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Comments

Religion and the Three Wisemen: A Philosophical Inquiry into Selected First Amendment Jurisprudence

Eric Michael Prock*

Section I: Introduction

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the

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The author would like to note that since the foregoing Comment contains many explanatory footnotes, a careful reading of all footnotes is essential to a full and complete understanding of the ideas expressed herein.

> governed—that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it.[1]

On July 4, 1776, these words gave birth to a new nation, a nation whose people were long starved for a government that would promote individual liberties and protect them from state sponsored persecution, particularly religious persecution.[2] Cognizant of these desires and expectations, our forefathers ratified the First Amendment as a mechanism that would guarantee religious freedom, equality, and toleration.[3] Our forefathers accomplished this goal through the simple phrase "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[4]

Fueling the citizens' desire for religious liberty and informing our forefathers' decision to incorporate a guarantee of religious freedom into the Bill of Rights were the social and political writings of influential European philosophers.[5] Not only did the works of these philosophers influence the First Amendment's guarantee of religious freedom,[6] they were also influential in identifying the limits of this guarantee.[7] Indeed, the ideals contained in these philosophical works often informed the United States Supreme Court in its attempt to resolve issues of free religious exercise and non-establishment.[8]

The extent to which the government may use religion in its effort to create a national identity is one of the more prevalent issues faced by the Court.[9] Perhaps the most explicit example of this phenomenon occurred

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1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2. *See* Brett Thompson, *Locke v. Davey: The Fine Line Between Free Exercise and Establishment*, 56 MERCER L. REV. 1093, 1094 (2005) (explaining that American colonists were concerned with religious liberty and the ability to freely dissent from religious tenets without suffering persecution).

3. *See id.* (explaining that concerns regarding religious liberty and freedom from persecution were the impetus for the First Amendment).

4. U.S.CONST. amend. I.

5. Interview with Dr. Giacomo Gambino, Professor of Western Political Thought, Muhlenberg College, in Allentown, Pa. (Nov. 12, 2003).

6. *E.g.*, Matthew C. Berger, *One Nation Indivisible: How Congress's Addition of "Under God" to the Pledge of Allegiance Offends the Original Intent of the Establishment Clause*, 3 U. ST. THOMAS L.J. 629, 641 (2006) (explaining that John Locke heavily influenced Thomas Jefferson in the latter's penmanship of the Bill for Establishing Religious Freedom, which was one of the major precursors to the Establishment and Free Exercise Clauses of the First Amendment).

7. *E.g.*, City of Boerne v. Flores, 521 U.S. 507, 540 (1997) (explaining that certain limitations on the scope of religious exercise have been associated with the philosophy of John Locke).

8. *See generally id.*

9. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (involving a challenge to an Alabama law that authorized teachers to set aside one minute at the start of each day for a moment of silent meditation or voluntary prayer); Abington Sch. Dist. v. Schempp, 374

after the terrorist attacks of September 11, 2001. On that infamous night, President George W. Bush addressed the nation and concluded his remarks with the words "God Bless America."[10] In the days, weeks, and months that followed, the American people uttered and displayed the phrase "God Bless America" countless times. These words of "ceremonial deism"[11] resulted in a meteoric increase in national pride and national unity,[12] which cultivated a public culture and national identity that explicitly embraced God and religion.[13]

The governmental use of religion in shaping a national identity is not limited to explicit actions such as the President's Address of September 11, 2001; seemingly benign governmental use of religion can affect public culture and national identity just as dramatically.[14] Historically, it is the province of the judiciary to utilize the First Amendment in defining the extent to which government may use religion in its attempt to create or maintain a public culture or a national identity.[15] In extrapolating the extent of the religious rights guaranteed by the First Amendment, courts have often identified and deferred to the conceptions of our founding fathers,[16] reasoning that these notions

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U.S. 203 (1963) (involving a challenge to school sponsored Bible reading in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (challenging the ability of state officials to compose an official school prayer and require its recitation in public schools).

10. President's Address to the Nation on the Terrorist Attacks, 37 WEEKLY COMP. PRES. DOC. 37 (Sept. 11, 2001).

11. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 36 (2004) (O'Connor, J., concurring) (In this opinion, Justice O'Connor coined the phrase "ceremonial deism" in reference to the phrase "under God" in the Pledge of Allegiance. Phrases falling under the umbrella of "ceremonial deism," which include "In God We Trust," are forms of religious speech because they involve "references to God and invocations of divine assistance" that "can serve to solemnize an occasion instead of invoking divine provenance." O'Connor asserted that governmental use of ceremonial deism is justified because any "reasonable observer . . . fully aware of our national history . . . would not perceive these acknowledgements as signifying a government endorsement of religion, or even of religion over non-religion.").

12. *See* Gary Langer, ABC News, *Still Proud to Be an American*, http://abcnews.go.com/sections/us/dailynews/sept11_yearlaterpoll020910.html (last visited Nov. 17, 2006).

13. *See id.*

14. *See Elk Grove*, 542 U.S. at 36 (explaining that the phrases "under God" and "In God We Trust" are phrases of ceremonial deism, which are religious invocations that have been ingrained in the American political psyche and therefore do not pose any threat of implying that the government is attempting to establish any particular religion).

15. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

16. *See, e.g.*, Lemon v. Kurtzman 403 U.S. 602, 642 (1971) (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.")).

embody the principles underlying the First Amendment.[17] This brand of historical deference gives rise to an interesting question. If courts are willing to defer to the notions of our founding fathers in this regard, why are more courts not deferring to the beliefs of the socio-political philosophers whose theories influenced the notions of our founding fathers? Would these thinkers agree with the way our American judiciary has regulated governmental use of religion that is designed to create a public culture and national identity?

This Comment will explore the latter of these questions. It will create a "Supreme Socio-Political Philosophy Court" ("SSPPC") in order to conduct this inquiry. The SSPPC will be composed of John Stuart Mill, John Locke, and Thomas Hobbes.[18] Since the views of these men will be confined to their most important socio-political works, the following is an exhaustive list of the primary texts that will be used: *Utilitarianism*[19] and *On Liberty*[20] (Mill), *Second Treatise of Government*[21] and *An Essay on Toleration*[22] (Locke), and *Leviathan*[23]

17. *See* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976) (implying that the intent of the framers speaks to the purposes of the Constitution), *cited in* Michael T. Gibson, *Congressional Authority to Induce Waivers of State Sovereign Immunity: the Conditional Spending Power (and Beyond)*, 29 HASTINGS CONST. L.Q. 439, 525 n.189 (2002).

18. Mill will be the first member of the SSPPC because he articulated a non-interference principle that mirrors the purposes of the Establishment and Free Exercise Clauses. *See* Mark Strasser, *Lawrence, Mill, and Same-Sex Relationships: on Values, Valuing, and the Constitution*, 15 S. CAL. INTERDISC. L.J. 285, 286 (2006). This principle "precludes [governmental intrusion] in those areas of life which only concern individuals themselves." *Id.* Locke will be the second member of the SSPPC because his philosophy was influential in the framing of the Establishment Clause. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 350-51, 369-71 (2002). Hobbes will be the third and final member of the SSPPC because his philosophy influenced the Establishment and Free Exercise Clauses insofar as it illustrated the drawbacks associated with the commingling of church and state. *See* Matthew A. Ritter, *Constitutional Jurisprudence of Law and Religion: Privacy v. Piety—Has the Supreme Court Petered Out?*, 40 CATH. LAW. 323, 372 n.22 (2001).

19. JOHN STUART MILL, UTILITARIANISM (Prometheus Books 1987) (1863) [hereinafter MILL, UTILITARIANISM].

20. JOHN STUART MILL, ON LIBERTY (1859), *reprinted in* J.S. Mill: On Liberty and other writings, (Stefan Collini ed., Cambridge University Press 2000) (1989) [hereinafter MILL, LIBERTY].

21. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT: AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT (1689), *reprinted in* POLITICAL WRITINGS OF JOHN LOCKE (David Wootton ed., Penguin Books 1993) [hereinafter LOCKE, TREATISE].

22. JOHN LOCKE, A LETTER CONCERNING TOLERATION (1876), *reprinted in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION (Ian Shapiro ed., Yale University Press 2003) [hereinafter LOCKE, TOLERATION].

23. THOMAS HOBBES, LEVIATHAN (Richard E. Flathman and David Johnston ed., W.W. Norton & Co, Inc. 1997) (1651) [hereinafter HOBBES, LEVIATHAN]; THOMAS HOBBES, LEVIATHAN (Barnes & Noble Publishing, Inc. 2004) (1651) [hereinafter

(Hobbes). The theories of these men will be used to analyze contemporary First Amendment jurisprudence in an attempt to discover whether this jurisprudence is in accord with the philosophies that influenced the beliefs of our forefathers and their ancestors. The obvious place to begin such an inquiry is with the exposition of these socio-political philosophies.

Section II: Philosophical Background

A. John Stuart Mill, Utilitarianism and On Liberty

In *Utilitarianism*, John Stuart Mill bases morality on the standard of utility,[24] which is illustrated by the Greatest Happiness Principle.[25] This principle states that actions are right to the extent that they produce happiness and wrong to the extent that they produce unhappiness.[26] Mill posits that pleasure is the only thing desirable as an end; and that all desirable things are desirable either for the pleasure inherent in themselves, or as means to producing pleasure.[27] Thus, Mill measures the morality of an action by its ability to produce utility, not by the motivation stimulating the action.[28]

For Mill, there is a relationship between utility and justice. He claims:

> The idea of justice supposes two things; a rule of conduct, and a sentiment which sanctions the rule. The [rule] must be supposed common to all mankind, and intended for their good. The [sentiment] is a desire that punishment may be suffered by those who infringe the rule. There is involved, in addition, the conception of some definite person . . . whose rights are violated by [the infringement].[29]

For Mill, justice is done when rights are observed, and injustice is done when rights are violated.[30] Mill believes that preserving rights produces

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HOBBES, LEVIATHAN UNABRIDGED].

24. *See* MILL, UTILITARIANISM, *supra* note 19, at 12.

25. *See id.*

26. *Id.* at 16-17 (explaining that "happiness" means pleasure and the absence of pain, whereas "unhappiness" refers to pain and the dearth of pleasure).

27. *Id.* at 17. Mill justifies this by claiming that humans actively pursue utility because it is rooted in the fundamental human desire for unity. *Id.* at 45, 50.

28. *Id.* at 29-30. "Motive has nothing to do with the morality of the action. He who saves a fellow creature from drowning does what is morally right, whether his motive be duty, or the hope of being paid for the trouble." *Id.*

29. *Id.* at 70.

30. *See id.*

utility[31] and thus, he asserts that it is unjust to deprive someone of their legal rights if those rights are compatible with utility.[32]

Mill claims that justice is primarily concerned with the utility produced by security.[33] Security is crucial because it provides "immunity from evil."[34] Since the mandates of justice preserve security, they also preserve peace.[35] If the mandates of justice were ignored, there would be no happiness because everyone would be obsessed with securing themselves against the aggression of others.[36] Paranoia and chaos would reign supreme and people would be paralyzed by their fear of others.[37] Thus, Mill asserts that the protection of individual rights, and the security it engenders, is essential for utility and social progress.[38]

Mill believes that there is only one condition that allows the government to impinge upon individual rights and liberties.[39] This condition is articulated by the "Harm Principle,"[40] which states that:

> the sole end for which mankind are warranted . . . in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm[41] to others.[42]

In practical terms, this passage illustrates Mill's belief that a

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31. *Id.* at 71. It is clear that Mill believes that justice is not based in the enforcement of laws, which can be fundamentally unjust; rather, justice is found in the enforcement and protection of rights, which originate in utility. *Id.*

32. *Id.* at 60.

33. *Id.* at 71.

34. *Id.*

35. *Id.* at 77.

36. *See id.*

37. *See id.*

38. *Id.* at 77-81.

39. *Id.* at 13.

40. *Id.*

41. Mill intended "legal harm" to be defined as a significant material or non-material misaffection inflicted upon an individual by another individual's failure to perform a negative duty. Interview with Dr. Christine Sistare, Professor of Law and Morality, Muhlenberg College, in Allentown, Pa. (Sept. 5, 2002) [hereinafter Sistare Interview]. Mill would consider something "significant" if it obstructed the liberty of action of any rational adult. FREDERICK SCHAUER & WALTER SINNOTT-ARMSTRONG, THE PHILOSOPHY OF LAW: CLASSIC AND CONTEMPORARY READINGS WITH COMMENTARY 310 (1996). "Material" indicates that the result of the alleged action is tangible, whereas "non-material" indicates that the result is intangible. Sistare Interview. A "misaffection" occurs if an individual endures an event that puts the person in a worse condition then the condition the person was in prior to experiencing the event. *Id.* A "negative duty" is a duty to refrain from something. *Id.*

42. MILL, LIBERTY, *supra* note 20, at 19. Self-harm and harm inflicted upon those consenting to the harm do not fall under the guise of the Harm Principle and therefore do not justify governmental interference. *Id.* at 15.

government can justly levy punishment upon its citizens when they harm others.[43] Thus, Mill reconciles his notion of liberty with his promotion of utility by indicating that individual liberties should only be protected to the extent that they are conducive to utility; in other words, individual liberties must be circumscribed by notions of utility.[44] He concludes that people are not free to harm others because doing so consistently produces disutility and displeasure.[45]

Mill asserts that there are three spheres of human liberty.[46] These spheres are the freedom of consciousness, the freedom of self-determination, and the freedom to assemble so long as that assembly does not harm others.[47] He claims that genuine liberty is the ability to live one's life as one sees fit, as long as one does not interfere with the right of others to do the same.[48] Mill asserts that the protection of individual liberty produces social utility because it stimulates social progress.[49]

Based on his concept of liberty, Mill provides four justifications[50] for the free expression of opinion.[51] First, he claims that the suppression of individual opinion is detrimental to society because it may deprive society of the truth.[52] If the suppressed opinion is actually true, the suppression prevents society from exchanging error for truth.[53] Conversely, even if the opinion is wrong, suppression of the opinion prevents society from gaining a clearer perception of the truth because it inhibits society from contrasting truth with error.[54] Second, Mill argues

43. *Id.* at 13.

44. *See* MILL, LIBERTY, *supra* note 20, at 13; MILL, UTILITARIANISM, *supra* note 19, at 77-81.

45. *See* sources cited *supra* note 44.

46. *See* MILL, LIBERTY, *supra* note 20, at 15-16.

47. *Id.*

48. *See id.* at 15-16. Again, I do not interfere with your rights if you permit me to violate them. *See id.* at 76. This caveat in the Harm Principle recognizes the individual right of self-determination. *See id.*

49. *See* MILL, LIBERTY, *supra* note 20, at 15-22; MILL, UTILITARIANISM, *supra* note 19, at 77-81.

50. All of these justifications for free expression extend to the free criticism of laws. *See* MILL, LIBERTY, *supra* note 20, at 22. For, although laws are framed to serve general utility, they may fail to do so. *Id.* The free exchange of ideas promotes dialogue concerning these laws so that they can be reformed or repealed if they are genuinely misguided. *Id.* Conversely, the suppression of opinions and ideas promotes conformity to the status quo, and inhibits the repeal of misguided laws. *Id.* at 64-65.

51. *See id.* at 20-52.

52. *Id.* at 20.

