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## Holier Than You and Me: 'Religious Liberty' Is the New Bully Pulpit and Its New Meaning Is Endangering Our Way of Life

Marsha B. Freeman\*

“Your beliefs don’t make you a better person, your behavior does.”<sup>1</sup>

Many of you have probably seen this quote floating around the internet on all forms of social media. I have it hanging on my office door in the hope that those who enter will take a moment to notice and maybe, if needed, even reflect on it. The problem is that most people likely do not recognize the negative forces within themselves and those who do may be perfectly fine with them.

Recent decisions show how the Supreme Court has allowed negative politics to influence its work leading to heretofore unlikely decisions.<sup>2</sup> Today’s political climate has induced changes in society impelling legal findings,<sup>3</sup> leading to upheavals in how we view everything from corporate entities<sup>4</sup> to limitations on personal rights.<sup>5</sup> The shaping of such laws has been

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1. Sukhraj S. Dhillon Quote, in DR. PURUSHOTHAMAN, BELIEF QUOTES 207 (2015).

2. See Marsha B. Freeman, *Liberal, Conservative, and Political: The Supreme Court’s Impact on the American Family in the Uber-Partisan Era*, 19 J. GENDER RACE & JUST. 39, 70, 71 (2016) (discussing politically charged cases from *Bush v. Gore*, 531 U.S. 98 (2000), to *Citizens United v. Fed. Election Comm’n*, 588 U.S. 310 (2010), and *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014) and the influences that, at least in part, drove the Court).

3. See *id.* at 43 (speaking about cases such as *Citizens United v. Fed. Election Comm’n*, 588 U.S. 310 (2010), and *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014) and how they have led to a new way of thinking about rights and obligations under the law).

4. “Corporations are people, my friend” became a new rallying cry for the conservative right. See Adam Winkler, *Corporations Are People, and They Have More Rights Than You*, HUFFINGTON POST: THE BLOG (Aug. 30, 2014), [http://www.huffingtonpost.com/adam-winkler/corporations-are-people-a\\_b\\_5543833.html](http://www.huffingtonpost.com/adam-winkler/corporations-are-people-a_b_5543833.html) [https://perma.cc/D3LG-TSUA].

5. This term the Court has agreed to hear cases on a state’s ability to virtually destroy the legal right to abortion through logistical requirements. See *Whole Woman’s Health v.*

accomplished in large part due to a dramatic rise of the conservative right, particularly the so-called Tea Party,<sup>6</sup> and a corresponding sense of “us versus them” from everyone else.

The rise of such hostile political forces does not occur in a vacuum, rather it is reflective of a far broader problem in society as a whole: the lack of not just understanding, but respect for differences among us. The term “tolerance” has frequently been used to explain how we should view, for instance, religions different from our own. Tolerance, however, means basically that I should merely acknowledge that you are different from me, and hopefully not berate you for it.<sup>7</sup> A far better term for how we should view others’ beliefs would be respect:<sup>8</sup> not merely recognizing that there are differences among us, but understanding and accepting that it is actually appropriate that we believe differently, and most of all that each of our beliefs is entitled to value.

The lack of such mutual respect is playing out among all areas of our lives today, from religion, to social views, to the virulent political discourse coursing through our recent election season. While previously referenced Court decisions may well have taken their energy from the shift to the political right,<sup>9</sup> in a

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Hellerstedt, 136 S. Ct. 1001 (2016); *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015).

6. The Tea Party, formed in 2009 and since grown into a major political movement, is the common name given to a splinter political group of conservatives protesting the federal government. *See Freeman, supra* note 2, at 40.

7. The definition of tolerance is “sympathy or indulgence for beliefs or practices differing from or conflicting with one’s own.” *Tolerance*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/tolerance> [https://perma.cc/7XQ7-KZD5]. While there are other definitions, this one probably most epitomizes the use of it in the context of feelings about others’ religious beliefs.

8. The definition of respect is “a feeling or understanding that someone or something is important, serious, etc., and should be treated in an appropriate way.” *Respect*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/respect> [https://perma.cc/8VB4-JPQL].

9. *See generally Freeman, supra* note 2, at 39-43 (discussing the political and societal implication of the holdings of cases such as *Citizens United v. Fed. Election Comm’n*, 588 U.S. 310 (2010), and *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014)). *Citizens* compared corporations to people, leading to the idea that institutions could invoke free speech beliefs and feelings in their dealings with others, particularly in the realm of campaign financing. *See id.* at 42 n.31. *Hobby Lobby* took that a step further and allowed that secular corporations could raise similar beliefs and restrict employees’ rights in the name of protecting the corporation’s beliefs. *See id.* at 52. These holdings have drastically altered the landscape of citizens’ rights in the realm of giving and receiving business benefits. *See id.* at 62. They have led to numerous state laws restricting the rights of consumers in the name of protecting the rights of business owners, as will be discussed further down. *See id.* at 62-63.

case of chicken versus egg it is likely that those decisions have likewise fueled broader social acceptance of a conflicted society, the pitting of different parts of the citizenry against each other.

This article will examine the ever-growing world of sanctioned bullying we occupy today, fueled in large part by the rise of not just customary politics, but more specifically, religious politics. Part I will focus on the enormity of said religious politics in today's world, including how theoretically constitutionally separate religious views are nevertheless permeating legal and social decisions. Part II will examine the outgrowth from these changes on the socio-legal repercussions surrounding major controversial areas including immigration, racism and abortion. Part III will view today's super-charged political world as both provocateur and outcome of these other components. Part IV and the conclusion will try to find a rational methodology to recognizing, yet still respecting differences, and a hopeful path to a return to civility in our everyday lives.

## I. RELIGION AS A WEAPON

Few in this nation would argue with the truism that our country was founded on religious freedom.<sup>10</sup> Throughout our nation's history the meanings of these words have been debated and determined at the highest levels. Religious beliefs have fueled many of our policies and engendered fierce debate on its meaning.<sup>11</sup> Notwithstanding definitive holdings on many of these issues over the years, public discourse and anger have continued unabated for a number of them, including abortion.<sup>12</sup> While

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10. See U.S. CONST. amend I. In pertinent part, the amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." *Id.* These two parts of the religious freedom clause of the First Amendment are a mainstay of our nation's founding and purpose, and while interpreted widely over our history, are nevertheless being subjected to more and wider discussion today.

11. Traditionally, disputed policies as disparate as slavery, prohibition and segregation have at least in part been based on the idea of religious freedom. See Matt Baume, *Blast From the Past: States Using 'Religious Freedom' to Justify Segregation*, HUFFINGTON POST (Feb. 2, 2016, 10:01 AM), [http://www.huffingtonpost.com/matt-baume/states-using-religious-freedom-to-justify-segregation\\_b\\_6946658.html](http://www.huffingtonpost.com/matt-baume/states-using-religious-freedom-to-justify-segregation_b_6946658.html) [https://perma.cc/B47J-HDWU]. It has been up to the Supreme Court and the Congress to determine the Constitutional rights attached to these and other contested issues, regardless of the personal religious beliefs attached to them. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-96 (1954).

12. Rather than abate over time, the rise of ever-more conservative politics in the nation has fueled more and more state and federal challenges to abortion, with hundreds of laws being proposed and/or enacted over just the last few years. See, e.g., Liam Stack,

abortion has remained for years in the forefront of public dispute, other issues have joined the spotlight of “religious liberty” concerns.

Religion, while always occupying a high level of interest from the beginnings of the nation, now seems to have taken over much of the debate about the landscape of our country. Politicians assert we are a “Christian nation” despite the dual Constitutional clauses which reject such definition.<sup>13</sup> At least a number of the founding fathers were adamant that the new nation was not established on the Christian faith.<sup>14</sup> Some, including Thomas Jefferson, characterized religion in terms of artificial mythology, hopeful that the new nation would not succumb to its ideology.<sup>15</sup> Jefferson advocated tolerance above all, and hoped that his statute for religious freedom in Virginia would encompass “within the mantle of its protection, the Jew and the Gentile, the Christian and the Mohammeden, the Hindoo and Infidel of every denomination,” specifically avoiding the idea of a single dominant religion.<sup>16</sup> There is no reference to God or “the Almighty” or any synonym for such anywhere in the Constitution.<sup>17</sup> The four founding documents of our history—the Declaration of Independence, the Articles of Confederation, the

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*Florida Governor Signs Law to Cut Funding for Abortion Clinics*, N.Y. TIMES (Mar. 25, 2016), <http://www.nytimes.com/2016/03/26/us/florida-governor-signs-law-to-cut-funding-for-abortion-clinics.html> [https://perma.cc/NC2U-PMHW]. While public funding of abortions was already banned, this law cut off funds for preventive services at clinics that also provide abortions, including birth control and cancer screenings for low-income citizens. *Id.* This is an example of conservative legislatures taking a “back-door” to ending abortion services by requiring providers to use any other funds available for them. On the federal level, Congress has been embroiled in a multi-year effort to cut off all funding for Planned Parenthood, again having nothing to do with abortion per se. See Laura Bassett, *Congress Votes Yet Again to Defund Planned Parenthood*, HUFFINGTON POST (Jan. 6, 2016, 4:01 PM), [http://www.huffingtonpost.com/entry/congress-votes-defund-planned-parenthood\\_us\\_568d5a67e4b0cad15e62fda6](http://www.huffingtonpost.com/entry/congress-votes-defund-planned-parenthood_us_568d5a67e4b0cad15e62fda6) [https://perma.cc/26XL-45BK].

13. See *supra* note 10.

14. See Jeff Schweitzer, *Founding Fathers: We Are Not a Christian Nation*, HUFFINGTON POST: THE BLOG (Apr. 28, 2015), [http://www.huffingtonpost.com/jeff-schweitzer/founding-fathers-we-are-n\\_b\\_6761840.html](http://www.huffingtonpost.com/jeff-schweitzer/founding-fathers-we-are-n_b_6761840.html) [https://perma.cc/V7AZ-UE87] (citing John Adams, “The government of the United States is not, in any sense, founded on the Christian religion.”).

