the district court should have considered the injunction's applicability in light of its original objective, avoiding perceptions of governmental religious endorsement.[142] Justice Kennedy outlined the proper analysis, stating that the district court must: (1) consider whether the reasonable observer standard applies to objects on private land;[143] (2) reassess the findings underlying the 2002 injunction in light of the new circumstances surrounding the cross, affording particular consideration to Congress's "policy of accommodation";[144]and (3) consider remedies less severe than a full invalidation of the land transfer.[145]

Declining to offer any more guidance on the constitutional issues, the Court remanded the case to the district court.[146]

D. Dissent

Justice Stevens, joined by Justice Ginsburg and Justice Sotomayor, argued in favor of upholding the ruling below.[147] According to Justice Stevens, the land transfer constituted an affirmative government act designed to permit the cross's display in violation of the injunction's bar against "permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."[148]

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139. *Buono*, 130 S. Ct. at 1817.

140. *See id.* at 1818 ("[T]he propriety of the 2002 injunction may be assumed, [but] the following discussion should not be read to suggest this Court's agreement with the judgment . . . . The constitution does not oblige government to avoid any public acknowledgement of religion's role in society.").

141. *Id.* at 1819.

142. *Id.*

143. *Id.* A question to which the court suggests an answer in the negative. *Id.*

144. *Id.* at 1820.

145. *Id.*

146. *Id.* at 1820–21. In addition to Justice Kennedy's plurality opinion, three Justices wrote concurring opinions. Chief Justice Roberts's concurring opinion briefly noted that Buono's counsel admitted it would likely be consistent with the injunction if the government tore down the cross, transferred the land to the Veterans of Foreign Wars, and allowed them raise the cross again. *Id.* at 1821 (Roberts, C.J., concurring). The Chief Justice asserted it would make no difference "to skip that empty ritual." *Id.* Justice Alito agreed with the plurality, but argued that the Court should have ruled on the merits because the factual record was sufficiently developed to support a ruling in the government's favor. *Id.* (Alito, J., concurring in part and concurring in the judgment). Justice Scalia, joined by Justice Thomas, argued that the Court should have dismissed Buono's complaint for lack of standing. *Id.* at 1824–25 (Scalia, J., concurring in the judgment).

147. *Id.* at 1828 (Stevens, J., dissenting). Justice Breyer wrote a separate dissent. He argued that the Court should resolve the case in Buono's favor under the law of injunctions, which grants great deference to a district court's interpretation of scope of its own injunctive orders. *Id.* at 1842–45 (Breyer, J., dissenting).

148. *Id.* at 1831 (Stevens, J., dissenting).

Additionally, Justice Stevens argued that the land transfer would not cure the endorsement that prompted the 2002 injunction because a reasonable observer would still perceive a governmental endorsement after the land transfer.[149] Justice Stevens reasoned that an observer would know that the cross had stood on government land prior to the transfer, that the district court had enjoined the government from displaying it, and that Congress had designated the cross as a national memorial and transferred the underlying land to a purchaser it knew would display the cross.[150] Furthermore, Justice Stevens argued that Congress's purpose in enacting the land transfer statute was to preserve the Christian symbol, which in and of itself manifested religious endorsement.[151] In stating that "continued endorsement" of a message as "starkly sectarian" as the one symbolized by the cross was unlawful, Justice Stevens's dissent unambiguously embraced the endorsement test and declared that the cross at issue failed it.[152]

III. ANALYSIS

In *Buono*, the Court directed the district court to reassess the enforceability of Buono's injunction in light of its original objective of "avoiding the perception of government endorsement."[153] However, the Court's actual framework resembled the endorsement test only in name. The endorsement test, as originally formulated, protects a worthwhile constitutional principle. *Buono* raises important concerns with respect to that principle. The district court can stave off the erosion of that principle by carefully applying the Court's framework in a manner consistent with the reasons the test was developed in the first place.