53. *Id.*

54. *Id.* at 20-22. Promoting the free exchange of ideas allows a multitude of ideas to enter the intellectual marketplace, where the viability of the ideas will be debated. *See id.* Contrasting the "true" ideas with "erroneous" ideas enables people to understand why the "true" ideas are more viable. *See id.* If the integrity of the intellectual marketplace is not

that if ideas are not expressed and challenged, the truth will become "dead dogma."[55] People will unquestioningly follow the truth, without any real understanding of it and therefore, they will not be able to defend it against criticisms.[56] If people cannot understand what is true, they will not be able to effectively attain utility because they will not understand how to pursue it.[57] Third, Mill maintains that if debate is stifled, the inherent meaning of the truth may be lost and individual acceptance of this truth may not be reflected in the actions of individuals.[58] Again, people will not be able to achieve utility because they will not have any concept of how to produce or pursue it.[59] Fourth and finally, Mill asserts that debate allows opposing sides to employ checks and balances on each other.[60] Each adversary provides a mechanism to moderate any potential radicalism displayed by the opposing side.[61] This mechanism aids utility because it prevents any abuse of power[62] by any of the opposing parties.[63] Additionally, this mechanism aids truth seeking, as the truth often lies somewhere in between the positions espoused by the opposing parties.[64]

Mill concludes his discussion of free expression by claiming that when expression serves to instigate an unjustly harmful act, the opinion can be rightfully suppressed.[65] To illustrate, Mill provides the following example:

> An opinion that corn dealers are starvers of the poor . . . ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed out among the same mob in the form of a placard.[66]

Mill echoes a similar sentiment when addressing the extent of freedom of

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preserved, there may not be anything against which truth can be contrasted. *See id.* at 23-24. In turn, people may lose the ability to accurately and consistently identify and reaffirm that which is genuinely true. *See id.* at 21-24. This inhibits the ability of people to pursue utility and attain social progress. *See id.*

55. *Id.* at 37.
56. *Id.* at 37-38.
57. *See id.* at 37-40.
58. *See id.* at 40-41.
59. *See id.* at 37-40.
60. *See id.* at 47-52.
61. *See id.* at 47.
62. An abuse of power would be any unwarranted deprivation of individual liberties. *See id.*
63. *Id.*
64. *Id.*
65. *Id.* at 56.
66. *Id.*

action.[67] He claims, "[i]t is essential that human beings should be free to form opinions, and to express their opinions without reserve" as long as they do not directly or vicariously produce more harm than utility.[68] Mill values the protection of thoughts and actions because it allows humans to identify more fulfilling ways of living by observing the opinions and actions of others.[69] It also allows humans to see the potential advantage of combining the attributes of different thoughts and opinions.[70]

At this point, it is important to note a significant facet of Mill's theory of liberty: he confines it to adults who are members of civilized societies.[71] He asserts that liberty can only be possessed by those who are capable of learning from the symbiotic relationship between divergent opinions and actions.[72] Regarding children, Mill asserts that parents do not have full ownership over the lives of their children.[73] It is the duty of society to train children in the doctrine it believes to be conducive to the accumulation of knowledge because knowledge will enable children to independently interpret experiences when they become adults.[74] This skill enables mature adults to assess opinions and make choices among competing opinions rather than blindly accepting the status quo.[75] Cultivating one's beliefs for one's self is an essential aspect of Mill's theory of liberty, as it is the only means by which society can the social progress associated with utility.[76]

Throughout his works, Mill adheres to the belief that it is only

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67. *Id.* at 56-57. Both freedom of expression and freedom of action are circumscribed by the Harm Principle. *Id.* However, actions are more likely to cause harm than are opinions. *See id.* at 56. Thus, in application, the Harm Principle restricts actions to an extent greater than it restricts opinions. *See id.* Mill himself admits, "No one pretends that actions [are as] free as opinions." *Id.* Indeed, opinions that are harmful in themselves do not violate the Harm Principle. *See id.* at 56-57. Opinions only violate the Harm Principle when they induce harmful actions, which in themselves violate the Harm Principle. *See id.*

68. *See id.* at 57.

69. *See id.* at 64-66.

70. *See id.* at 71.

71. *Id.* at 13-14.

72. *See id.* at 14, 20-24.

73. *See id.* at 82.

74. *Id.*

75. *See id.* at 20-24. Without proper education, dissenting opinions will near extinction because untrained children will blindly accept the status quo when they reach adulthood. *See id.* Consequently, they will not be able to identify and affirm truths during their adulthood. *See id.* This will stultify human development, which in turn will produce social stagnation. *See id.* Thus, Mill asserts that while the government can attempt to influence the beliefs of its citizens, it must ultimately respect their individual decisions, regardless of whether those decisions are the ones the government would like them to make. *Id.* at 82. If this were not the case, dissent would be eviscerated and society would never attain utility or progress. *Id.* at 20-24.

76. *Id.* at 15-22.

through the preservation of divergent opinions that society can attain progress and utility.[77] This can only be accomplished in a society where the government does not restrain the free dissemination of information; in a society whose government educates its citizens in freely interpreting the knowledge they have accumulated; and in a society endorsing individuality, toleration of dissent, and freedom from conformity.[78]

B. *John Locke, Second Treatise on Civil Government and an Essay Concerning Toleration*

When discussing the socio-political philosophy of John Locke, a logical starting point is Locke's "state of nature."[79] Locke views the state of nature as a state in which people have

> perfect freedom to order their actions and dispose of their possessions and persons as they see fit, within the bounds of the [L]aw of [N]ature, without asking leave, or depending upon the will of any man. [It is also a state] of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another.[80]

For Locke, the Law of Nature is universal and obligates everyone to avoid harming others in their life,[81] health, liberty or possessions.[82] Every person in the state of nature has the power to execute natural laws[83] and punish the violation of natural laws to the extent that such punishment will deter future violations of that law.[84]

The state of nature is characterized by "men living together according to reason, without a common superior . . . [and] with authority

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77. *See generally* MILL, LIBERTY, *supra* note 20; MILL, UTILITARIANISM, *supra* note 19.

78. *See* sources cited *supra* note 77.

79. *See* LOCKE, TREATISE, *supra* note 21, at 262 (explaining that the state of nature is the state in which humans naturally find themselves).

80. *Id.* at 262-63. In the state of nature, every person has the ability to exert influence over others because equality mandates that anything one person can do, others must be permitted to do. *Id.* By performing an act, an individual implicitly consents to the performance of that act by others. *See id.* Concordantly, this doctrine of reciprocity prevents the consolidation of absolute power in any one person. *Id.*

81. The law of self-preservation is integral to the state of nature, and permits a person to kill another in self-defense. *Id.* at 264. This is based on the belief that any aggression by one person against another constitutes a challenge to that person's liberty. *Id.*

82. *Id.* One can only deprive another of these things if it is in the name of justice, and justice demands that the punishment fit the crime. *Id.*

83. In the state of nature, men have "natural liberty," the right to be ruled solely by the laws of nature. *Id.* at 272. People have the right to protect themselves upon incursions of this freedom, as there is no central authority from which to seek protection. *Id.*

84. *Id.* at 264.

to judge between them."[85] Since men live without a common authority, there is no external power that prevents them from exerting force upon others.[86] Indeed, such force is often exerted when men compete for the limited resources available in the state of nature.[87] This aggressive competition ushers in the state of war.[88] Since men have no central authority from which they can seek remedy for this aggression, they are entitled to meet the aggression of their assailants with aggression of their own.[89] These oppressive conditions remain present until humans create a political society by entering into a social compact with each other.[90] This compact[91] is often forged by the desire to escape the instability of the state of war, thereby providing security for one's life and property.[92]

In coming together for collective security, those who enter into the social compact relinquish their personal freedom and agree to abide by the mandates of the majority, which will ostensibly act in the best interests of society as a whole.[93] Secondly, civil society provides three things that nature lacks: an established law (the province of a legislature), an objective judge or arbiter (the province of the judiciary), and the power to execute the laws (the province of the executive).[94] As long as these powers serve the best interests of those assenting to the social compact, the commonwealth is valid.[95] In order to gain these advantages of a civil society, humans must be willing to relinquish two treasured liberties associated with the state of nature: the power to pursue any act not violating the state of nature and the ability to gain

85. *Id.* at 270.
86. *See id.*
87. *Id.* at 270-79.
88. *See id.* at 269-72. By "war" Locke really means "interpersonal conflict," not the military conflicts among sovereign nations that contemporary society associates with the term. *See id.*
89. This principle extends beyond mere physical assaults and includes the use of lethal force. *Id.* at 270. "[I may kill a] thief . . . [when] the law, which was made for my self-preservation . . . cannot interpose to secure my life." *Id.* This situation can occur when humans are in the state of nature, since they lack a common authority. *See id.* at 269-72. It can occur in political society when the ineptitude of the government prevents it from sufficiently resolving interpersonal conflicts. *See id.*
90. *Id.* at 309-10 (Humans, being naturally free and equal, are subject to outside power only insofar as they consent to such subordination. The security in life, liberty, and estate—all of which Locke refers to as "property"—engendered by the laws of a commonwealth provide the only reason for relinquishing individual freedom and submitting one's self to the rules of civil society).
91. Creating a social compact and entering into a political society creates a "commonwealth," *id.* at 311, whose power cannot transgress the limits placed upon it by its creators, *id.* at 272.
92. *Id.* at 309-10.
93. *Id.* at 310.
94. *Id.* at 325.
95. *Id.* at 387.

retribution for violations of the natural law.[96]

Since civil society is formed at the behest of the people, Locke asserts that the majority has the power to select its form of government.[97] Regardless of form, Locke asserts that the commonwealth cannot be paternal or conjugal in nature.[98] While all people are born with freedom and reason, they initially lack the capacity to exercise the latter.[99] Thus, paternal power persists until children can exercise their reason in a way that allows them to function and survive independently.[100] Since individual liberty and reason are natural rights, society must recognize these rights when the latter has developed to the point where the individual can judiciously exercise the former.[101] Thus, civil society cannot be paternalistic in nature because paternalistic societies do not recognize the liberty associated with a rationale being.[102] Conjugal affiliations must be avoided because they are actualized through either a master-slave relationship or a parent-child relationship, relationships that also fail to respect the individual liberties associated with a rationale adult.[103]

In further articulating the characteristics of governmental power, Locke asserts that it should only extend to civil concerns and should not encompass the "salvation of souls."[104] Civil concerns include life, liberty, health, and physical possessions."[105] The power of the commonwealth is circumscribed in these ways for the following reasons.

Firstly, Locke maintains that God has never enabled any man to provide for the salvation of any other.[106] Secondly, Locke asserts that the power of the commonwealth extends only to external force, while

96. *See id.* at 326. Locke asserts that people in civil society are bound by the laws created by the majority. *See id.* Thus, they cannot commit an act that would violate those laws, even if that act would not violate the laws of nature. *See id.* The laws in civil society can be more stringent than those in the state of nature, but they may not violate the laws of nature. *See id.* at 324-27. Thus, freedom of action is only partially restricted by the entrance of humans into civil society, as humans can act freely provided that their actions do not violate any laws. *See id.* at 325-26. Conversely, humans completely forsake the right to punish criminals, as this responsibility will be divided between the judicial power and the executive power. *See id.*

97. *Id.* at 327.

98. *See id.* at 286-309, 349-351.

99. *Id.* at 291.

100. *Id.* at 293.

101. *Id.*

102. *See id.* at 291-93.

103. *Id.* at 300.

104. LOCKE, TOLERATION, *supra* note 22, at 218. Conversely, ecclesiastic laws can only concern themselves with the salvation of souls and the attainment of eternal life; they cannot relate to civil matters. *Id.* at 223.

105. *Id.* at 218.

106. *Id.* at 219.

religious beliefs are internal and can only be altered by the willing consent of an individual.[107] The latter cannot be altered through external compulsion, as they are internal affinities.[108] For Locke, it is impossible to compel someone to believe a specific religious doctrine because it is impossible to assess what his inner affinities are.[109] One can compel someone to recite a pledge or a prayer, but that external acquiescence does not necessarily mean that the person actually *believes* what he is professing.[110] The person may merely be placating his coercer so as to avoid any detrimental sanctions, while truly believing something antithetical to what they outwardly express.[111] Thus, since salvation depends upon inward beliefs that are impervious to outward coercion, Locke concludes that the salvation of souls is not the province of governmental power because any attempts to coerce religious beliefs would be futile.[112] Lastly, Locke asserts that governmental power should only extend to civil concerns because there is only one correct path to heaven and no one can indisputably identify which path is the correct path.[113] Since anyone's guess is as good as everyone else's guess, Locke asserts that the government should permit individuals to pursue the path that they believe maximizes their chance to attain eternal salvation.[114] Thus, he asserts that personal choices regarding religious beliefs should receive the respect of all other social beings, including the government.[115] This rationale forms the foundation for Locke's call to religious toleration.[116]

However, Locke asserts that there are limits to such toleration. Firstly, the Church retains the right to excommunicate any member who continually violates the tenets of the religion and ignores admonitions against such actions.[117] Secondly, an individual cannot injure the civil interests of another individual for religious reasons (i.e. different religious beliefs).[118] The same holds for churches in their interactions

107. *Id.* at 219.

108. *Id.* "For no man can . . . conform his faith []to the dictates of another. All the life and power of true religion consists in the inward and full persuasion of the mind; faith is not faith without believing." *Id.*

109. *Id.*

110. *Id.*

111. *See id.*

112. *Id.* at 220.

113. *Id.*

114. *See id.* Because of this, Locke also believes that individuals should be allowed to alter their beliefs at any time. *Id.* at 222.

115. *Id.*

116. *Id.* at 223.

117. *Id.*

118. *Id.* at 224.

with individuals and other churches.[119] Thirdly, Locke reiterates that ecclesiastical power is confined to the bounds of the Church and does not extend to civil interests.[120] Lastly, Locke posits that even though the state cannot coerce religious beliefs through punishment, it may attempt to teach and counsel its citizens as to what it believes is the proper path to righteousness.[121]

In order to more fully understand the requirements of toleration, Locke divides religion into two aspects: "the outward form and rights of worship, and the doctrines and articles of faith."[122] Regarding outward worship, Locke posits that the state has no power to legally prescribe the use of certain rituals as a component of religious worship.[123] While indifferent things[124] may fall under the legislative power of the state, objects are not classified as such unless they are in the greater good of the community.[125] Additionally, when indifferent things are incorporated into religious worship they cease to be "indifferent" and gain a wholly religious character.[126]

Just as the state cannot force a church to transform an indifferent act into a religious act by incorporating it into religious worship, the state cannot forbid the use of any religious acts that are traditional components of worship.[127] This latter assertion is circumscribed by the requirement that a religious act must be lawful during the ordinary course of life in order to gain such noninterventionist deference.[128]

With regard to the interaction between secular laws and religious worship, Locke asserts that if the purpose of a law is rooted in religious reasons, the law is invalid.[129] However, if there is a secular purpose justifying the law, it is valid in spite of any burdens it may impose on

119. *Id.*

120. *Id.* at 226 (explaining that the government can punish drunkenness for civil reasons but not for religious reasons).

121. *Id.* at 228.

122. *Id.* at 233.

123. *Id.*

124. "Indifferent things" are those things that do not inherently serve a religious or secular purpose, such as washing one's self. *See id.*

125. *Id.*

126. *Id.* (explaining that when the washing of an infant takes place in a sacred font during a baptismal ceremony, the specific act of washing loses its "indifferent" character and assumes an entirely religious character).

127. *Id.* at 235-36.