15. See *id.* (citing Jefferson’s letter to John Adams to discuss the “mystical generation of Jesus . . .”).

16. See *id.*

17. See *id.*

Federalist Papers and the Constitution itself—show a secular, not religious-based content.<sup>18</sup>

Despite such specific evidence to the contrary, many of today's pundits in particular insist we are, indeed, a nation founded not only on religion, but specifically on Christianity. One of the foremost justifications for this belief is often cited as the words "In God We Trust" on our silver currency.<sup>19</sup> Yet these words had nothing to do with the founding of the nation, and were not even placed on coins until the Civil War and not added to the Pledge of Allegiance until 1954.<sup>20</sup> Nevertheless, some politicians, likely out of contented ignorance for the most part, often cite these words as an example of the Founders' vision of our nation.<sup>21</sup> Political groups over the years have in fact tried to rectify what they considered an omission by the Founding Fathers to amend the Constitution to include references to God, but these attempts have thus far failed.<sup>22</sup>

History has been replete with claims of religious influence on the nation's beginnings. Many point to the ostensibly religious bent of the founders themselves to imply they must have intended religion (particularly Christianity) as a basis for our country.<sup>23</sup> Yet historians contend that the personal religious views of the Founders were based on deist perspectives—the idea that God does not interfere in the affairs of government.<sup>24</sup> Some believe that these deistic views were incorporated into the Founders' ideas of the new nation, and that they "viewed religion, and particularly religion's relation to government, through an

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18. *See id.* Only the Articles of Confederation include a general introduction even remotely connected to religion; the Federalist Papers, authored by John Jay, Alexander Hamilton and James Madison, have no mention of God or Christianity, and only refer to religion in the context of keeping it separate from affairs of government. *See* ARTICLES OF CONFEDERATION of 1777, art. III. The Constitution itself, besides the First Amendment preclusion of government endorsement of religion, has only a negative reference to religion in Article VI: "[N]o religious Test shall ever be required as a Qualification to any Office or Public Trust under the United States." U.S. CONST. art. VI, cl. 3.

19. *See* Schweitzer, *supra* note 14.

20. *See id.*

21. *See id.* (citing Sarah Palin, former governor of Alaska and Vice-Presidential nominee, saying, "If the pledge was good enough for the founding fathers, its [sic] good enough for me . . .").

22. *See id.* (referencing the National Reform Association efforts in 1864).

23. *See* Mark David Hall, *Did America Have a Christian Founding?*, HERITAGE FOUND. (June 7, 2011), <http://www.heritage.org/research/lecture/2011/06/did-america-have-a-christian-founding> [https://perma.cc/K3J3-TZK4].

24. *See id.*

Enlightenment lens that was deeply skeptical of orthodox Christianity.”<sup>25</sup> Others argue that since the founders themselves often identified as Christian, they clearly intended the use of Biblical principles in governing the nation,<sup>26</sup> despite, or even in opposition to, any evidence of such being found in any of the founding documents.<sup>27</sup>

The concept (or lack thereof) of a religious basis for the nation, while seemingly self-evident from the absence of such language in the founding documents, especially the Constitution, has always been ripe for interpretation. But the debate over whether the nation was founded on a religious basis has heated up in recent years, as a result of both legal and political rhetoric. Despite the fact that most citizens would likely argue for the right of religious liberty and freedom in our nation, exemplified by the First Amendment, what those words mean is clearly up for interpretation. In 2015, fifty-seven percent of Republicans reportedly believed the United States should be an official Christian nation.<sup>28</sup> More interesting, perhaps, is that in 2007 a survey had found that fifty-five percent thought that it already was.<sup>29</sup>

The origins of the political casting of religion as a founding tenet of the nation are not new. In the 1930s, business leaders saw the promotion of a nexus between themselves and Christianity as a counterpoint to the “creeping socialism” of Roosevelt’s New Deal, including using clergymen as spokespersons for business institutions.<sup>30</sup> The clergy movement included convincing Congress to incorporate weekly prayer meetings “in order that we might be a God-directed and God-controlled nation.”<sup>31</sup> Amidst these machinations, the Reverend Billy Graham emerged as such a major corporate supporter that a London paper called him “the

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25. *See id.* (quoting University of Chicago law professor, Geoffrey Stone).

26. *See id.* (citing Tim LaHaye).

27. *See id.* (using Madison’s writings to conclude that the First Amendment “prohibits Congress from . . . compelling men to worship God in any manner contrary to their conscience.”).

28. *See* Kevin M. Kruse, *A Christian Nation? Since When?*, N.Y. TIMES: OPINION, (Mar. 14, 2015), <http://www.nytimes.com/2015/03/15/opinion/sunday/a-christian-nation-since-when.html> [<https://perma.cc/X8PD-D5X7>] (citing Public Policy Polling).

29. *See id.* (citing First Amendment Center survey).

30. *See id.*

31. *See id.* (quoting Reverend Abraham Vereide’s proposal to start weekly prayer meetings in House and Senate).

Big Business evangelist.”<sup>32</sup> Dwight Eisenhower joined forces with the Rev. Graham to promote his presidential campaign as a spiritual journey, but personally did not see it as an end to the so-called “socialist” policies of the New Deal.<sup>33</sup> Eisenhower may have been able to separate the ideals of religion with the possible drawbacks from relying on it to govern, but times, and political rhetoric, have evolved.

One man’s victory is another’s defeat, and few legal decisions, absent abortion, have resonated so drastically as the Court’s decision holding that same-sex marriage is constitutional.<sup>34</sup> While the actual decision as to the marriage itself appears much more accepted than many would have anticipated,<sup>35</sup> the anger it has fostered among the religious right has continued unabated. Some have attacked the decision itself by attempting to thwart its implementation. A Kentucky county clerk of court refused to issue marriage licenses to same-sex couples in direct violation of the Supreme Court holding.<sup>36</sup> It took a contempt-of-court hearing and jailing to force her to cease interfering in the issuing of licenses, which she acknowledged was based purely on her belief that her personal religious views should and could trump the constitution.<sup>37</sup> Her highly publicized views and case caused one former solicitor general to publicly question whether any public official has a right to refuse service to anyone based on their own religious beliefs.<sup>38</sup> In an even more

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32. *See id.*

33. *See* Kruse, *supra* note 28 (Eisenhower opined, “Should any political party attempt to abolish Social Security, unemployment insurance, and eliminate labor laws and farm programs, you would not hear of that party again in our political history.”).

34. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2642-43 (2015).

35. Public opinion as to same-sex marriage has been fueled in large part by younger adults, even older citizens have in large numbers been more accepting (or less condemning) than likely would have occurred in years past. Much of this is likely due to the consistent movement in society over the past years which has led to a feeling of acceptance. *See generally* Freeman, *supra* note 2 (noting this is likely due to consistent movement in society over past years which has led to the feeling of acceptance).

36. *See* Andrew Wolfson & Mike Wynn, *Ky. Clerk Seeks New Way to Block Marriage Licenses*, USA TODAY (Sept. 3, 2015, 4:09 PM), <http://www.usatoday.com/story/news/politics/2015/09/02/rowan-county-ky-court-clerk-marriage-licenses-gays/71599600> [<https://perma.cc/KPQ3-CH9B>].

37. *See* Jason Hanna, Ed Payne & Catherine E. Shoichet, *Kim Davis Released, But Judge Bars Her From Withholding Marriage Licenses*, CNN: POLITICS (Sept. 8, 2015, 9:57 PM), <http://www.cnn.com/2015/09/08/politics/kim-davis-same-sex-marriage-kentucky/> [<https://perma.cc/U7EM-V4Y8>].

38. *See* David G. Savage, *Battles Over Religious Freedom Are Sure to Follow Same-Sex Marriage Ruling*, L.A. TIMES (July 13, 2015, 4:00 AM),



egregious demonstration of the use of personal religious beliefs trumping the law, Chief Justice Roy Moore of the Alabama Supreme Court was suspended from his post—for the second time in his judicial career—for ordering the state’s probate judges to ignore the Court’s ruling in *Obergefell* and for refusing to issue marriage licenses to same-sex couples.<sup>39</sup> Justice Moore acknowledged he took the action to fight what he termed the LGBT agenda.<sup>40</sup>

Well before *Obergefell*, Supreme Court decisions were being influenced by, and in turn were influencing, the religious right to action. *Citizens United*’s infamous “corporations are people too”<sup>41</sup> mantra led the way to businesses declaring their sincere institutional rights not just to free speech (and campaign finance funding) but to religious beliefs, leading to the decision in *Burwell v. Hobby Lobby*.<sup>42</sup> It was surely not a stretch to expect such extensions of heretofore individual rights to pure business entities would energize the religious masses to apply their own

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<http://www.latimes.com/nation/la-na-religion-gay-marriage-20150713-story.html> [<https://perma.cc/UF9M-288S>] (Walter Dellinger questioned whether a Texas county clerk would be able to keep his/her position having refused to issue a hunting license based on a personal religious objection to killing animals). Even Supreme Court Justice Anthony Kennedy publicly commented suggesting that “public officials who do not wish to follow the Court’s marriage equality decision should resign.” See also Ian Millhiser, *Justice Kennedy Suggests that Kim Davis Should Resign*, THINKPROGRESS (Oct. 26, 2016), <https://thinkprogress.org/justice-kennedy-suggests-that-kim-davis-should-resign-ef1f7759ca62#.agfk8na1l> [<https://perma.cc/9EW4-FHHR>].