A. The Endorsement Test's Core Value

The Court developed the endorsement test to protect the worthwhile principle that government should not "mak[e] adherence to a religion relevant in any way to a person's standing in the political community."[154] In other words, the government should not encourage the perception that members of certain religious groups are favored or preferred over members of other religious groups. When the government indicates that it favors or prefers particular religious beliefs, it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[155] Individuals

149. *Id.* at 1832–33.
150. *Id.* at 1833–34.
151. *Id.* at 1837–38.
152. *Id.* at 1828, 1832–33.
153. *Id.* at 1819 (plurality opinion).
154. *See* Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 593–94 (1989) (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).
155. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

then find themselves in a position where they must choose between the religious convictions of their consciences and adherence to beliefs that will earn them a perceived favored status in the community. This dilemma is an obstacle to enjoying the religious liberty that the Establishment Clause is intended to protect. Because the endorsement test prevents the government from creating that pressure and forcing such a choice, it protects religion from government manipulation to a far greater degree than a test that would only protect against direct legal compulsion to practice religion. The endorsement test is particularly helpful where messages conveyed by public religious displays implicate the Establishment Clause because the test focuses on the communicative effect of the state action.[156]

It has been argued that the Establishment Clause tests have proven so manipulable that the impact of using one test instead of the other is minimal.[157] According to this perspective, knowing the test will not help one predict the outcome of cases because what really matters is the attitude of the judges deciding the case. While it is true that one cannot stop a Supreme Court Justice determined to bend a constitutional test to reach the result that Justice wants, it goes too far to say the tests are interchangeable.[158] The endorsement test invalidates official actions that endorse religion in purpose or effect, or if they entangle government too closely with religion. The coercion test, on the other hand, only invalidates laws that compel citizens to practice religion or confer extraordinarily direct benefits to religion. The coercion test sees religious monuments as too passive and their benefits to religion too incidental to fail under the Constitution. So while religious displays like the cross in *Buono* could conceivably fail the endorsement test, their invalidation under the coercion test is very unlikely.[159] Conceptually, at least, the endorsement test protects against a wider swath of official action than the coercion test.

Recognizing and curtailing the evil of endorsement helps realize the Establishment Clause's core principle. The framers of the Constitution included the religion clauses precisely because of the nation's religious diversity,[160] and they did so to "assure the fullest possible scope of religious liberty and tolerance for all."[161] When the government conveys mes-

156. Forster, *supra* note 42, at 405.

157. Christopher Lund, Salazar v. Buono *and the Future of the Establishment Clause*, 105 NW. U. L. REV. COLLOQUY 60, 70 (2010), http://www.law.northwestern.edu/lawreview/colloquy/2010/22/LRColl2010n22Lund.pdf.

158. *See* Ian Bartum, Salazar v. Buono*: Sacred Symbolism and the Secular State*, 105 NW. U. L. REV. COLLOQUY 31, 38 (2010), http://www.law.northwestern.edu/lawreview/colloquy/2010/20/LRColl2010n20Bartrum.pdf ("The doctrinal test the Court adopts necessarily reflects its conception of exactly what the Establishment Clause guarantees . . . .").

159. *See* Gedicks, *supra* note 4, at 704.

160. *Allegheny*, 492 U.S. at 589–90.

161. Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

sages that demonstrate favoritism toward a particular sect, it narrows the scope of liberty by precluding the individual's ability to form his or her own religious values uninhibited by an official doctrine.[162] As Justice Breyer wrote in his controlling concurrence in *Van Orden*, although the Establishment Clause does not require absolute elimination of religion in the public square, realizing the framers' vision requires that the government "effect no favoritism among sects."[163]

Coercion test proponents argue that historical evidence demonstrates that the Framers could not have intended to prohibit public religious preference, citing numerous early American official acts that might fail the endorsement test, such as Congress passing a resolution in 1789 asking President Washington to declare "a day of public thanksgiving and prayer" and state legislative sessions opening with prayer led by publically paid chaplains.[164]

The responses to this contention are twofold. First, the historical evidence cuts both ways. Thomas Jefferson refused to issue Thanksgiving proclamations, believing they violated the Establishment Clause, and James Madison wrote that publically paid chaplains were inconsistent with the "immunity of Religion from civil jurisdiction."[165] Second, the endorsement test is not necessarily inconsistent with allowing traditional public allusions to religion, such as those mentioned above and the phrases "under God" and "In God We Trust," when they serve to "solemniz[e] public occasions, or inspir[e] commitment to meet some national challenge."[166] These functions give such practices an "essentially secular meaning" under the endorsement test because their purpose and effects are not to advance religious ideals and because the impact of their religious meaning has been blunted through repetition.[167]

The latter point has been criticized as a disingenuous attempt to ignore the religious significance inherent in religious statements, even when ubiquitously or ceremonially used.[168] After all, it is not clear why reference to God would serve to solemnize occasions or strengthen the nation's resolve in the face of a challenge unless the listener accepts the premise that God is real. There is some validity to the contention that if the Court were consistent in applying the endorsement test, then a number of entrenched, politically popular, and in some instances longstanding governmental acknowledgement of religion would have to be invali-

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162. *See* Steven G. Gey, The Procedural Annihilation of Structural Rights, 61 HASTINGS L.J. 1, 11 (2009).

