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Editor's Note

The *Chapman Law Review* is pleased to publish the second issue of volume twenty-two dedicated to our annual physical symposium. On January 25, 2019, the *Chapman Law Review* hosted a symposium honoring the life and scholarship of the late-Professor Ronald D. Rotunda. This event provided a forum for colleagues, mentees, friends, and other legal scholars to share the impact Professor Rotunda had on their lives and scholarship. This symposium also facilitated discussion of scholarship in two of Professor Rotunda's areas of expertise: Constitutional Law and Professional Responsibility.

This issue opens with a transcript of Judge O'Scannlain's Constitution Day Address for the Claremont Institute for the Study of Statesmanship and Political Philosophy, delivered at Chapman Dale E. Fowler School of Law on September 15, 2018 to celebrate Constitution Day. Judge O'Scannlain speaks to the democratic legitimacy of textualism and how it upholds and promotes a government by the people—an idea also supported by Professor Rotunda.

The symposium portion then opens with a transcript of Professor Hugh Hewitt's keynote address, in which he discusses Professor Rotunda's career and accomplishments as well as his own experiences with Professor Rotunda. Next, Professor Stephen Presser highlights the "constitutional heroism" of Professor Rotunda's scholarship and the benefits of faithfulness to the original understanding of the Constitution. Professor John Dzienkowski reflects on the origins of Professor Rotunda's contribution to the field of Professional Responsibility. Professor Denis Binder examines Professor Rotunda's many accomplishments throughout his career and the impact they had on him and the legal field. Professor Josh Blackman discusses Professor Rotunda's roles as teacher, mentor, and colleague. Then, Professor Redding discusses Professor Rotunda's role in Professor Redding's joining the Chapman faculty as well as their ensuing friendship. Mr. Jack Park discusses the imprudence of ABA Model Rule 8.4(g) and Professor Rotunda's opposition to its adoption. Next, Dean Rodney Smolla highlights Professor Rotunda's legal ethics and free speech scholarship and offers his own examination of ABA Model Rule 8.4(g) and the First Amendment rights of legal professionals. Professor John Eastman dedicates his analysis of the Citizenship

Clause and *Wong Kim Ark* to the constitutional scholarship of Professor Rotunda. Lastly, we are pleased to publish the late-Professor Rotunda's final article. In this article, Professor Rotunda explores an individual's right to speak of hateful or disagreeable speech under the protections of the First Amendment.

This issue then closes with two student comments. First, *Chapman Law Review's* current Articles Editor George Brietigam explores the quiz show scandal of the 1950s, the subsequent passage of 47 U.S.C. 509, and its application for today's "fake" reality television shows. Second, current Managing Editor Hope Blain explains the use of adult adoption for same-sex couples, examines each state's current revocation statutes for those adoptions, and proposes a workable solution to the problem.

The *Chapman Law Review* is grateful for the support of the members of the administration and faculty that made the symposium and the publication of this issue possible. We would especially like to thank Professors John Eastman and Celestine Richards McConville for supporting and assisting us throughout the planning and executing of this symposium, including recruiting the esteemed authors and panelists as well as their personal contributions to the conversation. We would also like to thank Dean of Chapman University Dale E. Fowler School of Law, Matthew Parlow; our faculty advisor, Professor Celestine Richards McConville; and our faculty advisory committee, Professors Deepa Badrinarayana, Scott Howe, Janine Kim, Ron Steiner, and Associate Dean of Research and Faculty Development, Donald Kochan.

Lastly, I would like to express my sincere appreciation to the staff of the 2018–2019 *Chapman Law Review*. It was an honor to work with such a hard-working, talented, and passionate group of people.

Amy N. Hudack
Editor-in-Chief

Constitutional Democracy and the Third Branch

*Diarmuid F. O'Scannlain**

Professor Eastman, distinguished judges and academics, and friends:**

Thank you for the privilege of speaking before such a distinguished audience. I am deeply honored and moved by the Claremont Institute's Reagan Jurisprudence Award. I am especially proud to receive it in the name of President Ronald Reagan because of his commitment to our fundamental constitutional principles—indeed, to those same founding principles that the Claremont Institute strives to sustain in American public life.

I am also personally indebted to him as well because he appointed me to this Article III judgeship. I think he might well be pleased to know after having telephoned me that morning in August, 1986, that I was faithful to his trust in naming me to the Ninth Circuit, although I was almost rude to him when he called me at home one day to be assured that he “had my permission” to sign my nomination and to send it on to the Senate.

As many of you know, President Reagan would never nominate an Article III judge with whom he had not personally talked. It was 7:30 in the morning in Portland, Oregon when the phone rang downstairs, where my wife, Maura, was preparing breakfast, and I was upstairs just finishing my shower. She shouted up the stairs that the phone call was for me, to which I responded, “Who is it?” She said, “I think it's the press.” To which I responded, “Tell them I'll call them back.” Well, the White House

* United States Circuit Judge, United States Court of Appeals for the Ninth Circuit; B.A., St. John's University, 1957; J.D., Harvard Law School, 1963; LL.M., University of Virginia, 1992; LL.D. (Hon.), University of Notre Dame, 2002; LL.D. (Hon.), Lewis & Clark College, 2003; LL.D. (Hon.), University of Portland, 2011. The views expressed herein are my own, and do not necessarily reflect the views of my colleagues or of the United States Court of Appeals for the Ninth Circuit. I wish to acknowledge, with thanks, the assistance of E. Garrett West, my law clerk, in preparing these remarks.

** This Address was delivered at Chapman University Dale E. Fowler School of Law on September 15, 2018, as the Constitution Day Address for the Claremont Institute for the Study of Statesmanship and Political Philosophy.

operator overheard my wife's side of the conversation and said, "Madam, it's the Press . . . ident of the United States calling." Whereupon Maura shouted, "Dear, it's President Reagan." "I think I'll take that call," I said, and thus began a delightful conversation with one of the most considerate public officials that I have ever known.