128. *Id.* at 236. For instance, infant sacrifice runs counter to the ordinary course of life, and therefore would not be permitted in any religious practice. *Id.*

129. *Id.* As long as a religious practice does not harm any person in the commonwealth or the commonwealth itself, that practice must be permitted. *Id.* Criminalizing a religious practice on religious grounds is impermissible. *Id.* Thus, just as individuals cannot injure religious interests for religious reasons, neither can the state.

religious worship.[130] In contemporary jurisprudential terms, Locke would require that the laws possess "formal neutrality" but would not require "substantive neutrality."[131]

These concepts illuminate the extent to which the state can regulate religion. Since any attempts to coerce beliefs are futile, governmental regulation of religious beliefs are invalid.[132] Likewise, governmental regulation of religious activities for the sake of religion is invalid because doing so would, in essence, be a vicarious regulation of a religious belief.[133] However, governmental regulations possessing secular purposes are completely valid regardless of whether they practically burden religion.[134] It is apparent from this exegesis that Locke does not issue a plenary condemnation of religious coercion; he only prohibits it when it is motivated by religious sentiments.[135]

It is through this dichotomy that one understands the type of freedom Locke espouses. Since freedom of action can be curtailed in certain circumstances, it is not absolute.[136] However, Locke notes that freedom of belief is never curtailed because individual beliefs reside in a completely internal realm.[137] For this reason, external forces can never coerce one into altering one's beliefs.[138] Since one is completely free to adhere to any beliefs one desires, and since those beliefs cannot be coerced, Locke insinuates that freedom of belief is absolute.[139] This conclusion is consistent with Locke's belief that liberty of conscience is

130. *Id.* at 236. Locke provides us with the following example. If outlawing the sacrifice of calves was necessary to promote an increase in a decimated cattle population, the law would possess a secular purpose. *Id.* Although it would have detrimental effects on those religions whose rituals included cattle sacrifice, the law would be valid because it would be motivated by a secular purpose. *Id.*

131. James R. Beattie, Jr., *Taking Liberalism and Religious Liberty Seriously: Shifting Our Notion of Toleration from Locke to Mill,* 43 CATH. LAW. 367, 375 (2004) (explaining that "formal neutrality" requires that the law's purpose be neutral, where as "substantive neutrality" requires the law to be neutral as implemented) [hereinafter Beattie, *Liberalism and Religious Liberty*].

132. LOCKE, TOLERATION, *supra* note 22, at 229-30.

133. *See id.* (explaining that the regulation of religious acts for religious reasons would be tantamount to sanctioning the beliefs underlying those religious acts). Locke asserts that external coercion is ineffectual in altering the religious beliefs of others. *Id.* at 232.

134. *See id.* at 236. Having a secular purpose permits these laws to achieve validity because they do not provide an explicit sanction on the beliefs of particular religions. *See id.* Rather, any detrimental effects on religion are considered collateral to the achievement of the secular purpose. *See id.* at 236-37. A law has a secular purpose and protects civil interests when it prevents harm or prejudice to the commonwealth or when it prevents harm or prejudice to the life or property of any other individual. *Id.* at 236.

135. *Id.* at 232-36.

136. *Id.* at 227-37.

137. *See id.*

138. *See id.*

139. *See id.* at 220-37.

a natural right of all humans.[140]

By now, it should be clear that Locke believes the government must tolerate all religious beliefs, while it is not required to tolerate all religious actions.[141] In addition to the restrictions outlined above, Locke narrows his conception of religious toleration in the following ways. Firstly, he states that opinions running contrary to human society are not to be tolerated.[142] Accordingly, people, or religious sects, that believe that a person's superior power over others is a function of that person's religious beliefs should be met with intolerance.[143] Secondly, a religion is not to be tolerated if it requires its adherents to deliver themselves into the service of a temporal being other than the head of their government because this would be tantamount to giving one's allegiance to a foreign king. Thirdly, atheism should not be tolerated because "the taking away of God . . . dissolves all."[144] Finally, Locke asserts that religious assemblies should be tolerated.[145]

With these maxims in mind, Locke reasserts that the commonwealth is created through the consent of the people, who entrust it with the tasks of promoting their interests and easing their concerns.[146] If the commonwealth abuses its power[147] or fails to serve the interests of its people, the people reserve the right to alter or dissolve it.[148] The power of dissolution enables the citizens to disband the government peacefully and permits them to resort to violent revolution.[149] The people

140. *Id.* at 246.

141. *See id.* at 220-36. Indeed, it would seem as though the state could regulate both tolerant and intolerant religious actions provided that there is a sincere secular purpose inspiring such legislation. Beattie, *Liberalism and Religious Liberty*, *supra* note 131, at 377.

142. LOCKE, TOLERATION, *supra* note 22, at 244.

143. *Id.*

144. *Id.* at 246. Additionally, he argues that since atheists do no believe in God, atheism is not a religion. *See id.* Therefore, atheists cannot argue for religious toleration. *Id.* From this it is clear that Locke assumes religion is inherently theistic. *See id.*

145. *Id.* at 247-249. Critics argue against the toleration of religious assemblies by asserting that they pose inherent threats to the security of the state. *See id.* at 248. However, Locke claims that they pose no inherent threat greater than that posed by civil assemblies. *See id.* at 248. "The sum of all we drive at is that every man enjoy the same rights that are granted by others." *Id.* at 248. Thus, since civil assemblies are tolerated, Locke argues that religious assemblies should also be tolerated. *Id.*

146. LOCKE, TREATISE, *supra* note 21, at 309-10.

147. Locke asserts that an abuse of power by the commonwealth places its people in a position worse than that of the state of nature. *Id.* at 337-39.

148. *Id.* at 369-74.

149. *Id.* at 376 (The more egregious the governmental abuses, the closer society becomes to the state of nature. When abuses are slight, citizens will suffer through them until their next chance to replace the government peacefully—i.e., through elections. When the abuses become unbearable and when peaceful solutions have been futile or will not become available for a long period of time, Locke permits the citizens to revolt against the government. Without such revolt, Locke maintains that society will be thrust

themselves reserve the right to judge when dissolution or rebellion is justified.[150] Locke ends his exposition on government by stating, "[t]he people have a right to act as supreme, and continue the [government] themselves, or erect a new form, or under the old form place it in new hands, as they think good."[151]

C. *Thomas Hobbes, Leviathan*

Thomas Hobbes describes man's natural condition as one in which there is no common supreme authority; where each man is sovereign over his own body and does not owe allegiance to any common power.[152] The lack of an overarching authority cultivates fear of all others in the hearts of every individual.[153] The widespread fear of death and bodily harm creates in every individual an insatiable appetite for power, which will enable individuals to defend themselves against any and all assailants.[154] Hobbes asserts that when the appetites of men are fixed upon this objective, the natural result is war.[155]

> During the time men live without a common power to keep them all in awe, they are in a condition which is called war[], and such war[] is of every man against every man . . . in such condition, there is . . . continual fear and danger of violent death. [In this state,] the life of man [is] solitary, poor[], nasty, brutish, and short.[156]

Thus, Hobbes believes that the state of nature is a state of war that pitts every man against every man, which results in the prevelance of violence and fear.[157] Ultimately, Hobbes asserts that two natural passions enable people to escape this brutish existence. First, the fear of death and bodily harm cultivates in every individual the desire to escape the state of nature; second, reason[158] illuminates the way to freedom and

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into a condition worse than that found in the state of nature.).

150. *See id.* at 387. Typically, rebellion is only justified when it is a last resort. *Id.* at 376.

151. *Id.* at 387.

152. *See* HOBBES, LEVIATHAN, *supra* note 23, at 68-72.

153. *Id.* at 69. Both the strong and the weak are fearful because even the weak can kill the strong. *See id.* at 68-69. This breeds natural equality. *Id.* at 69.

154. *Id.* at 69.

155. *Id.* at 69-70. Like Locke, Hobbes does not refer to war in the sense of a battle between nations, but in the sense of interpersonal physical conflict. *See id.*

156. *Id.* at 70.

157. *See id.*

158. *Id.* at 71-72. Hobbes believes that there is "no right [r]eason constituted by [n]ature" because human subjectivity taints each individual's perception of reality. *Id.* at 26. Therefore, individuals in the state of nature define and understand things differently. *Id.* at 25-26. This lack of consensus prevents true certainty, and persists until individuals begin to relate to each other with same language and definitions. *Id.* at 26. The certainty

peace.[159]

Reason dictates that peace is best fostered through the creation of a sovereign power that can ratify and enforce laws.[160] This common power is necessary to combat the ever-present desire to accumulate power.[161] The sovereign is created when people, through a social contract, voluntarily agree to live together in a civil society (called a "commonwealth" or the "leviathan") that prescribes rules of conduct and punishes violations of these prescriptions.[162] Thus, although the impetus to create a social contract is the fear associated with the state of nature,[163] the sovereign himself[164] rules through fear, the fear associated with the punishment of criminality.[165] Thus, fear is intimately associated with the dual purpose of the leviathan. First, the leviathan allows people to escape the carnal fears associated with the state of nature.[166] Second, it utilizes fear of punishment in order to foster a sense of security and peace among its constituents.[167] If the sovereign cannot accomplish these goals, the leviathan dissolves, nullifying the social contract and thrusting people back into the state of nature.[168]

In forging the social contract, individuals relinquish their rights and cede them to the sovereign, only retaining the right of self-preservation.[169] Thus, the sovereign becomes the entity that provides the

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produced through this process promotes reason, which Hobbes asserts is nothing more than the deduction of principles from the generally agreed upon definitions. *Id.* Hobbes believes that once the state of nature forces people to come together and form a common understanding, they will realize that their physical security depends upon escaping the state of nature. *See id.* at 71-72.

159. *Id.* at 71-72.

160. *Id.* at 95. In order for the sovereign to effectively protect his citizens, the citizens must agree to mutually and reciprocally consolidate their power, rights, and will in him. *Id.* In ceding their will to the sovereign, the citizens become authors of the sovereign's actions; therefore, they implicitly consent to those actions. *Id.*

161. *See id.* at 95.

162. *Id.* at 95.

163. *Id.* at 71-72.

164. The "sovereign" denotes the ruling entity created by the social contract. While it can be a single person or a group of people, Hobbes continually refers to it as "he." *See generally id.* For the sake of consistency, I will do the same.

165. *Id.* at 93. The fear associated with the state of nature is unbearable because this state lacks a common power that can enforce peace and order. *See id.* at 68-72. Contrastingly, the sovereign uses fear in order to produce peace and order. *See id.* at 93-95. Thus, living with the leviathanic fear is much more preferable than living with the fear associated with the state of nature because the former produces security. *See generally id.* at 68-95.

166. *See id.* at 93-95.

167. *See id.* at 95.

168. *See id.* at 169.

169. *See id.* at 95. Since self-preservation is the impetus for entering civil society, *id.*, the sovereign cannot demand that individuals jeopardize their life or cause harm to themselves or others, *id.* at 120. Thus, valid claims of self-preservation are the only

shared meanings and definitions that allow people to peacefully communicate with each other.[170] In addition to commanding loyalty and obedience from its constituents, the sovereign also possesses legislative and judicial powers.[171] He may determine what ideas are acceptable and may censor those that are deemed to threaten peace and order.[172] Subjects owe him loyalty and cannot be exculpated from this obligation.[173] In return for this obedience, the sovereign is proscribed from injuring any innocent subject.[174]

Hobbes notes that individuals gain absolute liberty by entering civil society, even though they relinquish their rights to the sovereign in so doing.[175] "Liberty" is the ability to act as one pleases without encountering encumbrances in executing that act.[176] Hobbes claims that liberty did not exist in the state of nature because actions were inhibited by fear.[177] However, while fear is still present in civil society, Hobbes asserts that this fear does not nullify freedom because individuals vicariously consent to it through their formation of the leviathan,[178] which uses that fear to protect them.[179]

In addition to playing a key role in the departure from the state of nature, reason also enables humans to discern "laws of nature," which are innate truths that are perceptible through natural mental faculties.[180] The First Law of Nature states, "every man, ought to [pursue] peace . . . and when he cannot obtain it . . . he may . . . use, all the helps and advantages of war[]. The first branch of [this] rule . . . is to seek [p]eace.

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legitimate reasons for disobeying the laws of civil society. *Id.*

170. *Id.* at 99 (insinuating that competing ideas produce social discord and violence).

171. *Id.* at 99-100.

172. *Id.* at 99.

173. *Id.* at 98.

174. *See id.* at 100.

175. *See supra* note 160 (insinuating that men in civil society retain liberty because they, as authors of the sovereign's actions, consent to the restraints placed upon them by the sovereign).

176. *See* HOBBES, LEVIATHAN, *supra* note 23, at 115.

177. *See id.* at 68-72. Individuals in the state of nature have no common authority that preserves order and thus, individuals live in a constant state of fear. *See id.* at 70-71. Individuals do not consent to this fear; it is their natural condition about which they can do nothing. *See id.* at 68-70. Ergo, in the state of nature, although individuals theoretically possess the freedom to do as they please, this theoretical freedom is effectively limited by fear to which they do not consent. *See id.* This is why humans lack true freedom in the state of nature. *See id.* Although actions in the commonwealth are also limited by fear (fear of punishment), humans have freedom in the commonwealth because they consent to the sovereign's use of fear. *See supra* note 160.

178. *See* note 160 (insinuating that citizens consent to the fear employed by the sovereign because they are authors of his acts).

179. *See* HOBBES, LEVIATHAN, *supra* note 23, at 116.

180. *Id.* at 72.

The [s]econd is . . . to defend ourselves [at all costs]."[181] Thus, Hobbes maintains that natural law mandates the attainment of peace because it exercises one's natural right of self-preservation.[182]

The Second Law of Nature mandates that individuals must mutually divest themselves of certain rights if they are to avoid war and live together amicably.[183] This principle of reciprocity emanates from the right of self preservation. Since people are constantly concerned with their physical well-being and self-preservation, they would loathe relinquishing rights that others retain because doing so would give others a competitive advantage. Other natural laws relevant to the present inquiry are as follows: the Fifth Law of Nature asserts that individuals should attempt to accommodate others when their differences revolve around minor issues;[184] and the Tenth Law of Nature reaffirms reciprocity, stating that people should retain only those rights which they are willing to recognize in others.[185] For Hobbes, the nineteen laws of nature comprise the foundation upon which morality is to be judged.[186]

While enforcement of the laws of nature is not contingent upon the publication of those laws, the enforcement of civil[187] laws is dependent upon publication.[188] The sovereign, or any judge appointed by him, may pardon the violation of a law if there is reasonable ignorance of the law; however, ignorance is no excuse when the law reasonably should have been known.[189] Transgression of both civil and natural laws may be excused when the transgressor lacks reason (by virtue of a condition of minority, mental ailments, or retardation).[190] When a reasonable person violates a law of which he or she should have been aware, the sovereign is justified in punishing the individual.[191] Additionally, it is important to note that the sovereign himself lies outside the law that he creates and cannot therefore be punished through it for any reason.[192]

While such a status means that violations of the law by the sovereign will not send the commonwealth into civil war, Hobbes does enumerate several conditions that would dissolve the leviathan, thereby

181. *Id.*
182. *Id.*
183. *Id.* at 72-73.
184. *Id.* at 83-84.
185. *Id.* at 85.
186. *Id.* at 86-87.
187. Civil laws are those laws ratified through any manifestation of the will of the sovereign. *Id.* at 132-33.
188. *Id.* at 135-36.
189. *Id.* at 137.
190. *Id.* at 136.
191. *Id.* at 134, 156.
192. *Id.* at 133.

thrusting society into the state of nature.[193] The conditions relevant to the present inquiry include: when the goodness of actions is determined by individuals instead of by the sovereign;[194] when individuals believe that their duty to the commonwealth is subordinate to their consciences;[195] and when individuals place their ultimate faith in supernatural phenomena instead of in the sovereign.[196] In order to avoid the state of nature that is ushered in through these conditions, citizens must obey the sovereign in all aspects of governance which assist him in preserving and maintaining peace and security.[197]

An interesting conflict arises when civil laws conflict with religious laws.[198] Hobbes resolves this tension by molding Christianity so that it fits into his philosophical system.[199] Hobbes claims that the Kingdom of God is not found in this world because God is not imminently present in this world; therefore, the sovereign is the supreme ruler of the temporal world.[200] Accordingly, the sovereign must not only serve as head of state, but also as head of religion.[201] Hobbes bases his assertion on the belief that the creation of peace and harmony rests on the ability of the sovereign to establish common dialogue and binding laws,[202] an objective frustrated by dividing civil and ecclesiastical power between two entities.[203]

Although Hobbes vests ecclesiastic and civil authority in the sovereign, he recognizes that social tension could occur if the sovereign ratifies laws that ostensibly contradict religious beliefs.[204] In such a situation, the people must obey the leviathanic dictates because disobedience would challenge the authority of the sovereign, thereby

193. *See id.* at 162-69.