163. *Van Orden*, 545 U.S. at 698–99 (Breyer, J., concurring) (quoting *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring)).

164. *Van Orden*, 545 U.S. at 686–88 (plurality opinion).

165. *Id.* at 724–25 (Stevens, J., dissenting).

166. Lynch v. Donnelly, 465 U.S. 668, 716–17 (1984) (O'Connor, J., concurring).

167. *Id.*

168. *Van Orden*, 545 U.S. at 695 (Thomas, J., concurring).

dated. It is perhaps most honest to say that the agreed-upon contours of the Establishment Clause have been slow to form and at some points in American history the opponents of government neutrality in matters of religion have succeeded in distorting the line. As described above, disagreement over how much the Establishment Clause separates church from state is as old as the Establishment Clause itself, so it is not surprising that one would find historical examples of government action that contradicts any given test. This, however, is no reason to abandon the test most conducive to religious liberty going forward. The endorsement test has allowed the Court to actualize the ideal of religious neutrality to the greatest extent feasible given the political reality that some government acknowledgements of religion have become too engrained to realistically abolish.[169]

For the reasons outlined above, the endorsement test preserves and protects an individual's religious choice. The next most viable alternative, the coercion test, protects against too little.

B. Concerns Raised by Buono

The *Buono* plurality opinion raises concerns that the endorsement test's core principle, stating that adherence to religion should not affect a person's political standing, may be endangered. The Court's mandate that the district court reassess the injunction's enforceability in light of the objective to avoid religious endorsement does not serve to assure the maintenance of that principle. Specifically, the plurality directed the district court to engage in an endorsement inquiry because that was the basis for the 2002 injunction,[170] and not because the Court supported the general use of the test. In fact, Justice Kennedy has criticized the endorsement test as "flawed in its fundamentals and unworkable in practice[,]" arguing instead for a standard that allows any government accommodation of religion short of legal coercion or conferring direct benefits on religion to a degree that tends to establish a state faith.[171] Additionally, in his *McCreary* dissent, Justice Scalia has interpreted the Establishment Clause as allowing "public acknowledgement of [a specifically monotheistic] Creator."[172] Moreover, Justice Roberts has previously lobbied for the *Lemon* test's abandonment in favor of a coercion standard. Furthermore, the endorsement test's champion, Justice O'Connor, has been replaced by Justice Alito, who favored defendants in Establishment Clause cases as a Third Circuit judge.[173] Thus, strong evidence suggests that a majority of the current Justices would definitively renounce the en-

169. *See* Gedicks, *supra* note 4, at 700.

170. *Buono*, 130 S. Ct. 1803, 1819 (2010).

171. *See* Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 659–60, 669 (1989) (Kennedy, J., concurring in part and dissenting in part).

172. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

173. Forster, *supra* note 42, at 409–10.

dorsement test if presented with a case where, unlike in *Buono*, the procedural posture did not foreclose the opportunity to reach the Establishment Clause claim.[174] Commentators have identified the coercion test as likely to replace the endorsement test as the prevailing Establishment Clause analysis in the near future.[175]

Although the Court did not use *Buono* as an opportunity to repudiate the endorsement test, it has nonetheless begun to erode the test. *Buono*'s distorted interpretation and application of the endorsement test raises three concerns: (1) a blurring of formerly independent aspects of the endorsement analysis; (2) the injection of aspects of the coercion standard that are inconsistent with the endorsement test's central value; and (3) the suggestion that the reasonable observer standard may be categorically inapplicable to objects on private land.