39. Judge Moore was previously removed from the position of Chief Justice after he ordered a large monument of the Ten Commandments to stand in the state judiciary building in Montgomery, further refusing a federal court order to remove it (although the citizens of Alabama again elected him to the post). See Kyle Whitmire, *Roy Moore Suspended from Office: Alabama Chief Justice Faces Removal Over Gay Marriage Stance*, AL.COM (May 8, 2016, 6:35 PM), [http://www.al.com/news/index.ssf/2016/05/alabama\\_chief\\_justice\\_roy\\_moor\\_10.html](http://www.al.com/news/index.ssf/2016/05/alabama_chief_justice_roy_moor_10.html) [<https://perma.cc/RG6C-TNG9>]. In the present instance, Moore ordered judges throughout the state to ignore court orders. See *id.*

40. See *id.*

41. Winkler, *supra* note 4 (quoting Mitt Romney’s speech regarding the ruling in *Citizens United*).

42. In *Hobby Lobby*, the Court held a secular (closed corporation) business could “exercise” its religious beliefs in withholding federally mandatory contraception coverage for employees. See *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2785 (2014); see also Maria Illiadis, *An Easy Pill to Swallow: While the Supreme Court Found that For-Profit, Secular Companies Can Exercise Religion Within the Meaning of the Religious Freedom Restoration Act, The Mandate Should Have Prevailed with Respect to Those Entities Because it Advances the Government’s Compelling Interest in Public Health and Is the Least Restrictive Means of Doing So*, 44 U. BALT. L. REV. 341, 349-53 (2015).

views to the broader issue of same-sex marriage and LGBT rights.<sup>43</sup>

Even as *Obergefell* was decided, opposition, some purely religious in nature, some pragmatic, began to surface. While those opposed could no longer influence the bigger picture of same-sex marriage itself, they could focus on ancillary issues, including how and when legal interpretations would be dealt with, some legitimate and some not.

Chief Justice Robert's dissent in *Obergefell* raised issues of tax exemptions for religious colleges that oppose same-sex marriage,<sup>44</sup> as well as whether adoption agencies could refuse to place children with same-sex couples.<sup>45</sup> But many of the religious right's concerns have been largely and loudly imagined. Religious conservatives have been vociferous in claims that clergy would be forced to marry same-sex couples despite long-established law under our separation of church and state that clergy have never been forced to marry anyone.<sup>46</sup>

Anti-gay marriage opponents, having lost the overall battle, have evolved into anti-LGBT forces, citing many of the same concerns and couching them in terms of safety and religious freedom. Yet these are not new arguments. When the Supreme Court decided *Loving v. Virginia* in 1967, it ruled against a multitude of southern states that prohibited miscegenation.<sup>47</sup> The Supreme Court of Virginia had upheld a conviction for marrying between the races by relying on almost purely religious justifications: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents . . . The fact that he separated the races shows that he

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43. See Marc A. Greendorfer, *Blurring Lines Between Churches and Secular Corporations: The Compelling Case of the Benefit Corporations Right to Free Exercise of Religion (With a Post-Hobby Lobby Epilogue)*, 39 DEL. J. CORP. L. 819, 851-60 (2014).

44. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (2015) (Roberts, J., dissenting).

45. See Savage, *supra* note 38. The adoption issue appears to be largely settled with states acknowledging the rights of same-sex couples to adopt. See Mollie Reilly, *Same Sex Couples Can Now Adopt in All 50 States*, HUFFINGTON POST (Mar. 31, 2016), [http://www.huffingtonpost.com/entry/mississippi-same-sex-adoption\\_us\\_56fdb1a3e4b083f5c607567f](http://www.huffingtonpost.com/entry/mississippi-same-sex-adoption_us_56fdb1a3e4b083f5c607567f) [<https://perma.cc/88NX-KLL2>] (discussing a federal judge's ruling against a Mississippi ban on same-sex adoption).

46. See Savage, *supra* note 38 (citing James Esseks, Director of the American Civil Liberties Union's Gay, Lesbian, Bisexual Transgender Project).

47. See *Loving v. Virginia*, 388 U.S. 1, 2-3 (1967).

did not intend for the races to mix.”<sup>48</sup> Although the Court found such rationales a clear violation under the Constitution, almost fifty years later religious conservatives are invoking many of the same justifications and actions to attack those who differ with them.<sup>49</sup> And not all of it is religion based. Much of the religious right’s interests have coalesced into other areas: basically, usurped by those with pure discriminatory intent.<sup>50</sup> North Carolina has enacted a “bathroom bill” declaring that transgender people must use the bathroom associated with their gender at birth no matter how long or how complete a transition may be.<sup>51</sup> The conservative legislature and state are willing to risk billions in aid to the state university system, as well as weathering a public relations backlash from businesses, conventions and musical performances that have pulled out or threatened to if the law is not withdrawn.<sup>52</sup> Broader still, Mississippi passed a law allowing businesses to refuse service to LGBT people based on the owner’s religious beliefs—a tactic going back to the refusal to serve African-Americans at the lunch counter during the height of segregation.<sup>53</sup> Despite the fact that such “religious based” discrimination has been unconstitutional and illegal for well over fifty years, states are enabling businesses to once again categorize citizens as “lesser” than their counterparts. Mississippi’s law allows virtually any form of discrimination against LGBT people, for virtually any reason, including housing, employment, service, and even medical treatment, and protects both private and state

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48. *See id.* at 3 (quoting the trial-judge who ruled that the Lovings could “not return to Virginia together for 25 years”).

49. *See* Douglas Laycock, *Religious Liberty and the Culture Wars*, 3 U. ILL. L. REV. 839, 848 (2014) (describing the differences between how “religious believers” and others view same-sex marriage). While Laycock attributes such views to “religious believers” (versus secular believers), that is not completely accurate, as he is actually describing the fundamental or orthodox view of any religion.

50. *See infra* Part II.

51. *See* Editors, *America’s Potty War Heats Up*, USA TODAY (May 9, 2016, 4:35 PM), <http://www.usatoday.com/story/news/2016/05/09/evening-news-roundup-monday/84136332/> [<https://perma.cc/B8P9-EQP9>] (explaining the state filed suit against the Department of Justice to keep their bathroom designations, and the Department of Justice countersued, alleging the law is discriminatory).

52. *See id.*

53. *See* Amber Phillips, *Mississippi’s New Law Allowing Refusal of Service to LGBT People Is the Most Sweeping Yet*, WASH. POST (Apr. 5, 2016) <https://www.washingtonpost.com/news/the-fix/wp/2016/04/05/mississippi-new-religious-freedom-law-is-the-most-sweeping-weve-seen-yet-heres-what-it-does/> [<https://perma.cc/D4QQ-X9U3>].

actors from the consequences of their actions.<sup>54</sup> It is such a throwback to the unconstitutional discrimination outlawed in the 1950's and 1960's that it is hard to even comprehend—yet it is fact, and at least nine other states are now considering similar bills.<sup>55</sup>

## II. A BULLY'S TARGETS: THE SOCIO-LEGAL REPERCUSSIONS OF A RETURN TO OPEN DISCRIMINATION

Religious beliefs are certainly not new, nor are private beliefs that run counter to our laws. What is new and disturbing is that today's political climate has allowed these private beliefs to not only surface publicly but to take precedence in many cases. Bigotry and intolerance are not only openly sanctioned, they are promoted and applauded. This return to open discrimination is threatening our children, our families, and our very lifestyle.<sup>56</sup>

One aspect of these new laws is the idea that discrimination overall, in large part having lain if not dead then dormant for many years, is making an open comeback.<sup>57</sup> LGBT issues are a newer form of discriminatory practice but by no means the only. Racism has reared its ugly head in numerous ways; it was never

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54. *See id.*

55. *See id.*; *see also* Chai R. Feldman, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 64 (2006) (arguing that such laws burden an individual's religious liberty interest by infringing on that individual's essential beliefs). While state legislatures argue for the rights of the people overall (assuming it is the views of the majority they are representing here) as rationale for such laws, they are in essence arguing that the majority can, in fact, overrule the rights of the individual, in direct opposition to the purpose of the religious clauses of the First Amendment. *See* U.S. CONST. amend I.

56. Feldman, *supra* note 55, at 123. Feldman argues for a respectful dialogue on such controversial issues as LGBT rights—an honorable thought. *Id.* Yet he also argues such differences need to be addressed through the legislative process—also admirable, until one realizes that that is exactly what these states are doing. *See id.* at 64. The problem arises when these state legislatures are openly thwarting the larger, federal legislative/judicial processes with discriminatory acts. *See id.* at 75-76.

57. *See generally* E.J. DIONNE, SOULED OUT: RECLAIMING FAITH AND POLITICS AFTER THE RELIGIOUS RIGHT (Princeton Univ. Press 2009) (arguing both religious and secular Americans are reclaiming their faith from those who have exploited it for their own means, and declaring the era of the religious right, “the exploitation of faith for political advantage,” over). However, seven years later, the laws being passed in numerous states by ultraconservative legislatures, fueled in large part by the religious right, would argue that point. *See* Jennifer Bendery & Michelangelo Signorile, *Everything You Need to Know About the Wave of 100+ Anti-LGBT Bills Pending in States*, HUFFINGTON POST (Sept. 23, 2016), [http://www.huffingtonpost.com/entry/lgbt-state-bills-discrimination\\_us\\_570ff4f2e4b0060ccda2a7a9](http://www.huffingtonpost.com/entry/lgbt-state-bills-discrimination_us_570ff4f2e4b0060ccda2a7a9) [<https://perma.cc/2HMJ-3FUC>].

gone but is now once again openly tolerated and even accepted.<sup>58</sup> These laws not only target specific people, they encourage a broader, and deeper, range of discriminatory behavior, and they change our way of life.

Immigration has long been a hot-button issue in American politics, but today's immigration debates are tinged with far more than foreign policy concerns. Indeed, they have become the center of a new wave of racism, aimed at the immigrant him/herself. The tactics of some of the recent field of presidential candidates had been to identify Muslims as the new "enemy," which has exposed a frightening willingness for others to jump on the hateful bandwagon.<sup>59</sup> Former candidate Ted Cruz jumped on the offensive by creating a divisive religious test for immigration, advocating screening of immigrants, allowing Christian refugees from war-torn nations into the United States, and barring Muslims fleeing the same terror.<sup>60</sup> Despite evidence of the vast numbers of Muslims being murdered, Cruz insisted they were not facing genocide the way Christians were.<sup>61</sup> Others were even more honest about the openly discriminatory purposes of these new attacks on Muslims. Former presidential hopeful Louisiana Governor Bobby Jindal purposely espoused that immigrants be required to adopt American "values," clearly suggesting they are far superior than what they arrive with.<sup>62</sup> Planned anti-Islam

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58. See Bob Woodward & Robert Costa, *Trump Reveals How He Would Force Mexico to Pay for Border Wall*, WASH. POST (Apr. 5, 2016), [https://www.washingtonpost.com/politics/trump-would-look-to-block-money-transfers-to-force-mexico-to-fund-border-wall/2016/04/05/c0196314-fa7c-11e5-80e4-c381214de1a3\\_story.html](https://www.washingtonpost.com/politics/trump-would-look-to-block-money-transfers-to-force-mexico-to-fund-border-wall/2016/04/05/c0196314-fa7c-11e5-80e4-c381214de1a3_story.html) [<https://perma.cc/HU9X-JBBF>].