194. *Id.* at 162.

195. *Id.* at 163-64.

196. *Id.* at 164.

197. *Id.* at 121-22 (When the sovereign fails to preserve peace and order, citizens are no longer bound to the rules established by the sovereign. This causes society to revert to the state of nature.).

198. In mentioning religious laws, Hobbes only considers Christian tenets, insinuating that he believes that Christianity is the only valid religion in the Leviathan. *See generally id.* at 180-252.

199. HOBBES, LEVIATHAN UNABRIDGED, *supra* note 23, at 366-67.

200. *Id.*

201. *Id.* at 367.

202. *Id.*

203. *Id.* (explaining that vesting ecclesiastic and civil power in different authorities frustrates peace because it creates confusion as to which authority figure is supreme). Challenges to the power of the sovereign lead to civil war, which thrusts individuals into the state of nature. HOBBES, LEVIATHAN, *supra* note 23, at 120. This violates natural law because it jeopardizes security. *See id.* at 72. Hobbes firmly believes that peace and security are preserved by allowing the sovereign, and the sovereign alone, to proclaim the laws. *See id.* at 99.

204. HOBBES, LEVIATHAN UNABRIDGED, *supra* note 23, at 455-56.

jeopardizing security.[205] Thus, Hobbes requires individuals to obey the sovereign in all things, even if doing so contradicts personal religious beliefs.[206]

A sovereign that commands disobedience to Christianity becomes a member of the "Kingdom of Darkness," a "[c]onfederacy of [d]eceivers, that to obtain dominion over men in this present world, endeavor . . . to dis-prepare them for the Kingdom[] of God."[207] Hobbes claims that there are four causes of the Kingdom of Darkness: errors resulting from misinterpretation of the Bible; the belief that the Kingdom of God can be established in this world; the belief that the Pope is the vicar or Christ; and the belief that the clergy possess privileged knowledge of God's will and can invoke God's presence through incantation—i.e., consecrations, baptisms, and the transubstantiation[208] of the Eucharist.[209] Hobbes claims that religious clergy are the source of these maladies because they derive personal benefit from professing an understanding of and control over the divine.[210]

For Hobbes, disavowing the chimerical teachings of modern Christianity is an essential aspect of preserving civil society because these teachings present challenges to the authority of the sovereign, which jeopardizes his ability to eliminate discord and unite the people under common understandings of nature, religion, and the law.[211] Such challenges ultimately lead to civil war, which thrusts people into the brutish state of nature that they so desperately long to escape.[212] According to Hobbes, adopting his philosophical construct is the only way to avoid such consequences and ensure that each embodiment of

205. *Id.* at 455 (explaining that Christians do not sin as long as they subjectively recognize that what they are compelled to profess is not the Word of God and is not ultimate truth).

206. *See id.* For Hobbes, religious salvation is not based upon actions, but on inner convictions because the former does not necessarily reflect the latter. *See id.* Since the true realm of religion is internal, Hobbes believes that individuals disobey God and jeopardize their eternal salvation only when they abandon their inner faith. *See id.*

207. HOBBES, LEVIATHAN, *supra* note 23, at 215.

208. "Transubstantiation" is the "transformation of bread and wine into the body and blood of Christ during Roman Catholic or Eastern Orthodox masses." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1252 (10th ed. 2001) [hereinafter MERRIAM-WEBSTER].

209. HOBBES, LEVIATHAN UNABRIDGED, *supra* note 23, at 481-83 (explaining that these acts are symbolic because humans cannot command God's presence in this world).

210. *See generally id.* at 541-50. This type of boasting attracts people, who eventually renounce the authority of the sovereign in favor of the authority wielded by the clergy member. *Id.* Obviously, this threatens the vitality of society because it inhibits the ability of the sovereign to command and preserve peace and order. *Id.*

211. *See generally id.* at 476-540.

212. HOBBES, LEVIATHAN, *supra* note 23, at 120.

civil society will not continually degenerate into the state of nature.[213]

This concludes the exposition of the socio-political philosophies that will be utilized in the present Comment. Focus can now be shifted towards the application of these philosophies to American case law.

Section III: Case Law and Analysis

In the present section, the socio-political ideals of Mill, Locke, and Hobbes will be applied to contemporary First Amendment case law in order to determine whether these thinkers would agree with American jurisprudence regarding governmental attempts to use religion in creating a public culture or national identity. Since public education is one of the main vehicles through which the government controls public culture,[214] the present analysis of American case law will focus on jurisprudence in this area. More specifically, because recitation of pledges and prayers in public schools remains controversial,[215] the present inquiry will examine jurisprudence involving these two issues.

For each issue, a summary of a relevant Supreme Court decision will be followed by an analysis of that decision through the eyes of the three socio-political philosophers. Each philosophical analysis will implicitly agree or disagree with the majority opinion of the United States Supreme Court. The conglomeration of the individual decisions will illustrate whether the SSPPC would agree with the limits that the Supreme Court has placed on the governmental attempts to use religion to create a public culture.

A. *Compelled Pledge Recitations,* Board of Education v. Barnette[216]

1. Summary

On January 9, 1942, the West Virginia Board of Education enacted

213. *See generally* HOBBES, LEVIATHAN, *supra* note 23.

214. Kathleen A. Brady, *The Push to Private Religious Expression: Are We Missing Something?*, 70 FORDHAM L. REV. 1147, 1242 n.220 (2002) (citing Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 189 (1992)).

215. James E. Pfander, *Brown II: Ordinary Remedies for Extraordinary Wrongs*, 24 LAW & INEQ. 47, 76 (2006) (citing Mark W. Cordes, *Prayer in Public Schools After Santa Fe Independent School District*, 90 KY. L.J. 1, 1 (2002) ("Religion in public schools has long been a subject of intense controversy in our country and from all appearances will remain so for a long time to come. Among the various ways that religion might interject itself in schools, there is none more volatile than the issue of school prayer."); Charles J. Russo, *The Supreme Court and Pledge of Allegiance: Does God Still Have a Place in American Schools?*, 2004 BYU EDUC. & L.J. 301 (2004) (asserting that the recitation of the Pledge of Allegiance in public schools remains controversial)).

216. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

a resolution ["mandatory pledge resolution" or "pledge resolution"] proclaiming that a salute to the American flag would become "a regular part of the program of activities in the public schools," that all teachers and students "shall be required to participate in the salute honoring [our] Nation, [and that] refusal . . . [shall] be regarded as an [a]ct of insubordination . . . [to be] dealt with accordingly."[217] Barnette appealed to the Supreme Court praying for an injunction that would inhibit the enforcement of the resolution against nonconforming Jehovah's Witnesses ["Jehovah's"].[218] One of the basic Jehovah beliefs is that divine laws established by God are superior to the secular laws created by government.[219] The Jehovah's also believe in a literal interpretation of the following Biblical passage: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them or serve them."[220] For the Jehovah's, the American flag constituted such an "image."[221]

The Court noted that while "the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind,"[222] it was unclear whether the resolution required the students to believe the content of the pledge, or whether mechanical recitation without conviction would suffice.[223] Regardless, the Court noted that censorship of expression "is tolerated . . . only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish."[224] Since compelling action is a more severe limitation on free speech than is mere censorship, the Court reasoned that the former would require a more immediate threat than the threat justifying the latter.[225]

The Court then revisited precedent by considering one of its previous cases, *Minersville v. Gobitis*.[226] In *Gobitis*, the Supreme Court had held that threats to national unity and national security qualified as the type of threats which the government could justly prevent and punish.[227] In *Barnette*, the Court recognized that the governmental right

217. *Id.* at 626. Insubordination was met with expulsion, during which time the child was considered "delinquent" and the parents of the child could be prosecuted accordingly. *Id.* at 629. If convicted, the parents would face a fine not exceeding $50 and a jail term of no more than thirty days. *Id.*

218. *Id.* at 629.

219. *Id.*

220. *Id.* (quoting *Exodus*, 20:4-5).

221. *Id.*

222. *Id.* at 633.

223. *See id.*

224. *Id.*

225. *See id.*

226. Minersville v. Gobitis, 310 U.S. 586 (1940).

227. *Id.* (upholding the requirement that students salute the American flag against the

to promote national unity and security was not in question; rather, it noted that the real issue was whether compulsion was a constitutional means of producing this unity and security.[228] The Court also noted that racism and authoritarianism have often been promoted under the guise of "national unity" or have been produced by ostensibly benign attempts at promoting "national unity."[229] Attempts to create national unity often promote conflict, as different groups with different agendas compete to become the group whose beliefs form the basis of that unity.[230] The Court asserted that the greatest national division would result from finding it necessary to choose a specific dogma with which American youth would be indoctrinated.[231] "If there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in . . . religion."[232] Thus, the Court held that the compulsory flag salute was unconstitutional, thereby overturning *Gobitis* and granting the requested injunction.[233]

2. Analysis: John Stuart Mill

At first blush, it may appear that Mill would dissent from the opinion of the majority. After all, he believes that it is the duty of society to train children so that they cultivate the ability to discern for themselves the best way of living.[234] In doing this, the government is permitted to inculcate children with the beliefs that it thinks are most conducive to utility.[235] Proponents of the pledge resolution could argue that the resolution is an example of the governmental implementation of this power. Furthermore, since Mill believes that the expression of opinions can only be suppressed if they instigate unjust harm,[236] pledge proponents could argue that nonconformists should be punished because their insubordination produces an unjust harm; namely, it threatens national security by jeopardizing national unity.[237] Since security is the

challenge of two Jehovah families). The Court held that threats to national unity implicitly threaten national security. *See id.*

228. Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943).

229. *Id.* "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." *Id.* at 641.

230. *Id.* at 641.

231. *Id.*

232. *Id.* at 642.

233. *Id.* at 641-42.

234. *See supra* notes 74-76 and accompanying text.

235. *See supra* notes 74-75 and accompanying text.

236. *See supra* note 65 and accompanying text.

237. Minersville v. Gobitis, 310 U.S. 586 (1940).

type of utility with which individuals are primarily concerned,[238] jeopardizing security would have a detrimental effect on the production and attainment of utility.[239] People would become paralyzed by the fear of bodily harm.[240] This preoccupation would stymie social development, as people would lose the ability to discern and pursue that course of action producing the most utility.[241]

Alternatively, proponents of the mandatory pledge resolution could justify their position by alleging that the nullification of the pledge produces disutility. They could assert that while exempting the Jehovah's may not threaten national security or national unity, it does instigate unjust harm in the sense that it produces divisiveness in the classroom.[242] Such divisiveness, and the tension associated with it, would produce a classroom setting that would not be conducive to education. Children would lose their opportunity to fully learn how to make decisions for themselves, which would negatively affect their ability to identify and pursue conduct conducive to utility.[243] Thus, children certainly would suffer a "material misaffection."[244] Since the children would not learn how to effectively exercise their individual liberty, the misaffection would also be considered "significant."[245] Lastly, the misaffection would result from the failure to perform a negative duty, the governmental failure to refrain from jeopardizing utility and security.[246] This significant material misaffection would unjustly deprive the government of its right to inculcate children as to the conduct most conducive to utility. Thus, pursuant to Mill's Harm Principle, the proponents of the mandatory pledge resolution could justify their position by arguing that exempting dissenters would inflict unjust harm upon the students.

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238. *See supra* note 33 and accompanying text.

239. *See supra* note 38 and accompanying text.

240. *See supra* note 37 and accompanying text.

241. *See supra* note 38 and accompanying text.

242. McDaniel v. Paty, 435 U.S. 618, 642 (1978) (Brennan, J., concurring) (explaining that the Establishment Clause prevents government from supporting or advancing religion, a prohibition that reduces the divisiveness that often accompanies religious differences). The divisive nature of religious matters could manifest itself when the children, who lack reason and may not have been educated as to the correct way to treat those who do not ascribe to their belief system, realize that some of their classmates do not share the same beliefs. Religious sides could be drawn and tension could mount, causing a decrease in utility.

243. *See supra* notes 74-75 and accompanying text.

244. *See supra* note 41 (defining a "misaffection" as an event that puts the person in a worse condition then the condition the person was in prior to experiencing the event).

245. *See supra* note 41 (defining a misaffection as "significant" if it obstructs a rationale adult's freedom of action).

246. *See supra* note 41 (defining a "negative duty" as a duty to refrain from something).

While these arguments may seem persuasive at first blush, a closer examination of Mill's philosophy reveals that these positions are untenable. Any assertion that permitting abstention instigates an unjustly harmful act[247] is unwarranted. Firstly, in terms of suppressing the expression of an idea when that expression instigates unjust harm, Mill asserts:

> An opinion that corn dealers are starvers of the poor . . . ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed out among the same mob in the form of a placard.[248]

Unlike this example where the idea was expressed in a volatile context likely to incite harm, the expression of the Jehovah's occurred in the context of a classroom where the majority of the students did not share their beliefs.[249] This minority status made it unlikely that the expression of their minority ideas would incite anti-American demonstrations or threaten national security. Such expression was not delivered to terrorists or expatriates; it was delivered to school aged children who, through their pledge of allegiance, displayed affection for the United States.[250] This would seem to cast doubt upon the assertion that permitting the Jehovah's to refrain from the pledge could decrease national unity or security.

While Mill would acknowledge the governmental right to train children in developing the ability to discern the best way of living, he would claim that the government must respect personal life decisions because individual choices preserve dissent.[251] The preservation of dissent is important because it produces the social debate that is conducive to utility and social progress.[252] With regard to the issue in *Barnette*, pledge opponents would assert that the government exercised its right when it attempted to inculcate the children by implementing the pledge resolution. However, he would note that the inculcation failed to garner the assent of all the children, as the Jehovah's made the choice to follow their own religious beliefs. According to pledge opponents, the government should respect this decision because coercing the complicity of the Jehovah's would deprive society of a dissenting opinion, therefore decreasing utility and preventing social progress.

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247. The harmful act would be the threat that abstention poses to national security.
248. MILL, LIBERTY, *supra* note 20, at 56.
249. *See* Bd. of Educ. v. Barnette, 319 U.S. 624, 626-30 (1943).
250. *See id.*
251. *See supra* note 75.
252. *See supra* notes 55-57 and accompanying text.