1. Blending the Purpose and Effect Prongs

First, *Buono* improperly blends the purpose and effect inquiries of the endorsement analysis. While Justice O'Connor's endorsement test combined the first two prongs of the *Lemon* test in the sense that they now both focus on endorsement, she made it clear that the law's purpose and effect would continue to be examined independently of one another.[176] Under the endorsement test's original formulation, state action could run afoul of the Establishment Clause if *either* the government passed the law with the purpose to endorse religion *or* if the action conveyed endorsement in effect, regardless of the government's intent.[177] The district court explicitly issued the 2002 injunction after an effect analysis and did not consider whether the cross's presence had a secular purpose.[178]

The *Buono* plurality mandated that the district court reevaluate the land transfer's constitutionality in light of the objectives of the 2002 injunction, even declaring the district court's illicit purpose inquiry improper.[179] It would appear, then, that the Court intends for the district court on remand to only examine the land transfer's effect of endorsing religion and not the transfer's purpose. However, in telling the district court to reassess its findings "in light of the policy of accommodation that Congress had embraced" to "balance opposing interests,"[180] the

174. It is also interesting to note that Justice Stevens, the chief dissenter and advocate for the endorsement test in *Buono*, has since been replaced by Justice Kagan. Justice Kagan argued on behalf of the government in *Buono* as solicitor general. This, of course, does not necessarily mean she will be permissive of religious endorsement in her role as Justice.

175. Gedicks, *supra* note 4, at 692.

176. Lynch v. Donnelly, 465 U.S. 668, 688–90 (1984) (O'Connor, J., concurring).

177. *Id.* at 690.

178. Buono v. Norton (*Buono II*), 212 F. Supp. 2d 1202, 1215 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004).

179. Salazar v. Buono (*Buono*), 130 S. Ct. 1803, 1819 (2010).

180. *Id.* at 1817, 1820.

Court directs the district court to ask whether Congress's purpose would affect the "perceived governmental endorsement"[181] in a reasonable observer with the knowledge of "all the pertinent facts and circumstances surrounding the symbol and its placement."[182] The Court has made the reasonable observer an exceptionally aware person, knowledgeable of the motivations of members of Congress. This causes the government's purpose to become a central component of the inquiry into whether state action has the effect of endorsing religion, effectively eliminating "effect" as a sufficient ground for invalidating government action independent of "purpose." Therefore, *Buono* could make the endorsement test's original vision of invalidating certain instances of government action because they in fact send a message of religious endorsement—regardless of whether that was the government's intent—difficult to realize.

In blurring the distinction between purpose and effect, the Court endangers protection against government action that inadvertently conveys religious endorsement to a reasonable observer. If the endorsement test was only designed to regulate the government's intentions, then this might be a logical development. However, the endorsement test also protects individuals from social or political perceptions that inhibit their freedom of religion. If the government carelessly conveys messages that create perceptions of religious favoritism, then the harm occurs regardless of the government's actual objectives. The Court would brush aside the protection from the harm if it forced plaintiffs to challenge the government's purpose in order to establish an impermissible effect.

The first post-*Buono* appellate case addressing whether a public religious display violates the Establishment Clause, *American Atheists, Inc. v. Duncan*,[183] offers a potential solution to this merging of purpose and effect by recognizing, and deemphasizing, the relevance of the government's purpose toward the effect of religious endorsement. In *American Atheists*, a number of twelve-foot-high crosses were erected by the Utah Highway Patrol Association (UHPA) to honor fallen Utah Highway Patrol (UHP) officers.[184] With UHP's permission, UHPA placed the crosses on publically owned property including rights-of-way near the highways, rest areas, and the lawn outside the UHP office.[185] Each cross also depicted the UHP insignia.[186] In determining whether these crosses violated the Establishment Clause under the endorsement test, the Tenth Circuit first found that the crosses had primarily secular purposes: honoring

181. *Id.* at 1819.
182. *Id.* at 1819–20.
183. 616 F.3d 1145 (10th Cir. 2010).
184. *Id.* at 1150. The Utah Highway Patrol Association is a private organization supporting the officers and families of the Utah Highway Patrol. *Id.*
185. *Id.* at 1151.
186. *Id.* at 1150.

fallen troopers and promoting highway safety.[187] Next, the court proceeded to an effects analysis, in which the secular purpose was considered. However, the court did not afford Utah's purpose much weight at that stage of the analysis, ruling that the State's purpose was "merely one element of the larger factual and historical context" pertaining to the effect of endorsement.[188] Because the crosses were the "preeminent symbol of Christianity,"[189] were not displayed alongside other symbols to dilute their religious meaning, bore the insignia of the UHP, and were found on public land, the court concluded that a reasonable observer would infer that Utah endorsed Christianity.[190] Declaring this to constitute an Establishment Clause violation, the court noted that such an effect was harmful because reasonable observers would fear that Christians would receive preferential treatment by UHP on the highways and in UHP's hiring processes.[191] The Tenth Circuit emphasized that the purpose of the designers of the cross would not always coincide with their effect on a reasonable observer.[192] While this case bodes well for the endorsement test's continued force after *Buono*, it does not seem to reflect the preeminent role the *Buono* plurality desired purpose to play in the effect inquiry. How future cases will separate these concepts remains a major concern.