59. See *id.* As a presidential candidate, Donald Trump early on made the issue of immigration his hot button, threatening to build a wall between the U.S. and Mexico and bar all non-citizen Muslims from entering the country. See also Lisa Rein, *Border Walls and Muslim Bans? Obama Officials Have to Be Careful What They Say About Candidate Trump*, WASH. POST (May 13, 2016), [https://www.washingtonpost.com/news/powerpost/wp/2016/05/13/trumps-border-wall-plan-seems-to-be-off-limits-for-top-obama-officials/?utm\\_term=.ef89839d5f55](https://www.washingtonpost.com/news/powerpost/wp/2016/05/13/trumps-border-wall-plan-seems-to-be-off-limits-for-top-obama-officials/?utm_term=.ef89839d5f55) [<https://perma.cc/EKT9-YQQ5>].

60. Ali Weinberg & Jessica Hopper, *Syrian Muslims 'Not Facing Genocide the Way Christians Are,' Ted Cruz Says*, ABC NEWS (Nov. 17, 2015, 10:35 PM), <http://abcnews.go.com/Politics/syrian-muslims-facing-genocide-christians-ted-cruz/story?id=35264285> [<https://perma.cc/65TS-2PQ3>].

61. See *id.*

62. Marina Fang, *Bobby Jindal Claims Immigration Policy Is Not About Border Security, But About 'Values'*, HUFFINGTON POST (Aug. 30, 2015, 1:11 PM), [http://www.huffingtonpost.com/entry/bobby-jindal-immigration\\_us\\_55e32e73e4b0c818f61832fd](http://www.huffingtonpost.com/entry/bobby-jindal-immigration_us_55e32e73e4b0c818f61832fd) [<https://perma.cc/YZU3-69CS>]. See

rallies across the country invited people to demonstrate against Muslims, targeting mosques across the nation.<sup>63</sup> A Florida gun shop declared his business a “Muslim-free zone” in response to a shooting in Tennessee. All this was in spite of long-standing anti-discrimination laws, the rationale being that we must “battle against extreme political correctness that threatens our lives . . . .”<sup>64</sup> Of vast concern, besides the intended discriminatory practices themselves, is the acceptance and imitation of them in others. A moment of silence for victims of a terrorist attack was broken by a fan shouting out an anti-Islamic slur loudly enough for the quarterback to hear it and respond.<sup>65</sup> A passenger on an airliner pulled the hijab off a woman on the flight yelling, “Take it off—this is America!”<sup>66</sup>

It is a fact that such outright, public and seemingly acceptable forms of racism have invaded our lives and our ideals.<sup>67</sup> When a presidential candidate’s call to block Muslims was loudly announced, the nation was faced with a Muslim child so frightened that her mother posted her fears in an effort to

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generally Michael W. McConnell, *Why Protect Religious Freedom*, 123 YALE L.J. 772 (2012) (reviewing BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013)) (arguing that religion is what generates controversy, but that the ideal of religious freedom is a core and indisputable value in the United States; contrasting religious freedom as core value but it cannot be an indisputable determination of fact for lawmakers when deciding who is subject to what rule of law and who is not).

63. Niraj Warikoo, *Anti-Islam Rallies Across USA Making Muslims Wary*, USA TODAY (Oct. 10, 2015, 6:16 PM), <http://www.usatoday.com/story/news/nation-now/2015/10/09/anti-islam-rallies-across-usa-making-muslims-wary/73672674/> [<https://perma.cc/YU4H-UDR2>].

64. See Aamer Madhani, *Florida Gun-Shop Owner Declares Store ‘Muslim-Free Zone’*, USA TODAY (July 21, 2015, 4:24 PM), <http://www.usatoday.com/story/news/2015/07/21/florida-gun-shop-owner-declares-his-shop-muslim-free-zone-after-chattanooga-rampage/30458663/> [<https://perma.cc/2XH5-XQEN>].

65. See Nick Visser, *Aaron Rodgers Scolds Fan’s Islamophobic Heckle Made During Moment of Silence*, HUFFINGTON POST (Nov. 16, 2015), [http://www.huffingtonpost.com/entry/aaron-rodders-fans-islamophobic-heckle\\_us\\_56496507e4b045bf3defc1b6](http://www.huffingtonpost.com/entry/aaron-rodders-fans-islamophobic-heckle_us_56496507e4b045bf3defc1b6) [<https://perma.cc/TJE2-LW4Y>].

66. See Doug Stanglin, *Man Pleads Guilty to Grabbing, Taking Off Woman’s Hijab on Plane*, USA TODAY (May 14, 2016, 2:33 PM), <http://usatoday.com/story/news/nation/2016/05/14/man-pleads-guiltily-grabbing-taking-off-womans-hijab-plane/84373732/> [<https://perma.cc/W4UV-9N4Y>].

67. See Sameer Ahmed, *The Religious Right to Refuse Service: Accommodating Muslims in a ‘Christian’ America*, 7 ALB. GOV’T L. REV. 379, 382 (2014) (discussing the concept of broadening religious rights with respect to civil rights: the right to refuse contraception coverage and to reject service to customers based on a business owner’s beliefs). It is just this idea that somehow one person’s “right” makes it acceptable to discriminate against someone else that is so anathema to our American laws and culture.

educate others as to the consequences of such words.<sup>68</sup> The young child had been collecting her favorite things in case “they” came to take her family away.<sup>69</sup> American service members and veterans began an online campaign to assure her and other children that they would not be hurt by their own country.<sup>70</sup> Such sadly predictable reactions to racist rhetoric reminds one of the history of young African-American children running the gauntlet through segregationist crowds just to go to school. One could say it is inconceivable that such fear-mongering and attacks could take place in today’s American society, but that has already been shown to be wrong. It can, and it does.

While there is sadly a portion of society willing to follow such openly racist and hostile ideas, there are thankfully many who truly abhor them. Large numbers of Americans are expressing their own concerns over the state of race relations in our nation; after a fairly steady level of concern over the past decade or more, apprehension about race relations has more than doubled in the past two years<sup>71</sup> not coincidentally syncing with the rise of the ultra-right presidential candidates. When the presidential race heated up with calls to ban Muslims and/or prioritize Christian refugees over them, even Christian relief organizations spoke up in opposition.<sup>72</sup> The candidates’ rhetoric had already translated to a House Republican bill to require a “religious” test for refugee status.<sup>73</sup> Humanitarian leaders expressed concerns about the anti-Muslim bigotry affecting not only largely false terrorist perceptions but the refugee status of those most in need.<sup>74</sup> Much of the rhetoric ignores the fact that the vast majority of those fleeing terror-filled nations like Syria

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68. See Gillian Mohney, *Armed Forces Members, Veterans Use #iwillprotectyou After Muslim Child Says She’s Afraid*, ABC NEWS (Dec. 20, 2015, 5:29 PM), <http://abcnews.go.com/US/armed-forces-membersveterans-iwillprotectyou-muslim-child-shes-afraid/story?id=35876582> [<https://perma.cc/N8TZ-K6Z3>].

69. See *id.*

70. See *id.*

71. See Janie Velencia, *Concern Over Race Relations Has More Than Doubled in The Past 2 Years*, HUFFINGTON POST (Apr. 11, 2016, 3:53 PM), [http://huffingtonpost.com/entry/race-relations-worry-rise\\_us\\_570bd5a7e4b0836057a1c547](http://huffingtonpost.com/entry/race-relations-worry-rise_us_570bd5a7e4b0836057a1c547) [<https://perma.cc/YM98-8HMA>].

72. See Elise Foley, *Even Christian Groups Disagree with Republicans’ Plan to Prioritize Religious Minorities in Refugee Crisis*, HUFFINGTON POST (Oct. 1, 2015), [http://huffingtonpost.com/entry/michael-mccaul-syrian-christians-refugee-bill\\_us\\_560ad771e4b0768126ff6010](http://huffingtonpost.com/entry/michael-mccaul-syrian-christians-refugee-bill_us_560ad771e4b0768126ff6010) [<https://perma.cc/B6R6-V3M8>].

73. See *id.*

74. See *id.*

are Muslim, while just ten percent are Christian.<sup>75</sup> Facts seem to be in the way, instead of in the lead, here. A nation founded on religious freedom finds itself listening to presidential hopefuls publicly espousing that they “would not advocate that we put a Muslim in charge of this nation” even though the Constitution expressly forbids a religious test for public office.<sup>76</sup>

Religion, traditionally used to justify such abhorrent social platforms as slavery, segregation, and miscegenation,<sup>77</sup> has rallied to once again promote biases both racist and otherwise.<sup>78</sup> A long-standing religious-based political fight has been waged against the abortion movement, barely subsiding since the Court’s ruling in *Roe v. Wade* and affirmation in *Planned Parenthood v. Casey*.<sup>79</sup> After years of largely unsuccessful open attacks on abortion itself,<sup>80</sup> the conservative right has targeted a new facet of the fight, obstructing access to abortions by closing the door to funding and medical requirements.<sup>81</sup>

Public funds have never been allowed to be used for abortion,<sup>82</sup> yet the religious right has constantly and consistently

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75. *See id.*

76. *See* Samantha Lachman, *Ben Carson Would Not Support A Muslim Running for President*, HUFFINGTON POST (Sept. 21, 2015), [http://www.huffingtonpost.com/entry/ben-carson-muslim-president\\_us\\_55febdf6e4b08820d918faae](http://www.huffingtonpost.com/entry/ben-carson-muslim-president_us_55febdf6e4b08820d918faae) [<https://perma.cc/AKP4-N37A>]; *see also* Freeman, *supra* note 2, at 57-59 (speaking about cases such as *Citizens United* and *Hobby Lobby* and how they have led to a new way of thinking about rights and obligations under the law). Perhaps even more surprising for people is the notion of an African-American candidate espousing such words, yet today’s political climate has shifted to such a degree that even those traditionally fighting racism are now supporting it against others.

77. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896) (upholding the idea of separate but equal); *Brown v. Bd. of Educ.*, 347 U.S. 483, 492-93 (1954) (overturning *Plessy* and holding segregation unconstitutional); *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (holding miscegenation, which was openly based on racial discrimination, unconstitutional).

78. *See, e.g.*, Phillips, *supra* note 53 (discussing biases against LGBT people).

79. *See* *Roe v. Wade*, 410 U.S. 113, 162, 164 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 860-61 (1992) (narrowing some of the applications of *Roe* but strongly affirming its language and constitutionality).

80. While cases like *Casey* and *Gonzales v. Carhart*, 550 U.S. 124, 190-91 (2007)—which deal with so-called “partial-birth,” or late-term, abortions—have narrowed the right to abortion in certain instances and circumstances, anti-abortion advocates have not as yet succeeded in their avowed main goal of overturning *Roe*.

81. Andrea Grimes, *Planned Parenthood Is Not Harvesting ‘Baby Parts’*, ROLLING STONE (Oct. 8, 2015), <http://www.rollingstone.com/politics/news/planned-parenthood-is-not-harvesting-baby-parts-20151008> [<https://perma.cc/SD43-WYHV>].

82. *See* Hyde Amend., H.R. 14232, 94th Cong. (1976) (first passed in 1976 and attached to annual appropriations bills since). The Amendment prohibits the use of federal funds to pay for abortions, with exceptions for rape, incest or to save the life of the mother. *Id.* Recently, Florida passed a law prohibiting any state funding to clinics that also provide abortion, even though the funding was for other, preventive medical services only. *See*



argued they should not be, presumably hoping to convince the masses that they are, indeed, being used for such. Some of this focus may be historical in nature. In the beginning, the pro-choice movement presumably overreached in trying to force all hospitals, including religious ones, to perform abortions.<sup>83</sup> Yet this has never been the law. Notwithstanding the actual facts, long-held principles on such contentious moral issues have fueled continuing legal, social, and political tensions.<sup>84</sup> Today's political climate has fostered a highly organized attack on funding of any type that is even peripherally related to abortion: targeting Planned Parenthood clinics not on abortion funding, which has always been outlawed, but for funding for all other purposes, including cancer screenings, contraception, testing for sexually transmitted diseases, and education.<sup>85</sup> Republicans have repeatedly threatened to shut down the government if funding for these programs is not cut off, despite the fact that these funds provide needed services for low income women and families that in many cases cannot be duplicated.<sup>86</sup> And the effort has paid off. While many Republicans worry about the blame that would be attached to such a government shutdown, they have determinedly proceeded to curb funding for the organization,<sup>87</sup> exhibiting little public concern about the actual effect on women and families of not being able to access these needed medical services.

Far from merely wanting to curb funding for medical services to Planned Parenthood, the Republican party this past year brought hearings trying to tie the organization to illegal

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Reuters, *Florida Clinics That Provide Abortions Will No Longer Get Funding*, N.Y. POST (Mar. 26, 2016, 1:56 PM), <http://nypost.com/2016/03/26/florida-clinics-that-provide-abortion-will-no-longer-get-funding/> [<https://perma.cc/3AWM-BDQ6>]. Proponents laud it as a "historic victory," while opponents note it severely limits the ability of low income families to get education and testing for HIV and Aids and predict that teen pregnancies will likely rise because of it. *See id.*

83. *See* Laycock, *supra* note 49, at 846 (describing the actions and counteractions of the religious right in relation to the abortion movement over the years).

84. *See id.* (describing not only the abortion movement but the moral values associated with the same sex marriage movement).

85. *See* Laura Bassett, *28 Republican Men Threaten Government Shutdown Over Planned Parenthood*, HUFFINGTON POST (Sept. 9, 2015), [http://www.huffingtonpost.com/entry/republican-men-planned-parenthood\\_us\\_55ef4bebe4b002d5c07717b5](http://www.huffingtonpost.com/entry/republican-men-planned-parenthood_us_55ef4bebe4b002d5c07717b5) [<https://perma.cc/6FCF-RHXQ>].

86. *See id.*

87. *Id.*

“sales of baby parts.”<sup>88</sup> Although numerous hearings elicited the mainly false nature of the charges, the conservative and religious right used them as a continuous attack not just on abortion but on funding for medical services for the low income families relying on the organization.<sup>89</sup> And the effort has been largely successful. The conservative right, led by legislatures in a number of states, have moved to cut off funding for Planned Parenthood clinics throughout the states, leaving a dearth of medical care available for families in need.<sup>90</sup> The Supreme Court this session took up a Fifth Circuit case which, if allowed, would have effectively shut down the vast majority of abortion clinics in Texas and presumably be followed by other states.<sup>91</sup> Unable to directly and concretely overturn *Roe* and/or *Casey* over the years, conservatives have targeted medical standards and hospital affiliations as the next best thing, in an effort to effect a de facto elimination of the ability to access legal abortions.<sup>92</sup>

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88. See Grimes, *supra* note 81. The Center for Medical Progress (CMP) secretly, and in some cases illegally, filmed Planned Parenthood officials supposedly negotiating to sell “baby parts” and even trying to convince women to get abortions so as to have a ready supply. *Id.* Although the tapes were found to be heavily edited and false for the most part, much damage was done to Planned Parenthood, at least in terms of spreading the myth on the conservative right. See Laura Bassett, ‘Sting’ Videos of Planned Parenthood Are Totally Manipulated, Forensic Analysis Finds, HUFFINGTON POST (Aug. 28, 2015), [http://www.huffingtonpost.com/entry/planned-parenthood-sting-videos-forensic\\_us\\_55df2334e4b029b3f1b1be9f](http://www.huffingtonpost.com/entry/planned-parenthood-sting-videos-forensic_us_55df2334e4b029b3f1b1be9f) [<https://perma.cc/HKB6-VE2V>].

89. See *id.*

90. See Bassett, *supra* note 85.

91. See Adam Liptak, *Supreme Court Appears Sharply Divided as it Hears Texas Abortion Case*, N.Y. TIMES (Mar. 2, 2016), <http://www.nytimes.com/2016/03/03/us/politics/supreme-court-abortion-texas.html> [<https://perma.cc/5LFC-URC7>]. The Court struck down the case in June in a five-three decision, holding that the restrictions violated *Casey*’s prohibition against an undue burden on a woman’s right to access to legal abortion. See Adam Liptak, *Supreme Court Strikes Down Texas Abortion Restrictions*, N.Y. TIMES (June 27, 2016), [https://www.nytimes.com/2016/06/28/us/supreme-court-texas-abortion.html?\\_r=0](https://www.nytimes.com/2016/06/28/us/supreme-court-texas-abortion.html?_r=0) [<https://perma.cc/JJ4T-TWWE>].

92. See *id.* Much of the Court’s questioning on oral hearing stemmed from whether the Texas law imposes an “undue burden” on women seeking treatment, with the Court apparently acknowledging that it has no intention of overturning or further limiting *Casey* on that issue. *Id.* Justice Kennedy, architect of the “undue burden” test in *Casey*, appeared clear that it would not be attacked, giving some hope to providers. *Id.* The move to close the clinics is admittedly fueled by religious beliefs rather than legal arguments, and is symptomatic of the continuing attempt by the religious right to use its views to curtail the legal rights of others. See Steven Ertelt, *Supreme Court to Consider Texas Pro-Life Law Closing Abortion Clinics, Saving 10,000 from Abortion*, LIFE NEWS.COM (Sept. 3, 2015, 5:47 PM), <http://www.lifenews.com/2015/09/03/supreme-court-to-consider-texas-pro-life-law-closing-abortion-clinics-saving-10000-from-abortion/> [<https://perma.cc/Q9LM-GDF7>].

Fights over same-sex marriage issues, LGBT rights, religious liberty, and abortion are not the only forums seeing an increased level of attacks. All racism is not directed at the immigration issue. Old fashioned but still viable anti-African-American actions are at a high as well. The owner of a Mississippi RV Park recently evicted a couple from the park when he learned the husband, a National Guardsman, is African-American, ostensibly because the neighbors complained.<sup>93</sup> The president of the Mississippi chapter of the NAACP opined that incidents like this are likely to grow, not diminish, thanks to the legal discrimination laws now effective in the state.<sup>94</sup> One of the lawsuits almost inevitably to come will likely be based on the federal Fair Housing Act, which makes it illegal to refuse housing to people based on race, color, religion, sex or national origin.<sup>95</sup> (Interestingly, and perhaps a sign of the negative personal backlash that will ensue, the RV Park owner has declared he is closing the park rather than have to deal with the issue again, thereby affecting his livelihood as well.)<sup>96</sup> Religious views have even woven themselves into the fabric of our courts. Recently, a court removed children from their mother, who had sought help with her sons, when she refused an order to meet with a Christian counsellor, although she was perfectly willing to undertake secular counselling.<sup>97</sup>

The long-standing divisions between liberal and conservative have taken on new life and new intensity in the wake of the Supreme Court's landmark rulings in *Citizens United* and *Hobby Lobby*,<sup>98</sup> and in the subsequent empowerment of the conservative and religious right in light of them.<sup>99</sup>

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93. See Jerry Mitchell, *Mississippi RV Park Owner Evicts Interracial Couple*, THE CLARION-LEDGER (Apr. 5, 2016, 5:46 PM), <http://www.clarionledger.com/story/news/2016/04/02/mississippi-rv-park-owner-evicts-interracial-couple/82469086/> [<https://perma.cc/2SHG-SUVY>].

94. See *id.*

95. See *id.*

96. See *id.*

97. See Kirstie McCrum, *Sons Removed from Mother Who Refused Court Order to Meet 'Christian Counsellor'*, DAILY MIRROR (Sep. 16, 2015, 4:00 PM), <http://www.mirror.co.uk/news/world-news/sons-removed-mother-who-refused-6454573> [<https://perma.cc/MN5H-3K5Q>].

98. See *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2751-806 (2014); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 310-486 (2010).