Additionally, opponents of the pledge resolution would assert that the opinion of the pledge proponents[253] could be justly suppressed because it inflicts harm.[254] The pledge resolution would certainly inflict "misaffections" upon dissenting Jehovah's because it would prevent them from attending classes, an act that would jeopardize their education. The tangible nature of this injury would qualify it as a "material misaffection." It would also be "significant" because it would prevent liberty of action in two ways. It would prevent dissenters from living their lives as they see fit, and it would prevent them from attending school. All this would result from the failure of the government to perform its negative duty to refrain from interfering in the ability of people to direct their own way of life. Thus, the pledge opponents would assert that the opinion expressed in the pledge resolution certainly produces harm. They would contend that this harm is "unjust" because it results in the deprivation of a right[255] that is compatible with utility.[256] Therefore, they would conclude that the opinion expressed in the pledge resolution inflicts unjust harm upon dissenters and can therefore be summarily suppressed.

Since both the pledge proponents and pledge opponents argue that their theory produces utility, Mill would assert that the utility produced by reaffirming the pledge resolution must be balanced against the utility produced from nullifying the resolution.[257] Mill would ultimately condone the course of action that produces the most utility.[258] Upholding the pledge resolution produces utility either through the creation and preservation of national unity and security or through the creation of a nurturing educational environment; however, it also produces disutility

253. The opinion justifying punishment of the Jehovah's on the basis of national unity and security.

254. *See supra* note 65 and accompanying text (explaining that opinions may be suppressed when they inflict harm upon others who do not consent to sustaining that harm).

255. People have the right to direct their own way of life provided that they do not interfere with the ability of others to do the same. *See supra* note 48 and accompanying text. Here, the Jehovah's merely ask for an injunction preventing the enforcement of the pledge resolution. Bd. of Educ. v. Barnette, 319 U.S. 624, 629 (1943). While this would permit them to pursue their life in their own way, it would not prevent others from pursuing their lives in their own way. *See id.* at 626-29. Others could still pledge allegiance to the flag if they so chose. *See id.*

256. *See supra* notes 48, 55-59 and accompanying text (explaining that social progress and utility are based on the dissenting opinions that are produced by recognizing each individual's right to lead their life as he or she sees fit).

257. *See supra* note 65 and accompanying text (insinuating that the utility produced from pursuing action "x" must be weighed against the utility produced from refraining from action "x" in order to determine whether or not the action should be taken).

258. *See supra* note 27 and accompanying text (indicating that utility is the only legitimate goal of human actions).

through the suppression of the dissenting opinions espoused by the Jehovah's. Conversely, the nullification of the mandatory pledge resolution produces utility through the recognition and protection of dissenting viewpoints; however, it produces disutility in the sense that it either jeopardizes national unity and security, or it jeopardizes the educational environment of students.

When balancing the pros and cons of these actions, a striking feature becomes apparent. Upholding the mandatory pledge resolution guarantees disutility because it ensures the suppression of the dissenting opinions held by the Jehovah's. Conversely, it does not guarantee utility, as the mechanical recitation of the pledge will not necessarily infuse the students with patriotism or love for America.[259] Nor will it necessarily eliminate the disruptive classroom tension produced through the expression of dissenting opinions.[260]

On the other hand, the nullification of the mandatory pledge resolution guarantees utility, as it ensures the free expression and protection of dissenting opinions. Conversely, it does not necessarily produce disutility because the exemption for the dissenting Jehovah's is unlikely to threaten national security or unity. Additionally, the ostensible disutility emanating from an unstable educational environment can be preempted by simultaneously teaching children how to civilly interact with others who do not share similar viewpoints. After all, Mill believes that society should be a place where people can freely espouse their beliefs without fear of negative repercussions, and a place where people tolerate differences and learn from those differences.[261]

Since utility is assured through the nullification of the mandatory pledge resolution but is not assured through the enforcement of the resolution, Mill would support the nullification of the resolution.

3. Analysis: John Locke

Having failed to persuade Mill, proponents of the mandatory pledge resolution would turn to Locke, where they would justify their position through the familiar assertion that the state has a right to counsel its

259. And it may not increase national security, as dissenters may simply view the mandatory pledge requirement as an inflammatory act of pomposity and self-righteousness on the part of America. In this sense, the pledge requirement may actually spark anti-American sentiments, which would ultimately serve to jeopardize national security instead of enhancing it.

260. After all, dissenters may acquiesce to the pledge requirement but may express their displeasure with it at other times or through other mediums. This could produce the classroom tension that supposedly disrupts the educational environment enabling students to identify and pursue the course of action producing the most utility.

261. *See generally* MILL, LIBERTY, *supra* note 20.

citizens as to the proper path(s) to righteousness.[262] The punishment of those who do not abide by the resolution could be justified by asserting that there is a secular reason[263] for such a policy. While Locke condemns the regulation of religious activities for religious purposes, he permits the regulation of religious activities when the regulation is incident to laws bearing a secular purpose.[264] Thus, while the mandatory pledge policy may in fact impose a burden on religious activities (the ability to refrain from committing idolatry), this burden is permissible because it is incident to the secular goal of promoting national utility and security. Acquiescing to the demands of the pledge opponents would make governmental authority hostage to the scruples of religious sects. The nullification of the pledge resolution would be an acknowledgement of the power that the Jehovah's held over the government,[265] a concession that Locke would never make.[266] In jurisprudential terms, the resolution achieves "formal neutrality" but fails to achieve "substantive neutrality," a condition to which Locke does not object.[267]

Additionally, proponents of the pledge resolution may assert that the resolution does not fail to tolerate the beliefs of the Jehovah's; it merely refuses to permit certain manifestations of those beliefs. After all, the resolution does not generally prohibit the Jehovah's from attending school, nor does it prohibit the general expression or discussion of Jehovah beliefs;[268] it merely prohibits the expression of those beliefs in a

262. *See supra* note 121 and accompanying text. Pledge proponents could argue that the pledge resolution is a byproduct of the exercise of this right.

263. The pledge proponents would argue that the secular purpose of the pledge is to promote national unity and security, which is the goal of the First Law of Nature. Although pledge opponents may argue that the resolution is invalid because it punishes children, *see supra* note 190 and accompanying text (providing for exculpation from punishment when the culprit lacks reason), the pledge proponents would use national unity and security to challenge this assertion. The proponents would note that Hobbes *allows* for the exculpation of children, he does not *mandate* it. *See supra* note 190 and accompanying text. Thus, the proponents would claim that the threat to national unity and security outweighs the condition of minority, allowing for the punishment levied upon the children pursuant to their violation of the pledge resolution.

264. *See supra* notes 129-30 and accompanying text.

265. More generally, it would recognize the superior power of religious groups to shape secular laws. In legislating, the government would have to be careful not to trample on the toes of any religious sect because that sect could use its religious tenets to successfully challenge secularly motivated laws in order to induce conformity with its tenets. This would lead to governmental impotency, as the government would lose its ability to provide its citizens with law and order.

266. *See supra* note 104 (Since Locke expressly criticizes the extension of ecclesiastic power into the secular realm he would condemn the nullification of the prayer resolution because it would amount to an acknowledgement of the Jehovah's power over civil interests).

267. *See* Beattie, *Liberalism and Religious Liberty*, *supra* note 131, at 375.

268. *See* Bd. of Educ. v. Barnette, 319 U.S. 624, 626-30 (1943).

certain way.[269] In their Lockean appeal, pledge proponents would again claim that the mandatory pledge resolution is not objectionable because freedom of action may be curtailed for secular purposes.

Opponents of the pledge resolution may respond by claiming that the policy is paternalistic,[270] a characteristic that Locke criticizes.[271] After all, inhibiting individual actions to protect individuals from harm whose potential they may not appreciate appears to satisfy the definition.[272] Secondly, they could assert that the state cannot justly forbid the use of a religious act that is already employed by a specific religious sect.[273] In this case, it could be argued that refraining from conduct constituting idolatry constitutes the said "act." Pledge opponents would argue that since this is a major aspect of Jehovah worship, the state cannot force the Jehovah's to eliminate it from their worship.

If the "act" in question was determined not to be that of committing idolatry but that of reciting the pledge, the opponents of the pledge resolution could still proffer an argument. They could assert that when an indifferent act becomes associated with a particular manifestation of religious worship, it acquires a religious meaning, nullifying its previously indifferent character.[274] The Jehovah's associate the allegiance to secular entities as a form of religious worship that they view as sinful.[275] Accordingly, opponents of the mandatory pledge resolution would claim that the recitation of the pledge is not an indifferent act for the Jehovah's; therefore, they should not be forced to interpret it as such. Since the recitation of the pledge is an act of worship for the Jehovah's, and since the government cannot force religions to subsume foreign things into their worship,[276] opponents of the pledge resolution would assert that the government cannot force the Jehovah's to recite the pledge.

Finally, opponents of the pledge resolution could challenge the proponent's assertion that the resolution was enacted for the secular purpose of promoting national unity and security. The pledge opponents

269. *See id.*

270. "Paternalism" is defined as the governmental practice of "taking responsibility for the individual affairs of its citizens, especially by supplying their needs or regulating their conduct." BLACK'S LAW DICTIONARY 1163 (8th ed. 2004).

271. *See supra* note 102 and accompanying text.

272. *Compare supra* note 270 and accompanying text *with supra* notes 217, 227 and accompanying text (indicating that forcing the Jehovah's to recite the pledge for reasons of national security results in the government taking responsibility for individual affairs by regulating individual conduct).

273. *See supra* note 126 and accompanying text.

274. *See supra* note 126 and accompanying text.

275. Bd. of Educ. v. Barnette, 319 U.S. 624, 629 (1943).

276. *See supra* note 123 and accompanying text.

could assert that the mandatory pledge resolution will not promote a feeling of national unity because compulsion of belief is impossible.[277] Simply forcing people to stand and recite the pledge will not change their inner feelings towards the nation. Thus, the imposition of the pledge resolution will not increase national security. In fact, it may threaten national security because the compulsion of American youth may incite tensions and violence that may fragment national unity and decrease domestic and foreign support for the American government. Opponents of the resolution would assert that justifying the pledge resolution on grounds of national security is merely a guise that cloaks its motivation, the regulation of an unappealing religious belief. They would claim that such a purpose cannot motivate government regulations.[278]

While there are persuasive arguments on both sides of the pledge debate, Locke would ultimately find more compelling those arguments offered by the proponents of the pledge resolution. He would discount the allegation that the desire to promote national unity and security is inherently paternalistic by asserting that paternalism, at its core, involves the exercise of parental power over children when the reasoning of the latter is not developed enough to recognize the restrictions that the law places on their liberty.[279] Thus, in paternalistic relationships, there is a dominant party (father and/or mother) and a subordinate party (child).[280] According to Locke, since the subordinate party lacks the reasoning to understand the law and the repercussions of failing to abide by it, that party also lacks the will to make decisions regarding the appropriate way to act.[281] Thus, the paternalistic power prescribes actions by which the subordinate party must abide until the latter party sufficiently develops its reason.[282] This prescription is given regardless of whether the party agrees with it.[283]

This framework runs counter to civil power, which involves subjects (the citizens) delegating mandates to the authority figure (the government).[284] Citizens do so with a reasoned understanding of the mandates and their repercussions, and with the will to act in accordance with those mandates.[285] In this scheme, the majority directs the course of the governmental action and willfully consents to its edicts in exchange

277. *See supra* notes 108-09 and accompanying text.
278. *See supra* note 129 and accompanying text.
279. *See supra* note 100 and accompanying text.
280. *See supra* note 100 and accompanying text.
281. *See supra* note 100 and accompanying text.
282. *See supra* note 101 and accompanying text.
283. *See supra* note 100 and accompanying text.
284. *See* LOCKE, TREATISE, *supra* note 21, at 324.
285. *See id.*

for the protection of property.[286] Thus, the differences between paternal and civil authority are stark. Under paternalistic power, the subordinate party cannot reason properly and therefore cannot create the rules or consent to them.[287] On the other hand, under civil power, the people can utilize reason properly and therefore have the ability to create the rules and consent to them.[288]

Locke would assert that the situation in *Barnette* is more akin to civil power. People create a society for the protection of their lives and property.[289] The people cede these interests to the government, which is charged with promoting and securing them.[290] Thus, the people are said to consent to governmental acts which aim to obtain these objectives.[291] The mandatory pledge resolution is an attempt to achieve these objectives because it promotes national security. If the pledge resolution was recanted, national unity and national security could dwindle, making individual lives and property susceptible to foreign invasion or domestic insurgency. Thus, since the pledge resolution serves the interests which individuals entrust to the government, the citizens are said to consent to the resolution. Therefore, Locke would conclude that the pledge resolution is a manifestation of civil power, not paternalistic power.

Secondly, the opponents of the pledge resolution could assert that the resolution should be retracted because it impermissibly forbids the use of a traditional religious act—refraining from idolatry—employed by the Jehovah's.[292] However, Locke would claim that this assertion is a mischaracterization of his philosophy. Locke does not believe that the state cannot forbid the use of any religious act committed by a religious sect; he states that such a prohibition only extends to acts that are used in the context of religious worship.[293] In making this assertion, he most likely confines the phrase "acts involved in religious worship" to affirmative acts. Otherwise, everything could be denoted as a "religious act."[294] If this were the case, no act could be regulated by the government, and the provision restricting governmental regulation to "acts involved in religious worship" would be frivolous.[295]

286. *See id.* at 309-10, 324.
287. *See supra* notes 100-01 and accompanying text.
288. *See* LOCKE, TREATISE, *supra* note 21, at 324.
289. *See supra* note 90.
290. *See supra* notes 92-93 and accompanying text.
291. *See supra* note 90 and accompanying text.
292. *See supra* note 127 and accompanying text.
293. *See supra* note 123 and accompanying text.
294. If the phrase included both affirmative acts (such as reciting a prayer) as well as acts that were omitted from worship (refraining from worshipping "false gods"), the prohibition against government regulation would extend to all acts, as all acts could either be characterized as an act used in worship or an act omitted from worship.
295. Essentially, the rule would swallow itself.

Since the prohibition on the governmental regulation of acts involved in religious worship extends only to those acts which are affirmatively used in worship,[296] it cannot extend to the "act" that the Jehovah's seek to protect, the act of refraining from idolatry. Thus, this argument against the pledge resolution is not colorable.

Likewise, Locke would also contest the argument that includes as its premise the assertion that the pledge is a religious article. The pledge opponents reason that because the pledge is a religious article, the recitation of the pledge is a form of religious worship. Thus, forcing the Jehovah's to recite it would be tantamount to forcing them to incorporate a nontraditional article into their religious worship. The pledge opponents argue that this is impermissible because the government is proscribed from forcing religions to subsume foreign objects or acts into their religious worship.

Locke would challenge this argument by asserting that the pledge is not a religious act because its purpose is secular.[297] Thus, one does not engage in religious worship through recitation of the pledge, meaning that the pledge resolution does not force the Jehovah's to subsume foreign acts into their religious worship.[298] Pledge opponents could counter this assertion by claiming that the "religion" incorporating the pledge into its worship is the religion of "nationalism." Locke would challenge this proposition by asserting that if nationalism was considered a religion, anything done to promote national interests would be invalidated when it negatively affected another religion. This would severely hamper the governmental ability to promote national security.[299]

While Locke would counter and discredit the arguments of the

296. *See supra* note 293 and accompanying text.

297. Elk Grove Unified Sch. Dist. v. Newdow, 524 U.S. 1,6 (2004) (asserting that the purpose of the Pledge of Allegiance is to serve as a symbol of our country and the values contained therein).