2. Infusing the Endorsement Test with the Coercion Test's Principles

Next, by infusing the endorsement test with the coercion test's principles, the *Buono* Court distorts the endorsement test. As discussed above, Justice Kennedy understood the United States' long history of "accommodation" and "acknowledgment" of religion to favor an Establishment Clause interpretation upholding government action as long as it does not involve coercion or direct benefits toward religion.[193] The coercion test would make it difficult for observers to challenge the constitutionality of religious displays to which they can freely turn their backs,[194] even if such challenges are needed to prevent any stigmas from being placed on non-adherents when the government endorses religion. Justice Kennedy's coercion test offers no protection against the coercive effect on a person's religious choices when the government stirs up the perception that certain religions are preferred over others using the potent communicative tool of religious displays. The coercion test's favorable treatment of acknowledgement and accommodation of particular relig-

187. *Id.* at 1157.
188. *Id.* at 1159.
189. *Id.* at 1160 (quoting Buono v. Norton, 371 F.3d 543, 545 (9th Cir. 2004)).
190. *Am. Athiests, Inc.*, 616 F.3d. at 1160.
191. *Id.* at 1160–61.
192. *Id.* at 1163.
193. Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part).
194. *See id.* at 664.

ious views to the exclusion of others in fact seems to invite the perception of favoritism. In this way, the coercion standard is antithetical to the religious liberty values the endorsement test was designed to protect.

However, the *Buono* Court's mandate that the district court reassess whether a reasonable observer would perceive a religious endorsement in light of Congress's policy of accommodation[195] subtly plants the seeds of the endorsement test's mutation into the coercion standard. The *Buono* Court recasts the reasonable observer as someone sympathetic to public policies "accommodating" religion as defined by Justice Kennedy. This affords minimal protection against perceptions of exclusion by members of minority religious groups.[196] A hypothetical observer agreeable to the coercion standard's foundation would allow judges to effectively conduct coercion inquiries in the guise of an endorsement analysis. For example, the observer might see all religious displays which have the effect of identifying a favored religion as not endorsing religion because they are non-coercive, passive accommodations of religion, thereby reaching the same result as would be reached under the coercion test. One could see a merging of Establishment Clause interpretations as something positive because it allows the Court to take account of both sets of values and come closer to a settled rule that will not be so fiercely contested.[197] However, if the endorsement test loses all its teeth and fails to protect religious liberty any more than the coercion test, then the endorsement test will be the product of a hostile takeover rather than a benign compromise.

3. Casting Doubt on the Reasonable Observer Standard

The third concern the *Buono* decision raises stems from the doubt it casts on the reasonable observer standard's applicability to objects on private land.[198] If the reasonable observer standard does not apply, the likely test to replace it, given the current Court's attitude toward Establishment Clause claims, is a per se rule categorically barring challenges to privately owned religious displays because they do not constitute government action. The tone of the *Buono* plurality and concurrences strongly indicates that this is where the Establishment Clause jurisprudence is heading.[199] But, as evidenced by the facts of *Buono*, the government can have substantial connections to private objects on private land, arguably rising to the level of endorsement. Even if the land transfer in this case were implemented, the cross and the land upon which it stands would still have a history of government ownership and would

195. Salazar v. Buono (*Buono*), 130 S. Ct. 1803, 1820–21 (2010).
196. *See* Dolan, *supra* note 97, at 58.
197. *Id.* at 57.
198. *See Buono*, 130 S. Ct. at 1819.
199. *Leading Cases*, *supra* note 8, at 227–28.

still be a national memorial.[200] The small size of the land transferred relative to the Preserve's vast tracts of public land and the lack of markers to distinguish public from private land also tend to minimize the government's distance from the cross.[201] By selling the land to the very group that erected the cross, the government made its best effort to ensure that the cross would stay in place.[202] The government did not consider any transferees other than the Veterans of Foreign Wars, the one group most invested in maintaining the cross.[203] Such favoritism to the one group most likely to preserve the Christian symbol places the government's imprimatur on that symbol. Based on these factors, one could entertain the notion that the cross conveys enough government endorsement of religion to avoid a categorical rejection of the claim.