99. See Elizabeth Sepper, *Gendering Corporate Conscience*, 38 HARV. J.L. & GENDER 193, 193 (2015) (noting that the contraceptive mandate under the ACA focuses on

### III. ENABLING BULLIES: YOU BROKE IT, YOU OWN IT, AND NOW YOU CANNOT CONTROL IT

In the beginning,<sup>100</sup> there were two parties: the Democrats and the Republicans.<sup>101</sup> While both have shown cracks and splinters in their ideologies over the years, neither was fractured to the point of no return until the birth of the Tea Party movement, a right wing conservative offshoot of the Republican Party, which emerged from the womb almost fully developed in 2008.<sup>102</sup>

While many in the traditional wing of the Republican Party were skeptical of this new neo-conservative movement, it soon became apparent that money, of which the Tea Party had vast sums, talks.<sup>103</sup> Numerous Republicans, including many long-term Senators and Congressmen, fell to the highly organized and well-supported Tea Party candidates.<sup>104</sup> The mere threat of a Tea Party challenge kept many others in line with the new branch's political agenda.<sup>105</sup> Those who had outright encouraged the rise of the Tea Party, or at least stood by and allowed it to grow—the GOP—soon found themselves in the predicament of having created a monster they could no longer control. The Republican party begat the Tea Party, the Tea Party begat political and religious bullying, and perhaps not so shockingly, thus begat the atmosphere for today's super-bully: the political race that even they had no control over.

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women's health, rather than being neutral. As such, it can be said that attacks on it are more of a gender-based discrimination as well.).

100. The modern day Democratic and Republican parties date back to the mid-nineteenth century and have controlled the Congress since at least 1856. See *The Modern Era of Political Parties*, BOUNDLESS, <https://www.boundless.com/political-science/textbooks/boundless-political-science-textbook/interest-groups-7/the-history-of-political-parties-55/the-modern-era-of-political-parties-320-8019/> [<https://perma.cc/AW2U-MXX9>].

101. *Id.*

102. See Carl Hulse, *Ryan Lands at Center of a Rivalry for the Soul of the G.O.P.*, N.Y. TIMES, Nov. 3, 2015, at A16.

103. See Editorial, *Tea Party's Big Money*, N.Y. TIMES, Sept. 24, 2010, at A28.

104. See Kenneth T. Walsh, *Richard Lugar Becomes Latest Tea Party Casualty*, U.S. NEWS & WORLD REPORT (May 9, 2012, 11:20 AM), <http://www.usnews.com/news/blogs/ken-walshs-washington/2012/05/09/richard-lugar-becomes-latest-tea-party-casualty> [<https://perma.cc/3KG4-VA2P>].

105. See Paul Kane, *Tea Party Threat Again Hangs Over Republicans' Efforts to Retake Senate*, WASH. POST (Dec. 10, 2013), [https://www.washingtonpost.com/politics/tea-party-threat-again-hangs-over-republicans-efforts-to-retake-senate/2013/12/10/8cdf470c-61d6-11e3-8beb-3f9a9942850f\\_story.html](https://www.washingtonpost.com/politics/tea-party-threat-again-hangs-over-republicans-efforts-to-retake-senate/2013/12/10/8cdf470c-61d6-11e3-8beb-3f9a9942850f_story.html) [<https://perma.cc/Z2KD-5FRL>].

When Barack Obama was elected President in 2008, many believed that this nation had, at least publicly, put racism behind it and was truly ready for the new millennium. This turned out to be an illusion. Far from enlightenment, the election of the first African-American president stirred long (publicly) buried racist sentiments, spurring attacks on everything from his birthplace to his religion and policies.<sup>106</sup> It is noteworthy that many of his critics seem to have a palpable (and open) intensity in their dislike of anything Obama.<sup>107</sup>

While the Tea Party had sprung forth a few years before Obama, his candidacy had an apparent catalyst effect in promoting no longer hidden but outright racial aversion in the political arena. Such racial pandering was not new: Ronald Reagan (in)famously invoked the “welfare queen” of the 1980s, all the way up to New Gingrich stamping “food stamp president” on Obama.<sup>108</sup> Much of this is attributed to the so-called “Southern Strategy” employed by the Republican base and is designed to appeal to racial resentment and white solidarity.<sup>109</sup>

While the Republican party has apparently, and judging from the above terms, openly employed such strategies for a long period of time, it is conceivable that even it could not foresee the (current) end result of such strategies. The fast and strikingly potent rise of the Tea Party likely surpassed most Republicans’ views on how this offshoot would work. What was early on seen as a boost to the conservative side of the party soon became an appropriation of the party itself.<sup>110</sup> The sheer amount of money

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106. See, e.g., Steve Nelson, *Race and Racism in the Time of Obama*, HUFFINGTON POST: THE BLOG (Feb. 21, 2016), [http://www.huffingtonpost.com/steve-nelson/race-and-racism-in-the-ti\\_b\\_9285156.html?https://perma.cc/6239-6FV4](http://www.huffingtonpost.com/steve-nelson/race-and-racism-in-the-ti_b_9285156.html?https://perma.cc/6239-6FV4) (discussing the shocking numbers of Americans, mainly identified as Republicans, who believe Obama was not born in this country and/or is a Muslim—despite the lack of any supporting evidence of either—and that there is a bar to religious tests for elective office).

107. See *id.* (noting that “coded language” purports to mask underlying racist biases). Factually, the majority of people who receive Supplemental Nutrition Assistance Program (SNAP) benefits are white. See Arthur Delaney and Alissa Scheller, *Who Gets Food Stamps? White People, Mostly*, HUFFINGTON POST: POLITICS (Feb. 28, 2015).

108. See Jamelle Bouie, *How Trump Happened*, SLATE (Mar. 13, 2016, 9:00 AM), [http://www.slate.com/articles/news\\_and\\_politics/cover\\_story/2016/03/how\\_donald\\_trump\\_happened\\_racism\\_against\\_barack\\_obama.html](http://www.slate.com/articles/news_and_politics/cover_story/2016/03/how_donald_trump_happened_racism_against_barack_obama.html) [https://perma.cc/AF3V-HBKW] (noting that supposedly neutral words have always been used as not-so-hidden subterfuge for racial profiling).

109. See *id.*

110. See, e.g., Heather Digby Parton, *Trapped by Trump: How the Tea Party’s Glorious Victories Created the GOP’s Current Nightmare*, SALON (Oct. 12, 2016, 7:02 AM),

flowing to the Tea Party and its supporters is staggering.<sup>111</sup> Billionaire conservatives Charles and David Koch distributed hundreds of millions of dollars to fund the ultraconservative agenda, including anti-gay marriage and anti-abortion evangelical groups.<sup>112</sup>

“Absolute power corrupts absolutely.”<sup>113</sup> While the Tea Party was not ostensibly in power per se, but merely a tributary to elective office, it soon became a force to be reckoned with in and of itself. But unbridled power can lead to unexpected problems. The most recent political campaign cycle began with close to twenty Republican candidates, each trying hard to present themselves as more conservative than all the others.<sup>114</sup> And while a number of these candidates likely thought of themselves as more mainstream Republican than Tea Party, it soon became apparent that any label less than neoconservative would not suffice.<sup>115</sup> But such labels, and the demagoguery that accompanied them, created yet more problems: a constituency that was fast demanding, and responding to, only those on the farthest right of the spectrum.

The religious right’s open views about controversial topics such as gay marriage, abortion, LGBT rights and racism led to the remarkable vision of presidential candidates trying to surpass each other as the most anti everything.<sup>116</sup> Suddenly extremism

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<http://www.salon.com/2016/10/12/trapped-by-trump-how-the-tea-partys-glorious-victories-created-the-gops-current-nightmare/> [<https://perma.cc/9K35-PZSA>].

111. See, e.g., Paul Blumenthal, *The Kochs’ Dark Money Reaches All the Way to NRA, Religious Groups*, HUFFINGTON POST (Nov. 17, 2015, 4:07 PM), [http://www.huffingtonpost.com/entry/koch-brothers-2014-election\\_us\\_564b7680e4b06037734b3987](http://www.huffingtonpost.com/entry/koch-brothers-2014-election_us_564b7680e4b06037734b3987) [<https://perma.cc/25FG-K4MN>].

112. See *id.* David Koch has publicly said that he personally favors both same-sex marriage and abortion rights, but apparently is more concerned about economic issues to worry about his money supporting the opposing views. *Id.*

113. *The Meaning and Origin of the Expression: Power Corrupts; Absolute Power Corrupts Absolutely*, THE PHRASE FINDER, <http://www.phrases.org.uk/meanings/absolute-power-corrupts-absolutely.html> [<https://perma.cc/S6KD-CFX9>] (John Emerich Edward Dalbert Acton, first Baron Acton, expressing his thoughts in a letter to Bishop Mandell Creighton in 1887: “Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men.”).

114. See Pablo Barberá, *Who Is the Most Conservative Republican Candidate for President?*, WASH. Post (June 16, 2015), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/06/16/who-is-the-most-conservative-republican-candidate-for-president/> [<https://perma.cc/Q374-QLME>].

115. See *id.*

116. See David Jackson, *Republican Candidates Appeal to Religious Conservatives*, USA TODAY (Oct. 18, 2015), <http://www.usatoday.com/story/news/politics/elections/2016/2015/10/18/prestonwood->

became not just acceptable but desired, with reason seen as weak and capitulating.<sup>117</sup> The rise of Donald Trump as the standard bearer of the Republican party in the presidential election energized his base, but clearly left many in the Republican party and beyond with a grave sense of foreboding as to the meaning of his rise to political prominence.<sup>118</sup> While fringe political groups have always been around, and some members have even succeeded to a degree in winning office,<sup>119</sup> the idea that a candidate who manufactured his rise to prominence on the trifecta of racism (building a wall to keep out Mexicans and denying entry to all non-citizen Muslims), xenophobia (requiring all Muslims to register and the surveillance of mosques), and even neo-Nazism<sup>120</sup> is frightening not just to those politically opposed in general, but to many of his own party. Pundits and studies show that the rise of racism fueled the candidacy of Trump, among others.<sup>121</sup> And Trump's supporters are not shy about extolling yet

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baptist-trump-carson-fiorina-carson-bush-cruz-huckabee-santorum/74175226/ [https://perma.cc/VZL8-8A54] (outlining the religious movement that, while active in American politics for at least a century, has truly flourished over the last few decades with the Republican party in many ways usurping its message).