298. Stated differently, the resolution does not force the Jehovah's to subsume foreign acts into their religious worship because they are not worshipping when they recite the pledge since the pledge is not a religious act.

299. "Nationalism" is defined as "loyalty and devotion to a nation . . . placing primary emphasis on promotion of its culture and interests." MERRIAM-WEBSTER, *supra* note 208, at 771. Since national security surely falls under the auspice of national interests, any attempt to promote national security could be seen as an act motivated by a religious purpose. Since laws with religious purposes cannot impose upon the religious worship of any sect, laws motivated by nationalism would be invalidated if they burdened any religious worship. Thus, governmental attempts to promote national security would have to be tailored around the religious worship of all religious groups. This would severely inhibit the ability of the government to effectively promote national security. As a result, individual lives and individual property would be jeopardized, a situation that is antithetical to Locke's philosophy. Thus, Locke is likely to reject the premise that engenders this odious result. Therefore, Locke likely would not classify nationalism as a religion.

pledge opponents in the above mentioned ways, he would not be able to controvert the assertion that the reaffirmation of the pledge resolution could jeopardize national security and civil peace. However, he would note that national security and civil peace may also be jeopardized by the nullification of the resolution. With similar hazards associated with both actions, Locke would likely defer to the action that poses the least threat to security and peace.[300] Since this action is likely to be that which most closely harmonizes with his philosophy, the plethora of problems associated with the arguments of the pledge opponents would likely induce Locke to side with the pledge proponents and reaffirm the pledge resolution.

4. Analysis: Thomas Hobbes

With Mill and Locke rendering contrary decisions, the opinion of Hobbes will determine the manner in which the SSPPC disposes of *Barnette*. A basic principle of Hobbesian philosophy is that the sovereign must rule supremely if society is to flourish.[301] At first blush, this maxim may induce readers to think that the laws created by the sovereign are absolute, meaning that the mandatory pledge resolution implemented by the West Virginia Board of Education, a quasi-sovereign body, must be upheld. However, such an interpretation is misguided.

Hobbes believes that the only way to produce peace and security in the commonwealth is to permit the sovereign to create and enforce the laws.[302] Otherwise, a plethora of individuals will attempt to proclaim what is right, giving rise to an abundance of differing and competing ideas regarding what the law should be.[303] Ultimately, this invites discord, competition for power, and interpersonal conflict.[304] Not only must society entrust the sovereign with the exclusive power to dictate the laws in order to promote peace and security, it must also prohibit any individual or groups of individuals from challenging the authority of the sovereign.[305]

This does not mean that individuals cannot successfully challenge particular laws ratified by the sovereign. Since the main task of the sovereign is to promote peace and security, the sovereign reserves the right to repeal laws that do not promote the attainment or maintenance of

300. *See supra* note 92 and accompanying text (explaining that the desire for security is the impetus for forming the commonwealth).

301. *See supra* note 200 and accompanying text.

302. *See supra* notes 200-02 and accompanying text.

303. *See supra* notes 200-03 and accompanying text.

304. *See supra* note 203.

305. *See supra* note 203.

those ends.[306] The sovereign may not be aware of the social affect of a law until it is implemented or until its shortcomings are made known to him. The entrustment of judicial powers to the sovereign indicates that Hobbes expected individuals to bring the detrimental aspects of laws to the attention of the sovereign in a civil manner. Undoubtedly, Hobbes would prefer that individuals address detrimental aspects through judicial mechanisms, as opposed to taking matters into their own hands and committing violent acts of renegade vigilantism.[307]

Thus, the combination of the sovereign's ability to repeal detrimental laws, Hobbes' anticipation of individual challenges to the laws, and the benefit of making these challenges through judicial mechanisms supports the assertion that Hobbes would permit individuals to challenge the prudence of specific laws.[308] However, his concern for the integrity of sovereign authority[309] would probably induce him to limit legal challenges to instances where those challenges do not question the general authority of the sovereign to legislate. With this said, it is at least feasible that Hobbes would rule against the West Virginia Board of Education.

Familiarly, proponents of the mandatory pledge resolution would justify the pledge by asserting that it promotes national unity and security. Arguably, the repeal of the resolution would permit the fragmentation of national unity, which would produce a multitude of competing theorists brandishing a plethora of remedies. This competition would produce the tension, conflict, and discord that Hobbes seeks to avoid. Domestic instability and insurgency would threaten national security, thereby jeopardizing individual security. Since individual security is both the impetus for departing from the state of

306. *See supra* note 172 and accompanying text.

307. Acts of vigilantism would be discouraged because they would present challenges to the ability of the sovereign to govern generally, as they would promote lawlessness and chaos. However, utilizing judicial mechanisms to remedy detrimental aspects of specific laws presents a challenge to that specific act, not to the ability of the sovereign to govern generally.

308. Since security requires individuals to obey the sovereign in all things, *see supra* note 200 and accompanying text, Hobbes would likely permit challenges to laws provided that those challenges do not manifest disobedience to the law while the law is still in effect. For instance, if I wanted to challenge a ban on smoking in restaurants, I could file a law suit, but I could not smoke in a restaurant while the challenged law was still in effect. If I did, Hobbes probably would not deprive me of my legal challenge, but, in order to preserve security and order in society, he would assert that I should be punished for violating an enacted law. *See supra* notes 173, 203 and accompanying text (explaining that the people owe loyalty to the sovereign because challenges to the sovereign's authority jeopardize the security of all members of the commonwealth).

309. *See supra* note 203 and accompanying text (explaining that the authority of the sovereign cannot be compromised if the commonwealth is to survive).

nature and the objective of civil society,[310] Hobbes would likely avoid any course of action that tended to endanger it.[311] Therefore, pledge proponents would argue that Hobbes would not invalidate the pledge resolution.

Reminiscent of their appeal to Locke, proponents of the pledge resolution could also argue that the resolution does not threaten the beliefs of the Jehovah's, nor does it fail to tolerate those beliefs. After all, the resolution does not ban the beliefs of the Jehovah's, or prohibit the Jehovah's from attending school; it merely bans a specific act (refusing to recite the pledge) associated with those beliefs.[312] Like Locke, Hobbes believes that the domain of religious beliefs is essentially an internal one.[313] For Hobbes, outward actions do not accurately reflect internal beliefs, nor can they be the basis for religious condemnation.[314] Thus, the recitation of the pledge does not reflect or coerce internal beliefs. Since recitation of the pledge does not mandate the abandonment of inner faith, it does not force the Jehovah's to sin and therefore does not jeopardize their eternal salvation.

Given that compliance with the pledge resolution does not jeopardize the eternal salvation of the Jehovah's, pledge proponents would assert that the issue the Jehovah's have with pledge compliance is minor. On the other hand, since national and individual security is promoted by the affirmation of the pledge resolution, and since security is necessary for the survival of civil society, pledge proponents would assert that the issue they have with disobeying the pledge is major. Thus, pursuant to the Fifth Law of Nature,[315] the pledge proponents would argue that the Jehovah's should engage in accommodation by acquiescing to the mandates of the pledge resolution.

The opponents of the pledge resolution would respond by noting that while the duty to obey one's conscience cannot supersede one's duty to obey the sovereign,[316] the failure to do the latter likely does not

310. *See supra* notes 163-67 and accompanying text.

311. *See supra* notes 163-67 and accompanying text. Proponents of the pledge resolution would assert that disobeying the resolution violates the First Law of Nature because it is an act of renegade vigilantism that challenges the ability of the sovereign to maintain peace and order. The duty to obey one's conscience is superseded by the duty to obey the sovereign in all aspects that enable him to maintain peace and order. *See supra* note 195 and accompanying text.

312. *See* Bd. of Educ. v. Barnette, 319 U.S. 624, 626-30 (1943).

313. *See supra* note 206.

314. *See supra* note 205.

315. *See supra* note 184 and accompanying text (explaining that the Fifth Law of Nature holds that individuals should attempt to accommodate others when others have minor issues with the contract).

316. *See supra* note 195 and accompanying text.

preclude one from legally challenging the law that one disobeyed.[317] Thus, pledge opponents would argue that while the disobedience of the children in *Barnette* would warrant punishment,[318] it would not preclude them or their guardians from legally challenging the pledge resolution.[319]

Pledge opponents would claim that the affirmation of the resolution would violate the First Law of Nature, as it would incite civil unrest, which would dissolve national unity.[320] The dissolution of national unity would give rise to a multitude of competing theories brandishing a plethora of remedies. This would produce the tension, conflict, and disagreement that civil society seeks to avoid. Domestic instability and insurgency would threaten national security, thereby jeopardizing individual security. Since individual security is both the impetus for departing from the state of nature and the objective of civil society, Hobbes would refrain from any course of action that endangers it.[321] Thus, according to the pledge opponents, Hobbes should avoid repealing the pledge resolution.

Alternatively, the pledge opponents may base an argument on the Second Law of Nature, which inherently recognizes the right of self-preservation in the context of reciprocity.[322] They could contend that the right to self-preservation extends beyond physical preservation and includes the preservation of all aspects of one's identity. Since the

317. After all, if violating a law precluded one from legally challenging it, citizens would become extremely cautious, for fear of losing their ability to sue. As a result of this extreme caution, many laws would never get broken. This may sound beneficial, but the detrimental effects of some laws may not become apparent until they are transgressed. Failing to transgress these laws would mean that their detrimental effects would never be known. Consequently, they would never be legally challenged. Thus, these detrimental laws would be enforced in perpetuity. This becomes problematic when detrimental secular laws violate the laws of nature. Pledge opponents would argue that Hobbes would never agree to anything that would perpetuate violations of natural laws. *See supra* note 186 and accompanying text (explaining that the natural laws form the basis of morality). Thus, they would argue that the violation of a secular law should not preclude one from legally challenging that law. In response to contentions that such a scheme would promote lawlessness, pledge opponents would assert that the punishment accompanying the violation of the secular law would be sufficient in deterring lawlessness and chaos. *See supra* note 191 and accompanying text (justifying punishment of those who transgress certain laws).

318. Arguably, they received their punishment when they were suspended from school.

319. *See supra* notes 308-09 and accompanying text.

320. *See* Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) ("No deeper division of our people could proceed from any provocation than from finding it necessary to choose what [religious] doctrine . . . public educational officials shall compel youth to unite in embracing.").

321. *See supra* notes 163-67 and accompanying text.

322. People only agree to cede their rights to the government insofar as others agree to do the same because their lives and security would be jeopardized if they were not on equal footing with others. *See* HOBBES, LEVIATHAN, *supra* note 23, at 72.

prayer resolution suppresses the identity of the Jehovah's,[323] this right enables them to resist the prayer resolution. Denying their challenge of the pledge resolution denies the Jehovah's their right of self-preservation and in doing so, it impermissibly gives civil law precedent over the laws of nature. Thus, the pledge opponents would conclude that the pledge resolution should be invalidated.

Since the pledge resolution vicariously burdens the identity of the Jehovah's, the pledge opponents would assert that the Jehovah objection does not revolve around a "minor" issue. Certainly, anything that touches upon aspects of one's fundamental existence must be deemed a "major" concern. Thus, contrary to the assertion of the pledge proponents, pledge opponents would claim that the failure of the Jehovah's to accommodate the pledge does not violate the Fifth Law of Nature because that law only mandates accommodation when disputes revolve around minor issues.[324]

While arguments on both sides are compelling, a close examination of Hobbesian philosophy indicates that Hobbes would likely perceive a major weakness in the arguments proffered by the pledge opponents. In particular, Hobbes would attack the arguments based in the Second and Fifth Laws of Nature. The argument from the Second Law of Nature is grounded upon the assumption that the right to self-preservation extends beyond physical preservation and includes the preservation of anything comprising one's identity, thusly giving people the right to preserve beliefs when they come under assault. However, this assumption is unsupported by anything in the *Leviathan*.[325]

All textual references to "self-preservation" associate that phrase with tangible entities.[326] For example, Hobbes states that people in the state of nature live in perpetual fear of violent death.[327] Thus, when he claims that the desire for self-preservation stimulates their departure from the state of nature and their entrance into civil society, he associates "self-preservation" with human life, something tangible. Additionally, with reference to the laws of nature generally, Hobbes states that they are "precept[s] . . . found out by [r]eason, by which man is forbidden to do that which is destructive of his life, or take away the means of preserving [it]."[328] In this statement, Hobbes again associates self-preservation with the preservation of bodily security.

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323. It suppresses their identity to the extent that it prevents them from expressing a concept essential to who they are as a people.

324. *See supra* note 184 and accompanying text.

325. *See infra* notes 327-28 and accompanying text.

326. *See infra* notes 327-28 and accompanying text.

327. *See supra* note 156 and accompanying text.

328. HOBBES, LEVIATHAN, *supra* note 23, at 72.

These examples make it clear that Hobbes intimately correlated the concept of "self-preservation" with the preservation of individual life and physical security, tangible entities. At no point in the *Leviathan* does he associate "self-preservation" with intangible entities such as beliefs or identity.[329] Thus, it is unlikely that he would extend the concept of self-preservation beyond physical preservation. With this said, the Jehovah's right of self-preservation would not include the right to defend their beliefs or any other intangible component of their identity. Therefore, even if the pledge resolution suppresses aspects of the Jehovah's identity, it would not violate their right to self-preservation. For this reason, the pledge opponents' argument regarding the Second Law of Nature must be rejected.

Additionally, since the preservation of one's identity does not fall under the penumbras of the Second Law of Nature, it is not likely that Hobbes would consider it a "major" concern.[330] Thus, Hobbes would likely assert that, pursuant to the Fifth Law of Nature, the pledge opponents must accommodate the pledge resolution.[331]

In light of the weaknesses identified in the arguments of pledge opponents, Hobbes would ultimately rule in favor of the West Virginia Board of Education by affirming the mandatory pledge resolution.

5. The Decision of the SSPPC

To summarize, Mill would rely on utility in weighing the benefits and disadvantages associated with the pledge resolution. Since nullifying that resolution would produce utility, while reaffirming it would produce disutility, the scales would tip in favor of nullifying the resolution.[332] For Locke, the dispositive element would be fidelity to his concept of the ideal commonwealth, which include notions of paternalism and security. Since the arguments for nullifying the resolution strain his philosophy, he would conclude that the arguments for reaffirming the resolution possess more fidelity.[333] Lastly, Hobbes would base his decision on fidelity to the laws of nature. Since arguments for nullifying the resolution involve more violations of the laws of nature than do

329. *See generally* HOBBES, LEVIATHAN, *supra* note 23.

330. *Compare supra* notes 166-67 and accompanying text *with supra* notes 327-30 and accompanying text (implying that Hobbesian philosophy emphasizes the preservation of life and physical security, things which are "major" concerns in light of Hobbes' emphasis on security).

331. *See supra* note 195 and accompanying text. After all, the concerns of the Jehovah's would be "minor," but the concerns of the state (national unity and national security) would be "major" concerns. Thus, Hobbes would likely assert that the Fifth Law of Nature mandates accommodation on the part of the Jehovah's.

332. *See supra* § (III)(A)(II).

333. *See supra* § (III)(A)(III).

arguments for reaffirmation of the resolution, Hobbes would ultimately vote in favor of the latter.[334]

Thus, in a 2-1 vote, the SSPPC would render a decision favorable to the West Virginia Board of Education by reaffirming the pledge resolution. This decision directly contradicts the decision of the United State Supreme Court and provides some indication that American jurisprudence lacks fidelity to the philosophies that influenced the framers of the Constitution. With this in mind, attention can be turned to the issue of school sanctioned prayer in order to determine if the SSPPC would agree with the jurisprudence of the United States Supreme Court in that arena.