Taken to its logical extreme, a per se rule might allow the government to exploit a loophole through which it could maintain the display of religious symbols by transferring small patches of land within any of its properties to organizations that the government knows will display the favored symbol.[204] Public areas widely peppered with religious imagery would send a message of endorsement, even to observers who know that private entities own the title to the otherwise indistinguishable patches of land. In order to prevent this result, the Court must employ an individualized fact-sensitive analysis[205] rather than a per se rule.

C. Applying the Core Principle on Remand

Although the Supreme Court's framework biases endorsement inquiries toward results similar to those that would be reached under the coercion standard, and although the Court at most thinly veils its desire to see the cross left in place,[206] the district court can still adhere to that framework without losing sight of the rationales that led to the Court's development of the endorsement test. The Supreme Court essentially provided a three-step analytical framework that the district court must use to evaluate whether the 2002 injunction's objectives necessitate the land transfer's invalidation. First, the district court must consider whether the reasonable observer standard still controls, given the land transfer.[207] The district court must then reconsider whether a reasonable observer, if such a construct is still relevant, would perceive an endorsement in light of the land transfer and its context.[208] Finally, the district

200. *Buono*, 130 S. Ct. at 1833–34 (Stevens, J., dissenting).
201. Forster, *supra* note 42, at 424.
202. *See* Roy, *supra* note 99, at 74.
203. Lund, *supra* note 157, at 67.
204. *Leading Cases*, *supra* note 8, at 228–29.
205. *Id.*
206. Roy, *supra* note 99, at 76.
207. Salazar v. Buono (*Buono*), 130 S. Ct. 1803, 1819 (2010).
208. *Id.* at 1819–20.

court must consider potential relief that is less drastic than an invalidation of the land transfer statute.[209]

First, for reasons already stated, a per se rule restricting the reasonable observer standard's applicability to objects only on public land could produce results inconsistent with preventing governmental religious endorsement. The district court should recognize that the government is capable of endorsing religious symbols regardless of their locations. With an eye toward preventing endorsement, the relevant question in *Buono* should not be whether the cross stands on government land. Rather, the proper question should be whether a reasonable observer would continue to perceive government endorsement of the cross after the land transfer or whether the transfer itself, made to an organization friendly to the cross, is an endorsement of the cross. All else being equal, a cross displayed on private land conveys less government endorsement of Christianity than the same cross displayed on federally owned land. This is because the government directly controls land to which it has title so anything on that land is more directly attributable to the government. But, in the complex case presented by *Buono*, ownership of the land was only one of many factors bearing on public perception of the cross. *Buono* also involved the cross's designation as a national memorial, the reversionary clause requiring that the site be used as a memorial, the government's choice of transferee, and the statutes enacted by Congress to preserve the cross.[210] It may be that none of these factors are sufficient on their own to necessitate removal of the cross, but when taken together a court might reach that conclusion. This is precisely why this case and others like it should be examined in light of all applicable factors through the eyes of a reasonable observer and should not boil down to the single question of whether or not the religious display stands on publically-owned land.[211] Although the reasonable observer standard could be subject to each individual Justice's perception of reasonableness, its contours are capable of becoming better defined over time through case law, providing more consistency and better protection against religious endorsement than the possible alternatives.

Second, once the district court has settled on the applicable standard, it must apply that standard, taking into account the observer's knowledge that Congress chose a policy of accommodation to balance compliance with the injunction against the impact that would have on religious adherents.[212] In general, the desire not to upset members of a particular religion advanced by an Establishment Clause violation does not justify a continued violation. If it did, then the courts could leave most constitutional violations that benefit one individual or group over

209. *Id.* at 1820.
210. *Id.* at 1833–34 (Stevens, J., dissenting).
211. *Leading Cases*, *supra* note 8, at 228–29.
212. *Buono*, 130 S. Ct. at 1819–20 (plurality opinion).

another uncured because losses of illicit advantages usually upset their beneficiaries. Even here, where the public's concern involves secular sensitivity toward seeing a war memorial's removal, such concern does not necessarily overwhelm the compelling need to avoid governmental demonstration of preference for Christian symbols. The Supreme Court has bound the district court to afford due weight to Congress's "dilemma," but it ought not to forget the reasons it originally found the land transfer in violation of the 2002 injunction. If the government's interest in accommodating religion takes precedence over all other factors, then the endorsement test will lose its teeth as well as its distinctiveness from the coercion test.