117. See Bouie, *supra* note 108.

118. See Scott Detrow, *Is It Too Late for a Third-Party Presidential Candidate to Run?*, NPR (May 10, 2016, 5:05 AM), <http://www.npr.org/2016/05/10/477449879/is-there-time-for-a-third-party-candidate-to-launch-a-presidential-bid> [https://perma.cc/5DQL-A8PP] (discussing the hopes of a number of both mainstream and tea party Republicans for a third-party challenger to Donald Trump).

119. See David Duke, S. POVERTY LAW CTR., <https://www.splcenter.org/fighting-hate/extremist-files/individual/david-duke> [https://perma.cc/F854-TQCE] (discussing how David Duke—Ku Klux Klan leader, International spokesperson for Holocaust denial, and Neo-Nazi—was elected to Louisiana's House of Representatives and how he was almost elected governor of the state).

120. See Stephanie Condon, *Donald Trump Prompts Nazi References*, CBS NEWS (Nov. 27, 2015, 3:03 PM), <http://www.cbsnews.com/news/donald-trump-prompts-nazi-references/> [https://perma.cc/QCR8-SPGW]. Trump has refused to disavow white supremacist supporters to his campaign and even appointed one as a delegate to the Republican convention. *Id.* When called on the appointment by journalists, Trump called it a “database error,” yet documents show personal correspondence between his campaign and the delegate and that the campaign missed a deadline to remove the delegate from the rolls. See Josh Harkinson, *Trump Selects a White Nationalist Leader as a Delegate in California*, MOTHER JONES, <http://www.motherjones.com/politics/2016/05/donald-trump-white-nationalist-afp-delegate-california> [https://perma.cc/2Z7Q-2U8N].

121. See Cheyenne Macdonald, *Does Racism Explain the Rise of Donald Trump? Controversial New Study Claims Supporters Want to Stop ‘Decline of Whiteness’*, DAILY MAIL (May 10, 2016, 6:41 PM), <http://www.dailymail.co.uk/sciencetech/article-3583550/Does-RACISM-explain-rise-Donald-Trump-Stanford-academic-claims-supporters-want-stop-decline-whiteness-controversial-new-study.html>

more racism and prejudice. Former governor of Alaska Sarah Palin attacked TV station ESPN for the suspension of a long-time sportscaster over openly anti-Muslim tweets he had sent.<sup>122</sup> White supremacist groups openly marshalled forces to drum up support for Trump, while the candidate himself refused to refute them until pushed to do so.<sup>123</sup> While Trump was not the only candidate espousing marginal and discriminatory political views, he is the one who thrived and survived on them, and ran for President of the United States and, not to be forgotten, the leader of the free world on the basis of such views. World leaders are taking note as well. The newly elected Muslim mayor of London has ridiculed Trump's threat to ban Muslims.<sup>124</sup> The mayor of Paris blatantly called him stupid.<sup>125</sup> The English Parliament debated whether he should be banned from entering the country.<sup>126</sup>

#### IV. CONCLUSION: A DOWNWARD PATH OR A TURNING POINT

It is not so much (or only) that we had a candidate, and now President, who espouses such a polarizing view of the world; in different degrees, there have been others before him (think: Barry Goldwater) and will likely be others that follow. While candidate Trump clearly had his supporters, the true test came when his views were subjected to the vote of the far larger electorate than

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[<https://perma.cc/G6WU-7VVE>] (citing a Stanford University study showing heightened levels of racial discontent tied to Tea Party support).

122. See Paige Lavender, *Sarah Palin Slams ESPN For Suspending Curt Schilling Over Anti-Muslim Tweet*, HUFFINGTON POST (Aug. 28, 2015, 10:19 AM), [http://www.huffingtonpost.com/entry/sarah-palin-espn\\_us\\_55e0614de4b0b7a96338940d](http://www.huffingtonpost.com/entry/sarah-palin-espn_us_55e0614de4b0b7a96338940d) [<https://perma.cc/CV7A-3TRE>].

123. See Christina Wilke, *White Supremacists Mobilize for Donald Trump*, HUFFINGTON POST (Feb. 28, 2016), [http://www.huffingtonpost.com/entry/donald-trump-white-supremacist-sec-primary\\_us\\_56cf4437e4b0bf0dab31222f](http://www.huffingtonpost.com/entry/donald-trump-white-supremacist-sec-primary_us_56cf4437e4b0bf0dab31222f) [<https://perma.cc/4YFL-VQCW>].

124. See Sadiq Khan *Dismisses Donald Trump's Muslim Ban 'Exception'*, BBC NEWS (May 10, 2016), <http://www.bbc.com/news/uk-politics-36256087> [<https://perma.cc/7338-DVB5>].

125. See Alana Horowitz Satlin, *Paris Mayor Anne Hidalgo Joins Growing List of World Leaders Fed Up With Trump*, HUFFINGTON POST (May 13, 2016), [http://www.huffingtonpost.com/entry/donald-trump-world-leaders-paris-mayor\\_us\\_57345c80e4b077d4df22cef](http://www.huffingtonpost.com/entry/donald-trump-world-leaders-paris-mayor_us_57345c80e4b077d4df22cef) [<https://perma.cc/Z5WZ-NGA2>].

126. See Griff Witte, *A First in British Parliament: Debate over Donald Trump*, WASH. POST, Jan. 19, 2016, at A1.



make up the Republican primaries. And those views surprised many.

*Citizens United* was a clear victory for the conservative right, who supported political funding through the use of unlimited corporate money.<sup>127</sup> Certainly the bevy of Republican candidates this election cycle agreed with it, each vowing louder than the other to defend it against all attacks.<sup>128</sup> Yet surveys have found a surprising ninety-four percent of Republicans join with their Democratic counterparts in supporting citizen-funded elections matched by public funds, seeking to do away with the perceived influence and corruption of corporate money in the process.<sup>129</sup> And some of today's topics in the Republican agenda, particularly attacks on Latinos and Muslims, have been tried before and failed, leading a large number of voters to abdicate to Democratic or Independent rolls.<sup>130</sup> While Trump clearly won the evangelical and born-again Christian vote, in essence he is not seen as a religious candidate, leading some to think that this is actually a decline or even death of the religious right in politics.<sup>131</sup> While that seems unlikely, there is great concern that this political season is more and more frequently seen as anathema to our system of government and our values as a nation. Many feel that conservatives have severely overreached over the past years, beginning with *Citizens United* and continuing with unabated attacks on the Affordable Care Act (ACA), commonly referred to as Obamacare and challenged in both the Congress and the Court dozens of times since its inception.<sup>132</sup> Much of these attacks have

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127. See Freeman, *supra* note 2, at 53-54.

128. There have been calls for a Constitutional amendment overturning *Citizens United*. See *State Resolutions in Support of Amending the Constitution*, FREE SPEECH FOR PEOPLE, <http://freespeechforpeople.org/state-resolutions-in-support-of-amending-the-constitution/> [https://perma.cc/2235-6F4F].

129. See Zephyr Teachout, *Republican Voters Want These Four Surprising Things*, HUFFINGTON POST: THE BLOG (Sept. 28, 2016), [http://huffingtonpost.com/zephyr-teachout/republican-voters-want-th\\_b\\_8210544.html](http://huffingtonpost.com/zephyr-teachout/republican-voters-want-th_b_8210544.html) [https://perma.cc/9GVJ-G3RM].

130. See Cathleen Decker, *Is the GOP Losing White Voters?*, L.A. TIMES, Sept. 13, 2015, at B2 (discussing former California Republican Governor Pete Wilson's attempt to ban the use of state services by immigrants).

131. See Daniel Burke, *R.I.P. Religious Right, and Other Super Tuesday Takeaways*, CNN: POLITICS (Mar. 2, 2016, 3:36 PM), <http://www.cnn.com/2016/03/02/politics/religious-super-tuesday/> [https://perma.cc/XGB8-Q728].

132. See Richard Wolf, *Liberal Unity, Conservative Disarray Led Supreme Court to the Left*, USA TODAY (July 1, 2015, 6:49 PM), <http://www.usatoday.com/story/news/politics/2015/07/01/supreme-court-2014-term-wrapup/29520761/> [https://perma.cc/PY5M-6TT4]. See generally Frank I. Michelman,

resulted in what is seen not as a philosophical change in direction by the Court but rather a repetitive, losing gamble by the conservative members of the Court, lining up four stalwart votes and failing to close with a fifth.<sup>133</sup> A number of times that fifth vote was Justice Kennedy, siding with what he saw as the new direction of society, particularly in cases involving healthcare and gay marriage.<sup>134</sup>

Some of these changes may help explain why, after a number of years at the top of the political hierarchy, at least in terms of influence, the Tea Party has actually been suffering a fall in popularity.<sup>135</sup> The problem for the Republican party in general is that having hung their hat, and candidacies, on the principles and money of the Tea Party, they find themselves reaping a reward they may no longer prize. Faced with a choice of conservative, more conservative, and ultra conservative, they had presumptively chosen a presidential candidate who some feared would not play out as well as hoped-for in the general public. While most Democrats were never likely to vote for Trump, the Republican choice was still founded on a belief that they could convince enough of them of the superiority of their platform. However, there may be some limits to today's extremism.

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*Tushnet's Realism, Tushnet's Liberalism*, 90 GEO. L.J. 199 (2001) (discussing the perception of the court as a political force rather than a purely legal entity, especially after the controversial decision in *Bush v. Gore*, 531 U.S. 98 (2000)).

133. See David G. Savage, *Losing Justices Picked Wrong Fights*, L.A. TIMES, July 2, 2015, at A1; see also Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 HARV. J.L. & GENDER 1, 28 (2015).