B. School Sanctioned Prayer, Lee v. Weisman [335]

1. Summary

Daniel Weisman, on behalf of himself and his daughter Deborah, objected to the custom of having a clergy member deliver an invocation and benediction at the graduation ceremony of Nathan Bishop Middle School, from which Deborah, fourteen, was graduating.[336] Robert E. Lee, school principal, ignored this objection and invited a rabbi to deliver the invocation and benediction [collectively referred to as the "prayer"] at the graduation ceremony.[337] As was custom, prior to the ceremony, Lee provided the rabbi with a pamphlet entitled "Guidelines for Civic Occasions" [the Guidelines], which "recommended that public prayers at nonsectarian civic ceremonies be composed with 'inclusiveness and sensitivity,' though it acknowledged that '[p]rayer of any kind may be inappropriate on some civic occasions.'"[338] With this knowledge, the rabbi crafted a prayer[339] that contained many religious allusions, including references to "God" as a parental figure who requires us to live righteously[340] and who gives us strength, guidance, and the capacity for learning.[341]

Although attendance at the graduation ceremony was not required in order to receive one's diploma, the Court noted that it was obligatory in

334. *See supra* § (III)(A)(IV).
335. Lee v. Weisman, 505 U.S. 577 (1992).
336. *Id.* at 581.
337. *Id.*
338. *Id.* (The rabbi was also notified that the ceremony would be nonsectarian).
339. Each of which lasted no longer than a minute. *Id.* at 583.
340. *Id.* at 581-82 (explaining that people should live justly, humbly, and with mercy).
341. *Id.* at 582.

essence.[342] The Court observed that the Constitution, at a minimum, guarantees that the government will not compel anyone to "support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion . . . or tends to do so.'"[343] Since the ultimate decision maker, Lee, was an employee of the state, the Court concluded that his potentially divisive decision[344] to include the prayer in the graduation ceremony was attributable to the state.[345] The Court had already established that the governmental imposition of official prayers in public schools was unconstitutional.[346] In *Weisman*, the Court observed that furnishing the rabbi with "the Guidelines" displayed sufficient governmental control over the prayer's content so as to render it "imposed" by the government.[347]

Having established the imposition of the prayer as a state act, the Court considered the religious nature of the prayer.[348] Although enduring offensive speech is an important aspect in learning to live in a tolerant pluralistic society, the Court claimed that justifying the prayer as an opportunity for children to cultivate their ability to tolerate unappealing ideas ignores the fact that the First Amendment protects speech and religion through different vehicles.[349] "Speech is protected by insuring its full expression even when the government participates," while the freedom of religion does not recognize the right of the state to intervene in certain religious affairs.[350]

Therefore, the Court asserted that freedom of religion could not justify the actions of the school district, whose supervision over the graduation ceremony could give reasonable dissenters the impression that the government was requiring elementary students to participate in

342. *Id.* at 586. The Court later insinuated that this obligatory nature may emanate from the pressure to stand as a group and be with classmates. *Id.* at 593.

343. *Id.* at 587 (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984)).

344. *Id.* at 587-88 ("The potential for divisiveness is of particular relevance here . . . because [the decision regarding the prayer] centers around an overt religious exercise in a secondary school environment where . . . subtle coercive pressures exist."). *See infra* note 376 and accompanying text (explaining that the coercion emanates from social pressure to conform to tradition).

345. Lee v. Weisman, 505 U.S. 577, 588 (1992).

346. *See generally* Engel v. Vitale, 370 U.S. 421 (1962).

347. Lee v. Weisman, 505 U.S. 577, 588 (1992) (noting that the rabbi would likely comply with governmental guidelines so as to avoid drawing the ire of the government, which might tarnish his reputation in the community).

348. *Id.* at 587-88.

349. *Id.* at 591.

350. *Id.* at 591-92 (The state is proscribed from interfering in matters of religion and conscience because "[i]n the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at great risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.").

and approve of certain religious worship.[351]

Additionally, the Court acknowledged that the interaction of peer pressure with the impressionability of adolescence makes school aged children increasingly susceptible to peer pressure.[352] Thus, the children themselves may have felt that their participation in the prayer and acceptance of the religious views contained therein was mandatory.[353] For these reasons, the Court held that the school board violated the Establishment Clause by creating a situation that tended to establish a state religion.[354]

2. Analysis: John Stuart Mill

Opponents of the school prayer could make the following utilitarian arguments in defense of their position. Even when compliance to government mandates are not mandatory or coerced, any government imprimatur on religion or irreligion suggests that those who do not adhere to sanctioned beliefs are outside governmental favor.[355] Such a "stamp of approval" could convey the impression that the beliefs of cynics are wrong. This could induce paranoia in the minds of cynics, as they might begin to fear for their physical safety or might start to question the sincerity with which their political interests are considered. Fear and paranoia would detract from the attainment of utility[356] and thus, opponents of school prayer would assert that the prayer policy should be rejected on these grounds.

Additionally, if cynics interpret government action to insinuate that their beliefs are wrong, they may acquiesce by altering their beliefs to conform to the governmental imprimatur in the hopes of gaining government approval. Opponents of school prayer could argue that such a situation produces disutility because it deprives society of the dissenting viewpoints upon which social progress is based. Individuals would no longer have the opportunity to contrast dominant social beliefs against the extinct beliefs.[357] This would deprive society of the utility gleaned from the sincere consideration of all viewpoints, a deprivation that would ultimately obstruct social progress. Opponents of school

351. *Id.* at 593 (noting that most students understood the act of standing and remaining silent during the rabbi's prayer as participation in that prayer).

352. *Id.*

353. *See id.* at 593-94.

354. *Id.* at 599.

355. *See id.* at 606 (Blackmun, J., concurring).

356. *See supra* notes 37-38 and accompanying text.

357. *See supra* note 54 and accompanying text (explaining that suppression of an opinion prevents society from gaining a clearer perception of the truth because it inhibits society from contrasting truth with error).

prayer would argue that the prayer policy should be invalidated on these grounds.

Additionally, prayer opponents would note that the detrimental effects of the prayer policy are felt not only by those whose beliefs differ from the beliefs espoused by the prayer; detrimental effects are also felt by those sharing the beliefs espoused by the prayer. Prayer opponents would assert that the secular adaptation of religious beliefs may result in the dilution, contamination, and bastardization of those beliefs.[358] To the extent that state endorsement induces dissenters to abandon their beliefs, adherents of the endorsed belief system would lose the opportunity to reinforce their beliefs by contrasting them against dissenting beliefs. This would prevent them from recognizing and reaffirming the truth that follows from this contradistinction. This may cause them to lose sight of what they truly believe,[359] which may cause the bastardized belief system to go unquestioned. This hurts the adherents of the endorsed belief system because their true beliefs may become extinct. It also hurts society because mechanical adherence to the bastardized belief system prevents individuals from cultivating the ability to identify and pursue that which produces maximum utility.[360] Thus, prayer opponents would argue that the prayer policy is disadvantageous to them as well as to prayer proponents.

While these arguments are persuasive, Mill would likely reject them and support the school prayer policy for the following reasons. He would first note that every individual has the right to live his own life as he sees fit, provided that he does not interfere with the right of others to do the same.[361] Thus, Mill would claim that the school prayer policy should be upheld so long as it does not harm the rights of others to live their lives according to their own dictates. Mill would conclude that the prayer policy does not inflict this type of harm.

To produce "harm," an action must produce a significant material or non-material misaffection inflicted through the failure to observe a negative duty.[362] The determination regarding whether or not the prayer policy was a "misaffection" seems to hinge upon whether or not one considers standing quietly during the prayer to be an act of assent to the beliefs contained therein. If it qualifies as assent, dissenters are certainly left in a worse position because their liberty of conscience has been compromised. To the contrary, if standing quietly does not imply

358. Lee v. Weisman, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring) (positing this idea).

359. *See supra* notes 55-56 and accompanying text.

360. *See supra* notes 55-57 and accompanying text.

361. *See supra* note 48 and accompanying text.

362. *See supra* note 41.

consent, it is hard to see how dissenters would be left in a worse position, as their liberty of conscience would be preserved.[363]

In contemplating the nature of quietly standing during the prayer recitation, Mill would conclude that this act is not an act of assent to the beliefs espoused in the prayer.[364] If every respectful observance of or reflection upon a set of beliefs constituted implicit agreement with those beliefs, people would never be willing to observe or reflect upon the ideas of others because doing so would be a renunciation of those beliefs which they hold dear. If this were the case, ideas would never truly be exchanged, discussed, or debated. Citizens would lose sight of the convictions informing their beliefs[365] and would be deprived of the advantages of incorporating other beliefs into their way of life.[366] This would ultimately produce social stagnation, as the inability to accurately identify and pursue utility would stunt social progress.[367] Thus, Mill would not consider the act of quietly standing during the prayer to condone the words or beliefs contained therein. Consequently, Mill would not consider that act a "misaffection," meaning that it does not produce harm. Therefore, it would not inhibit the right of dissenters to live their lives as they so choose.

With regard to the arguments proffered by the opponents of the customary graduation prayer, Mill would note that their arguments are based upon the presumption that the prayer constituted governmental endorsement of religion. He would dispute that assumption by asserting that the prayer, rather than signifying the endorsement of religion,

363. One may argue that the physical compulsion to stand in silence during the invocation may constitute a misaffection, as it may produce physical discomfort or leave some people with less energy. However, it is unlikely that Mill would consider this a misaffection. The graduation exercises have traditionally included the prayer and thus, the people in the community are most likely aware of this. Its prevalence, combined with other experiences the people have had with graduation ceremonies, probably puts them on notice that it is customary to stand in silence during an invocation or benediction. Mill would argue that their voluntary attendance at the graduation exercises manifests consent to all of the foreseeable consequences accompanying the exercises. Thus, any discomfort they experience resulting from foreseeable aspects of the graduation exercises (namely the prayer) cannot constitute harm because the people in attendance have consented to the foreseeable aspects. *See supra* note 42 (explaining that harm cannot be inflicted upon those that consent). While this theory would apply to the inclusion of the prayer in the graduation exercises, it would not extend to the specific content of the prayer because that would be unforeseeable.

364. He could characterize the act as a respectful observance of and quiet reflection upon a set of beliefs. After all, he believes that sincere deliberation of differing beliefs is essential to utility. *See supra* notes 58-59 and accompanying text.

365. *See supra* note 56 and accompanying text (explaining that the lack of debate leads to mechanical acceptance of the beliefs which leads people to lose sight of why they hold that belief).

366. *See supra* note 69 and accompanying text.

367. *See supra* note 57 and accompanying text.

represented a governmentally sanctioned opportunity for citizens to gain exposure to beliefs that are conducive to the debate upon which dissent and social progress are based.[368] Unlike *Barnette*, where the punishment of cynics could easily give the impression that the cynics held disfavored beliefs, there is nothing in *Weisman* that indicates that the prayer was anything more than an opportunity for people to gain exposure to a certain set of beliefs,[369] opportunities that the government reserves the right to provide.[370]

Furthermore, Mill would assert that the government cannot sanitize its presentation of an idea much more than it did in *Weisman*, as there comes a point where the dilution of an idea renders it an inaccurate embodiment of the original idea. If every situation involving the sanitized governmental presentation of a religious idea is considered an endorsement of that idea, the government would be divested of its right to educate its citzenry. This would jeopardize the intellectual marketplace, which would jeopardize the preservation of dissent and the utility produced by that dissent.[371]

Thus, Mill would argue that it is in the interest of utility to reject the arguments proffered by the opponents of school prayer and to tolerate the prayer as a mechanism aiding the preservation of dissenting view points,

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368. *See supra* notes 71-76 and accompanying text (Mill justifies the governmental power to educate children by claiming that it trains them in the ability to accumulate knowledge and sift through divergent ideas so that when they reach adulthood they can choose for themselves the tenets and beliefs that produce maximum utility. This individual choice creates the individuality and dissenting opinions upon which social progress is based. From this, one could reason that Mill would support government actions that were conducive to aiding individuals in their choices. Such "educational" endeavors would ensure that there was a meaningful choice to be made—i.e., that there were in fact competing ideas upon which individuality and dissent could be based. After all, governmental education of children would be futile if those children, upon entering adulthood, were not presented with any meaningful way to exercise that education—i.e., if there were no competing ideas from which to choose).

Thus, it appears that the governmental mandate to educate children should logically be accompanied by a governmental mandate to ensure the existence of a marketplace of ideas. Mill would argue that the presentation of religious view points in *Weisman* is an exercise of the latter right.

369. *See generally* Lee v. Weisman, 505 U.S. 577 (1992) (indicating that the prayer did not involve coercion, active profession of belief, or punishment of nonconformists). This lends credence to the assertion that the prayer was not a governmental attempt to endorse religion or disfavor irreligion. *Weisman* involved a simple, and arguably objective, presentation of a particular belief, not a coerced profession of a belief that clearly indicated governmental religious preference. *See id.* at 580-82.

370. *See supra* notes 74-76 and accompanying text (explaining that the government has the right to train children in the doctrines it believes to be conducive to utility). Thus, the government could claim that it has a right to teach the beliefs embodied in the prayer because those beliefs are conducive to utility.

371. *See supra* note 54.

an act that is imperative for utility and social progress.[372]

3. Analysis: John Locke

For many of the reasons mentioned in *Barnette*, Locke would not find anything objectionable in the prayer offered at the graduation exercises of Nathan Bishop Middle School. Again, proponents of the prayer would assert that the state has a right to counsel its citizens in what it believes to be the proper path to righteousness.[373] They would argue that there is a secular purpose to the prayer, that being the desire to dignify and solemnize the day. While Locke condemns the regulation of religious activities for religious purposes, he permits the regulation of religious activities when such regulation is incident to laws bearing a secular purpose.[374] Thus, while the prayer may serve as a de facto regulation of dissenting conduct,[375] such regulation is permissible because it operates to achieve a secular purpose. Declaring such a regulation impermissible would make government authority hostage to the scruples of religious sects. This would permit such a sect to exert its power and influence over civil interests,[376] a situation which Locke explicitly condemns.[377]

Additionally, even assuming the coercive effects associated with its de facto nature, prayer proponents could assert that the prayer does not voice intolerance of the religious convictions of others. After all, it does not prevent others from holding different beliefs, and, unlike the pledge

372. *See supra* note 54. It is important to note the fundamental differences between the pledge resolution in *Barnette* and the prayer policy in *Weisman*. The former required dissenters to actively profess something that they did not believe and provided for the punishment of those who were not complicit. Bd. of Educ. v. Barnette, 319 U.S. 624, 629 (1943). The prayer policy in the latter case did not require active profession of anything and did not provide for the punishment of anyone. Lee v. Weisman, 505 U.S. 577, 580-82 (1992).

373. *See supra* note 121 and accompanying text.

374. *See supra* note 130 and accompanying text.

375. It does not serve as a genuine regulation against religious activities because it does not proscribe or punish any activities running counter to the prayer. At most, the prayer is a de facto regulation of dissenting opinions because the peer pressure to conform to school conventions homogenizes conduct and counsels against the articulation of dissenting viewpoints. *See Weisman*, 505 U.S. at 593 (indicating that people are influenced by social conventions).