In applying the reasonable observer standard, the district court should be mindful of how much knowledge it is attributing to the observer. The *Buono* plurality has described an observer far more knowledgeable about the cross's seventy-year history, the litigation surrounding it, the acts of congress pertaining to it, and the motivations behind those acts than most of the park-goers who would realistically encounter the cross. The district court must follow this conception of a reasonable observer. However, if the observer is attributed as much knowledge of the facts as someone who has versed himself or herself in the history of Sunrise Rock, has read the briefs in *Salazar v. Buono*, and was privy to the litigants' oral arguments, then the facts will in effect be viewed through the eyes of a judge rather than through the eyes of a hypothetical observer. Resorting to the subjective perceptions of the Court would defeat the purpose of the reasonable observer construct, which is intended to achieve an objective lens through which to view religious endorsement.[213] In order to maintain the advantages of the endorsement test, the district court should take care not to assume the observer is omniscient and attribute to him or her little if any more knowledge than the Supreme Court has explicitly mandated.

Finally, should the district court determine relief is necessary, it must consider a remedy "less drastic than [a] complete invalidation of the land-transfer statute" and removal of the cross.[214] The court should tailor its relief with an eye toward eliminating the perception that the government favors the Christian members of the political community. If an effect of endorsement exists, then the solution would not be as simple as ensuring that passersby know that the cross is privately owned. This is because the Court has bound the district court to attribute knowledge of the land's private ownership to the hypothetical observer.[215] Visual indicia of private ownership would therefore not tell the observer anything

213. Joseph Blocher, *Schrödinger's Cross: The Quantum Mechanics of the Establishment Clause*, 96 VA. L. REV. IN BRIEF 51, 59 (2010), http://www.virginialawreview.org/inbrief/2010/10/25/blocher.pdf.

214. *Buono*, 130 S. Ct. at 1820.

215. *See id.* at 1819–20.

that he or she does not already know. However, indicia of private ownership might still decrease endorsement by showing to those who already know that the cross is privately owned that the government is making efforts to distance itself from the religious symbol. If observers can see the government attempting to diminish its imprimatur on the cross as much as possible, they will be less likely to perceive favoritism of the cross. Simply installing replicas of the plaques declaring that the Veterans of Foreign Wars erected the cross, as mentioned by the Court,[216] may not sufficiently quash endorsement perceptions. Such a sign would fail to unambiguously emphasize the land's private ownership and might not be visible from the road. A physical barrier like a fence would help distinguish the public and private tracts of land, though that is also problematic because it could turn what is meant to be elegant symbolism, a white cross standing alone in the desert, into an eyesore. That result might not reflect the policy of accommodation that the Court had in mind. A larger transfer of land surrounding the cross would reduce perceptions of endorsement by reducing the cross's proximity to government-owned land.[217] Some might criticize a larger transfer of land to the organization that erected the cross as constituting a worse Establishment Clause violation because it confers a larger benefit on an organization bent on displaying religious symbolism, but if the government exacts a fair price in exchange, then that benefit will be mitigated. A larger land exchange combined with some visual indication that the government does not endorse the cross, like a tasteful sign visible from the road labeling the land as private property, would most likely be sufficient to minimize perceptions of endorsement. Although the district court must assume observers automatically know the cross sits on private land,[218] these efforts would still reduce perceptions of endorsement by demonstrating a bona fide effort by the government to distance itself from the cross.

CONCLUSION

While *Buono* did not offer the Court an opportunity to definitively repudiate the endorsement test, the plurality opinion has nonetheless managed to endanger the policy at the heart of that test. Through its distorted framework, the *Buono* Court has begun to twist the endorsement test into the coercion standard's mold. Because the coercion test does not prevent the degradation of religious liberty that occurs when the government conveys or attempts to convey messages dividing citizens into insiders and outsiders on the basis of their religions, this trend ought to end at *Buono*. Religion is harmed when government manipulation of popular perceptions inhibits individuals from aligning their faiths with their consciences. As the current Court is comprised of Justices hostile to the en-

216. *Id.* at 1820.
217. Forster, *supra* note 42, at 424.
218. *See Buono*, 130 S. Ct. at 1819–20.

dorsement test, the prospects are not promising. On remand, the district court can resist abandoning core constitutional values by carefully applying the Supreme Court's framework without letting go of the rationale behind the initial development of the endorsement test.

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