134. See Savage, *supra* note 133, at A8. The election, however, led to the takeover of both House and Senate by the Republican Party, which celebrated by immediately voting to repeal the ACA. See Thomas Kaplan & Robert Pear, *Senate Takes Major Step Toward Repealing Health Care Law*, N.Y. TIMES (Jan. 12, 2017), <https://www.nytimes.com/2017/01/12/us/politics/health-care-congress-vote-a-rama.html> [<https://perma.cc/3AGX-9ZHM>]; Tom LoBianco, Deirdre Walsh & Tal Kopan, *House Takes First Step Towards Repealing Obamacare*, CNN: POLITICS (Jan. 13, 2017, 7:39 PM), <http://www.cnn.com/2017/01/13/politics/house-obamacare-repeal-vote/> [<https://perma.cc/EYW8-2L3X>]. The lack of a replacement, however, is already being felt by Republican members of Congress who are being questioned by their constituents as to what happens to their healthcare. See Sam Stein, *GOP Governors Privately Urging Congress to Reconsider Full Obamacare Repeal*, HUFFINGTON POST, (Jan. 15, 2017), [http://www.huffingtonpost.com/entry/gop-governors-obamacare\\_us\\_58792687e4b09281d0eab57d](http://www.huffingtonpost.com/entry/gop-governors-obamacare_us_58792687e4b09281d0eab57d) [<https://perma.cc/DE26-D7GJ>]. A number of Republican governors are urging Congress to rethink their vote to start the repeal process without a replacement. *Id.*

135. See Janie Velencia, *Tea Party Support Falls to a New Low*, HUFFINGTON POST (Oct. 26, 2015, 2:50 PM), [http://www.huffingtonpost.com/entry/tea-part-support-falls\\_us\\_562e5ee8e4b0c66bae58b80a](http://www.huffingtonpost.com/entry/tea-part-support-falls_us_562e5ee8e4b0c66bae58b80a) [<https://perma.cc/4XY2-NUTF>].

When former Republican candidate Ben Carson openly opined that he would not support a Muslim for President, even other candidates and journalists spoke out about the openly racist statement as representative of their party.<sup>136</sup> Joe Scarborough, a former Republican congressman and popular journalist, implored the GOP to publicly disavow such statements, warning that failure to do so would lead to failure as a party.<sup>137</sup> Christian refugee groups soundly criticized a Republican bill to prioritize religious minorities applying for refugee status, with Christians being given higher standing.<sup>138</sup> There may be yet more ominous warnings to the ultra conservatives out there. A study by the Pew Research Center found that United States' Catholics had far more liberal views on traditional Church teachings than previously attributed to them.<sup>139</sup> On topics of particular interest to the Republican platform, most do not condemn the use of contraceptives nor oppose abortion per se.<sup>140</sup> Nearly half believe the Church should recognize gay marriage.<sup>141</sup> While Catholics are theoretically not the evangelicals most of the Republican party has aimed for as its voting base, they are a large percentage of the Christian vote the party has courted.<sup>142</sup> More importantly, their views may appear to be more in line with those of the opposing party overall.

Other studies have shown that public identity has shifted in terms of religion. At least a quarter of Floridians, for example, identify as not religiously affiliated, up from sixteen percent seven years before.<sup>143</sup> Well over half of Floridians identify as

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136. See Gabriel Arana, *Joe Scarborough Tells GOP to 'Have Balls' and Stand Up to Ben Carson*, HUFFINGTON POST (Sept. 22, 2015, 1:59 PM), [http://www.huffingtonpost.com/entry/joe-scarborough-gop-ben-carson\\_us\\_560186dce4b00310edf8aef2](http://www.huffingtonpost.com/entry/joe-scarborough-gop-ben-carson_us_560186dce4b00310edf8aef2) [https://perma.cc/38GR-HL9T] (citing statements by then fellow candidates Carly Fiorina, Jeb Bush, Ted Cruz and Lindsay Graham).

137. See *id.*

138. See Foley, *supra* note 72.

139. Michael Lipka, *Key Findings About American Catholics*, PEW RES. CTR. (Sept. 2, 2015), <http://www.pewresearch.org/fact-tank/2015/09/02/key-findings-about-american-catholics/> [https://perma.cc/3UTP-523V].

140. See *id.*; see also Greg Toppe, *Like Pope Francis, Many USA Catholics' Beliefs Surprising*, USA TODAY (Sept. 2, 2015, 12:20 PM), <http://www.usatoday.com/story/news/2015/09/02/catholic-believes-survey/71535950/> [https://perma.cc/5KLW-LY2E].

141. See Toppe, *supra* note 140.

142. PEW RES. CTR., *AMERICA'S CHANGING RELIGIOUS LANDSCAPE* 4 (2015).

143. See Bethany Rodgers, *Report: A Quarter of Florida Adults Now Claim No Religious Affiliation*, ORLANDO SENTINEL (Nov. 4, 2015, 4:22 PM),

accepting homosexuality and by a smaller number, but still a majority, gay marriage.<sup>144</sup> Florida, of course, is a traditional swing state and one that has, in essence, decided the general election the last few cycles. Perhaps of even more concern to the GOP is that these statistics were not an anomaly but instead were consistent with the broader national findings.<sup>145</sup>

While concerns about race relations in general in the United States had been at a fairly consistent level for many years, studies have shown these concerns have spiked significantly in the past two years.<sup>146</sup> Many say they have a far greater level of worry about race relations than previously, with such fears spanning virtually all races and political parties.<sup>147</sup> Tellingly, some of these newfound fears have coincided with Trump's comments dealing with race and policy proposals, as well as the fact of the open support he gets from white supremacist groups.<sup>148</sup> The huge advances in voting rights, spurred by bi-racial voting coalitions and moderate governors and senators, even from the deep South, have largely disappeared in favor of ultra-conservative politicians supporting drastic changes to state voting rights, resulting in limitations of those rights.<sup>149</sup> Such actions by conservative states and politicians are anathema to much of the voting public.

Journalists have decried the tone and message of the recent election cycle. While we as a nation focus on raising children to reject bullying and negativity, the President made a campaign of just those messages, publicly ranting against anyone who

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<http://www.orlandosentinel.com/features/religion/religion-world/os-report-quarter-of-florida-adults-now-claim-no-religious-affiliation-20151104-htmlstory.html>  
[<https://perma.cc/A59J-6URZ>].

144. *See id.*

145. *See id.* There is, of course, the other side of the spectrum. Fundamentalist and/or evangelicals widely support the GOP platform, even when it puts them in opposition to the law and the majority view, as with gay marriage and LGBT rights. They will likely come out in large numbers for the Republican candidate, depending, of course, on what path the general election campaign takes in contrast to the primaries. *See* Thomas Lake, *Fear and Voting on the Christian Right*, CNN: POLITICS, <http://www.cnn.com/interactive/2015/10/politics/fear-voting-christian-right/> [<https://perma.cc/C2ZP-CR8K>].

146. *See* Velencia, *supra* note 71.

147. *See id.*

148. *See id.*

149. *See* Robert Kuttner, *Racism Hidden in Plain View*, HUFFINGTON POST: THE BLOG (Oct. 26, 2015), [http://huffingtonpost.com/robert-kuttner/racism-hidden-in-plain-vi\\_b\\_8386536.html](http://huffingtonpost.com/robert-kuttner/racism-hidden-in-plain-vi_b_8386536.html) [<https://perma.cc/6SP8-P53B>] (citing in part a New York Times study of differences in treatment of whites and blacks).

disagreed with him, including the use of misogynistic terms for women and calling nearly everyone derisive names and belittling their character.<sup>150</sup> Former treasury secretary Robert Reich refers to the Republican focus on private morality—abortion, gay marriage, contraception—while, he opines, the real concern is public morality and the acceptance of inequality.<sup>151</sup>

It is significant that even when Trump was anointed the nominee, many in the Republican party and beyond tried to find ways to thwart his ascension including having a contested convention and/or running a third-party candidate.<sup>152</sup> Some of this was due to the sheer inability of the party itself to control the candidate, and probably more still to the fears of not just what he might have meant for the election, but what he might mean for the party and the nation going forward.

Perhaps no better concern for what, exactly, this candidate cycle and national election might mean is stated by one journalist's view that the Founding Fathers would have been well supportive of the idea of derailing the presumptive nominee. The Founders' use of the Electoral College rather than the direct vote showed, apparently, that they were more worried about the uncontrolled passions of the people, than they were by the idea of limiting the democratic process.<sup>153</sup> "The figure whom the Founders most feared was the demagogue" who would and could provoke the negative passions of the people.<sup>154</sup> Madison's Federalist No. 10 outlines the methodology to help the new country control such politicians. Enlarging the size of the nation would help "to refine and enlarge the public views" and make it

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150. See Kristin Vanderhey Shaw, *Telling Our Kids Not to Be Bullies, When We're Surrounded by Them This Election Season*, WASH. POST (Mar. 11, 2016), <https://www.washingtonpost.com/news/parenting/wp/2016/03/11/telling-our-kids-not-to-be-bullies-when-were-surrounded-by-them-this-election-season/> [https://perma.cc/UU6V-7C3S].

151. See Robert Reich, *A Crisis of Public Morality, Not Private Morality*, HUFFINGTON POST: THE BLOG (Sept. 8, 2015), [http://www.huffingtonpost.com/robert-reich/a-crisis-of-public-morali\\_b\\_8105366.html](http://www.huffingtonpost.com/robert-reich/a-crisis-of-public-morali_b_8105366.html) [https://perma.cc/FD2X-9EQU] (while focusing on mainly economic issues, the author's words ring true for the searing attempts at separating us as a people this election season).

152. See Detrow, *supra* note 118.

153. See Andrew Trees, *The Founders Would Have Dumped Trump: Column*, USA TODAY (Mar. 31, 2016, 2:46 PM), <http://www.usatoday.com/story/opinion/2016/03/30/founding-fathers-would-have-dumped-trump-column/82388240> [https://perma.cc/VZ8S-NBKZ].

154. See *id.*

harder for “men of factious tempers, of local prejudices, or of sinister designs” to “betray the interests of the people.”<sup>155</sup>

While this election focused on what so many of the candidates believed to be the (albeit racist and biased) “will of the people,” it is altogether possible that the Founders would have feared just such rhetoric and hoped, indeed, for saner minds to prevail. Only time will tell how the surprise election of Donald Trump will affect those views, and the concerns of those citizens today who may well share them.

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155. *See id.* (citing Madison’s Federalist No. 10).