376. It would allow objectors to inhibit the ability of the government to counsel its citizens as to the proper path to righteousness. In this sense, it could prevent the government from promoting and maintaining civil order, which would threaten the lives and properties of citizens. Thus, religious or irreligious sects would exert their influence upon civil matters, a condition that Locke criticizes. Locke would condemn the elimination of the prayer on these grounds because it would amount to an acknowledgement of the power that irreligion has over civil interests.

377. *See supra* note 104 and accompanying text.

resolution in *Barnette*, it does not require the active affirmation of any beliefs with which one does not agree.[378] Even assuming that the de facto nature mentioned above operates to prevent the expression of certain religious beliefs, Locke argues that the expression of religious beliefs can be curtailed for secular purposes.[379] Since the prayer operates to serve the secular purpose of dignifying and solemnizing the occasion, any collateral effects it may have on religious activity are permissible and must be tolerated.

Prayer opponents would counter these arguments by characterizing the graduation events differently. They would claim that the ostensibly secular graduation ceremony was transformed into a religious ceremony through the various acts of the school.[380] A prayer traditionally was recited during the preliminary stages of the Nathan Bishop Middle School graduation ceremony.[381] The content of the prayer was regulated by the "Guidelines for Civic Occasions" pamphlet given by the principal to those who were slated to deliver the prayer.[382] The particular prayer challenged by Weisman praised God as providing humans with "strength and guidance," and thanked God for "keeping us alive, sustaining us, and allowing us to reach this day."[383] Thus, opponents of the prayer would argue that the traditional use of the prayer at graduation ceremonies, combined with the inherent tendency of the prayer to be religious, results in the transformation of the graduation from a secular ceremony into a religious ceremony containing religious worship.[384] Thus, the prayer opponents would assert that the prayer policy[385] is invalid because it

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378. *Weisman*, 505 U.S. at 580-82.

379. *See supra* note 130 and accompanying text.

380. What I refer to as "the prayer" contains two inherently religious components, an invocation and a benediction. "Invocation" is defined as "the act or process of petitioning for help or support; a prayer of entreaty as at the beginning of a service of worship." MERRIAM-WEBSTER, *supra* note 208, at 616. "Benediction" is defined as "the invocation of a blessing, especially the short blessing with which public worship is concluded; a Roman Catholic or Anglo-Catholic devotion." MERRIAM-WEBSTER, *supra* note 208, at 106. Thus, since the components of the prayer are inherently religious, the prayer itself is inherently religious. This assertion is supported by the fact that the school principal distributed the "Guidelines for Civic Occasions" so that the prayer would not offend the religious beliefs of anyone. If the prayer did not inherently tend to be religious, the consistent distribution of the Guidelines would be unnecessary and frivolous.

381. *Weisman*, 505 U.S. at 581.

382. *Id.*

383. *Id.* at 582.

384. *See supra* note 126 and accompanying text (explaining that when indifferent things are incorporated into religious worship, they gain a religious character). Thus, prayer opponents would argue that the consistent association of the indifferent graduation ceremony with the religious overtones expressed in the prayer serves to transform the ceremony into an act of religious worship.

385. Again, prayer opponents would argue that the prayer is inherently religious, *see*

suppresses dissenting viewpoints in order to promote the religious ideals for which it stands.[386]

With compelling arguments on both sides of the debate, Locke could look to policy implications to direct his decision. If one analyzes the facts closely, it becomes apparent that Weisman does not object to the prayer on religious grounds, as it does not offend his religion.[387] Rather, his objection to the inclusion of *any* prayers at the graduation ceremony is a strong indication that the prayer offended his irreligion.[388] If he were to triumph in this case, the victory could be seen as a triumph of irreligion over religion. Locke might see this as promoting a culture of atheism. While Locke promotes the tolerance of many belief systems, atheism is a belief system to which he does not extend this courtesy.[389] Thus, Locke would rule in favor of Lee by reaffirming the prayer policy of Nathan Bishop Middle School.

4. Analysis: Thomas Hobbes

Although the prayer in *Weisman* seems more benign than the pledge resolution in *Barnette*, thusly producing the assumption that Hobbes would uphold it too, a closer examination of Hobbesian philosophy yields a different result.

Much like the argument proffered in *Barnette*, proponents of the prayer would justify it by appealing to the Fifth Law of Nature, which states that parties must attempt to accommodate differences when discrepancies revolve around something minor.[390] They would claim that the mere act of standing in silence while a prayer is delivered cannot negatively affect the beliefs of anyone because beliefs are internal and cannot be coerced by outside influences.[391] Thus, the mere act of standing does not pose a threat to the beliefs or eternal salvation of anyone in the audience. Therefore, that act cannot precipitate any objections that would be "major" in nature. Since any objections would merely be minor scruples, and since citizens must obey the sovereign, who sanctions the prayer, the proponents of the prayer could assert that the Fifth Law of Nature mandates accommodation on the behalf of those who object to the prayer.

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supra note 380, and has the de facto effect of suppressing dissenting religious viewpoints, *see supra* note 375.

386. *See supra* note 129 and accompanying text (explaining that an act cannot regulate religion for religious reasons).

387. Lee v. Weisman, 505 U.S. 577, 581 (1992).

388. *See id.*

389. *See supra* note 144 and accompanying text.

390. *See supra* note 144 and accompanying text.

391. *See supra* note 206 and accompanying text.

Additionally, proponents of the prayer could make an argument based on the First Law of Nature, which mandates the pursuit and attainment of peace and security.[392] They could argue that the act of joining others in collective prayer unifies participants in an important way.[393] Namely, it immunizes against religious intolerance, prejudice, and bigotry.[394] Preventing people from uniting in this manner deprives them of an experience that cannot be duplicated.[395] This deprivation could unknowingly provide an opportunity for malcontents to cultivate religious intolerance and hatred, thereby chinking the armor of national unity. This would threaten and ultimately diminish national security, in direct violation of the First Law of Nature. Thus, proponents of the prayer would assert that the First Law of Nature mandates the affirmation of prayer during commencement exercise at Nathan Bishop Middle School.

The opponents of the prayer could counter by proffering their own arguments as to how the prayer violates the laws of nature. They would note that the prayer involved a clergy member delivering an incantation in which he asks God to "send [His] blessings upon the teachers and administrators [of the school]."[396] The rabbi continued the incantation by exclaiming, "[w]e give thanks to You, Lord, for keeping us alive, sustaining us, and allowing us to reach this special, happy occasion."[397] The prayer opponents could assert that this content would be objectionable to Hobbes for several reasons. Firstly, in asking for divine blessings, the rabbi displayed the belief that he had the power to compel the will of God.[398] Secondly, in thanking God for sustaining human life, the prayer expressed the belief that God was an imminent presence in this world.[399] Lastly, using the prayer to solemnize the graduation ceremony is repugnant because it is analogous to a consecration, an act that Hobbes criticizes for its tendency to deceive people into believing that members of the clergy possess the power to command the immediate presence of God in this world.[400]

Hobbes objects to these religious aspects because he believes that

392. *See supra* notc 181 and accompanying text.
393. Lec v. Weisman, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting).
394. *Id.* (Scalia, J., dissenting).
395. *Id.* (Scalia, J., dissenting).
396. *Weisman*, 505 U.S. at 582.
397. *Id.*
398. *See supra* note 209 and accompanying text (explaining that this is objectionable because it ushers in the "Kingdom of Darkness").
399. *See supra* note 200, 209 (explaining that the belief in God's imminence is a misinterpretation that leads to the "Kingdom of Darkness").
400. *See supra* notes 209-210 and accompanying text.

they place people in awe of clergymen.[401] Since this presents a situation where the sovereign controls the secular while the clergy ostensibly controls the divine, people are presented with two possible sources of authority. This confuses the public as to whom they are to obey.[402] Consequently, this presents a challenge to the sovereign's monopoly on temporal power, a monopoly that is necessary if the sovereign is to promote peace and security.[403] Thus, the prayer opponents could claim that the prayer should be proscribed because it is inherently inconsistent with the mandate to pursue and attain peace that is enunciated in the First Law of Nature. Since peace and security are certainly "major" concerns for Hobbes,[404] prayer opponents would argue that the Fifth Law of Nature cannot be utilized to compel accommodation from the prayer opponents. With these arguments, the prayer opponents could effectively counter the arguments proffered by the prayer proponents.

In assessing these arguments, Hobbes would likely defer to the side which produces the greater quantum of peace and security. While the arguments articulated by the prayer proponents are persuasive, Hobbes does not specifically recognize the validity of those arguments in his philosophy.[405] On the other hand, Hobbes does specifically recognize the validity of the arguments enunciated by the prayer opponents.[406] Thus, Hobbes would likely believe that the arguments of the prayer opponents tend to more consistently produce peace and security. Hence, he would proscribe the school sponsored prayer in *Weisman*.

5. The Decision of the SSPPC

To summarize, Mill would rely on his notions of harm and utility in reaffirming the prayer policy. He would note that the policy does not inflict harm upon the Jehovah's.[407] Additionally, he would assert that the

401. *See supra* note 210 and accompanying text.

402. *See supra* note 203.

403. *See supra* note 203 (Peace and security are promoted by eliminating social discord.).

404. *See supra* note 163 and accompanying text (insinuating that security is a "major" concern of individuals because it the impetus for entering into the state of nature).

405. He does not explicitly recognize that collective prayers promote the unity that serves to protect national security. *See generally* HOBBES, LEVIATHAN UNABRIDGED, *supra* note 22. Thus, he does not note that the invalidation of such a prayer consistently jeopardizes national security. *See generally id.*

406. He does explicitly recognize that consecrations, the belief in the imminence of God, and the belief that clergymen can invoke God's presence in this world all threaten national security by calling the supremacy of the sovereign into question. *See supra* note 209-10 and accompanying text. Since the prayer ostensibly invokes God's presence, *see supra* note 399 and accompanying text, Mill would view prayer as a threat to national security.

407. *See supra* § (III)(B)(ii).

government has a right to educate its children as it sees fit, making the prayer a governmentally sanctioned opportunity to enrich the intellectual marketplace thereby producing utility.[408] Locke would view the nullification of the prayer policy as a promotion of atheism. Since he believes that atheism does not deserve toleration, he would reaffirm the policy.[409] Finally, Hobbes would rely on his notion of security. Since his philosophy specifically recognizes that security is produced through the invalidation of the religious ideas embodied in the prayer, he would vote in favor of nullifying the prayer policy.[410]

Thus, in a 2-1 decision, the SSPPC would invalidate the public school prayer policy of Nathan Bishop Middle School. This decision directly contradicts the decision of the United State Supreme Court. Along with the decision of the SSPPC in *Barnette*, it provides credence for the assertion that contemporary American jurisprudence lacks fidelity to the philosophies that influenced constitutional framing and interpretation.

Section IV: Conclusion

The goal of this Comment was to provide a philosophical analysis of contemporary First Amendment jurisprudence involving governmental utilization of religion to create a public culture. The purpose of such an analysis was to discover whether this jurisprudence was in accord with the socio-political philosophies that influenced the beliefs of our forefathers and their ancestors. To accomplish this, the present Comment constructed the "SSPPC"[411] and applied the philosophies of its members to two controversial Supreme Court decisions, *Board of Education v. Barnette* and *Lee v. Weisman*. This application yielded interesting results.

In two 2-1 opinions, the SSPPC disagreed with the Supreme Court's disposition of both of these cases.[412] In *Barnette*, Mill, concurring with the United States Supreme Court, voted to invalidate the pledge resolution of the West Virginia Board of Education.[413] However, both of his colleagues joined together in voting to reaffirm the pledge resolution.[414] In *Weisman*, Locke teamed with Mill in reaffirming the

408. *See supra* § (III)(B)(II).
409. *See supra* § (III)(B)(II).
410. *See supra* note 406 and accompanying text.
411. As a reminder, the SSPPC is a judicial body composed of John Stuart Mill, John Locke, and Thomas Hobbes. *See supra* § I.
412. *See supra* §§ (III)(A)(V), (III)(B)(V).
413. *See supra* § (III)(A)(V).
414. *See supra* § (III)(A)(V).

prayer policy of Nathan Bishop Middle School.[415] This left Hobbes as the sole supporter of the United States Supreme Court's decision to invalidate the prayer policy.[416]

These determinations indicate that the SSPPC would not agree with the restrictions placed upon the American government in its attempt to utilize religion to promote a public culture. This is not to say the SSPPC would endorse the adoption of an authoritarian regime that would consolidate power, limit individual liberty, and squash dissent; however, it may indicate that the SSPPC would give the government more leeway in attempting to use religion to create a public culture. For example, these philosophers may assert that the government can legitimately use religion to create a public culture provided that this pursuit does not convey governmental favoritism for or discrimination against any religion.[417] Indeed, the intent of the framers has been interpreted to permit this pursuit.[418] "The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma."[419]

This maxim is the star in our constitutional constellation that guides the three members of the SSPPC toward an equitable balance between religious freedom and religious establishment. It is this star that guides the three wise men toward their ultimate goal: the pursuit of life, liberty, and happiness.[420] The question remains, will we follow their lead?

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415. *See supra* § (III)(B)(v).

416. *See supra* § (III)(B)(v).

417. Mill may permit such a pursuit insofar as it avoids inflicting harm upon others because it nurtures the intellectual marketplace, stimulating debate and thereby producing utility. If citizens alleged that the pursuit conveyed favoritism or discrimination of religion, the government could deny these averments by claiming that any favoritism or discrimination was not intentional but was a collateral product of the quest for utility. Locke would support this pursuit provided that it did not violate formal neutrality—i.e., provided that burdens inflicted upon a religion were motivated by public goals and not by disdain for that religion. If citizens alleged government favoritism or discrimination of religion, the government could deny these allegations by claiming that any favoritism or discrimination was not intentional but was the collateral effect of promoting a secular interest. Hobbes would support such a pursuit to the extent that it complies with the laws of nature and tends to eliminate social discord by consolidating civil and ecclesiastic authority in one person. Any favoritism or discrimination of religion would not be intentional, but would merely be incident to the production of security.

418. *See infra* note 419 and accompanying text.

419. Bd. of Educ. v. Barnette, 319 U.S. 624, 653 (1943) (Frankfurter, J., dissenting).

420. The pursuit of life can certainly be attributed to all three philosophers. Mill would undoubtedly support it because the fear produced in the absence of security for one's life detracts from utility. *See supra* note 33 and accompanying text. Locke would pursue it because the preservation of life is a component of the preservation of property, which is essential to his philosophy. *See supra* note 90 and accompanying text. Hobbes

would support the pursuit of life because he believes that the desire to secure one's life is the basis for the creation of the commonwealth. *See supra* note 163 and accompanying text. Liberty likewise would be a pursuit attributable to all three philosophers. Mill exalts individual liberty to the extent that it does not harm others. *See supra* note 44 and accompanying text. Locke asserts that liberty is a viable civil concern that the government may legitimately promote. *See supra* note 105 and accompanying text. Hobbes asserts that individuals perfect their freedom by entering into the social contract. *See supra* note 175 and accompanying text. Lastly, the pursuit of happiness is also a pursuit attributable to all three philosophers. Happiness is the definition of utility, so it undoubtedly becomes a pursuit for Mill. *See supra* notes 26-27 and accompanying text. Locke pursues happiness through entrance into civil society. *See supra* note 90 (explaining that entrance into civil society provides security, which eases concerns regarding the safety of one's life and possessions, which assumedly leads to happiness). Likewise, Hobbes pursues happiness through the formation of the commonwealth, which extracts individuals from the despair and war associated with the state of nature. *See supra* note 159 (insinuating that entrance into civil society quells despair and provides peace, which assumedly leads to happiness).