I

Because we are gathered here to celebrate Constitution Day, and because this particular event draws inspiration from President Reagan's jurisprudence, I believe it would be fitting to begin my remarks by returning to some of his.

Just over thirty years ago, speaking from the East Room of the White House, President Reagan presided over the swearing-in ceremony for Chief Justice William Rehnquist and Justice Antonin Scalia. He elaborated on the Founders' vision of an "independent" judicial branch: "For [the Founders]," he said, "the question involved in judicial restraint was not—as it is not—will we have liberal or conservative courts? They knew that the courts, like the Constitution itself, must not be liberal or conservative. The question was and is, will we have government by the people?"¹

Today, I would like to reflect on this timeless puzzle: How can a counter-majoritarian institution like the federal judiciary—an institution filled with judges whose appointing Presidents long ago left office, one that enforces laws written by long-dead drafters, and one that from time to time strikes down statutes written and passed by the people's representatives—how can that institution possibly be in service of "government by the people?" The answer, I will suggest, is in the textualist and originalist judicial methodologies which, I believe, are *compatible* with democratic self-governance and uniquely *promote* government by the people.

II

A

Let's start with the increasingly ascendant approach to statutory interpretation: Textualism. Judges have looked to the words of legal instruments to determine their meaning for a

¹ Ronald Reagan, *Remarks at the Swearing-in Ceremony for William H. Rehnquist as Chief Justice and Antonin Scalia as Associate Justice of the Supreme Court of the United States* (Sept. 26, 1986), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 1268 (1986).

long while. Justice Joseph Story's 1833 *Commentaries on the Constitution*, for example, wrote of that document:

[E]very word . . . is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. . . . [Constitutions] are . . . fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense: and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss.²

Textualism as a theory of interpretation is of more-recent vintage, largely developed in response to the perceived excesses of the Warren Court and popularized by Justice Scalia.³ But, in method, textualism channels Justice Story. As Justice Scalia explained: Judges should look to “the intent that a *reasonable person* would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”⁴ Though the terminology might be new, the tools are older than Justice Story and older even than the Constitution.⁵

How, then, does textualism reinforce democratic processes? Primarily because textualism respects the “legislative bargain”—the deal struck among legislators with competing interests and competing constituencies.⁶ Passing legislation is a messy and haphazard business, one that Justice Neil Gorsuch recently described as “the art of compromises.”⁷ So, to a judge looking for some high-minded, purposive reading of the statute, such incongruities and idiosyncrasies might look instead like *inconsistencies*. But a statute's foibles are not necessarily flaws, and so textualists enforce the law that the parties managed to pass—not the one that *some* of them, in the *Court's* view, might have wanted.

I believe the textualists' respect for this legislative bargain promotes democratic self-rule. Consider, first, the perspective of the forward-looking political actor who hopes to pass a new law, or to fix an old one. Passing such legislation, he or she knows, will require the investment of considerable political and financial capital. Party leaders, for instance, might need to make the vote a matter of party discipline, or to offer a seat on a committee to some recalcitrant dolt. Likewise, citizens and interest groups can spend money or make calls to urge the passage of the legislation—all of which expend time

² See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 451 (1833); see also Diarmuid F. O'Scannlain, *Joseph Story, the Natural Law, and Modern Jurisprudence*, HERITAGE FOUND. (Feb. 3, 2014), https://thf_media.s3.amazonaws.com/2014/pdf/HL1239.pdf (discussing Justice Story's theory of natural law).

³ See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 641–50 (1990).

⁴ ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (1997).

⁵ See STORY, *supra* note 2, § 400 (quoting Blackstone).

⁶ John Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 431 (2005).

⁷ *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2016).

and treasure. But textualism promises the legislator a return on investment: Expend your resources, and the third-branch will enforce this hard-earned text; your handiwork will govern until someone else puts as much effort in to change it as you did.

Relatedly, textualism ensures the democratic legitimacy of a court's decision, and it reinforces the accountability of the political branches. When judges enforce the text that Congress wrote, the case is decided at the politicians' directive. Sticking to the script is not only fair to the parties, but it reinforces the basic democratic principle that elected officials are responsible for the policies and practices of the government. If you don't like the law or its application, then you know whom to blame: Congressmen, unlike federal judges, can be thrown out of office.

These advantages of textualism perhaps partially explain its rapid ascendance in the broader legal culture. But we also have to thank Justice Scalia's charismatic persistence that Congress means what it says and says what it means. Just a few years back, Justice Elena Kagan claimed that he "taught everybody [] to do statutory interpretation differently."⁸ Because of him, she claimed, "we're all textualists now."⁹ And as I've argued elsewhere, one of his most-lasting legacies will likely be that he prodded judges to ask not what the statute *should* say, but what it *does* say.¹⁰

Despite textualism's ascendance among lawyers, politicians and commentators often seem not to understand the basic distinction between the lawmaking role of the political branches and the interpretive role of the courts. Justice Gorsuch, you will recall, was harangued during his Senate hearings for a dissent he wrote on the Tenth Circuit.¹¹ Then-Judge Gorsuch would have sided with a trucking company that fired a driver for abandoning his broken-down vehicle in subzero temperatures. "It might be fair to ask whether [the company's] decision was a wise or kind one," he wrote. "But it's not our job to answer questions like that. Our only task is to decide whether the decision was an illegal one."¹²

⁸ Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg>.

⁹ *Id.*

¹⁰ See Diarmuid F. O'Scannlain, "We Are All Textualists Now": *The Legacy of Antonin Scalia*, 91 ST. JOHN'S L. REV. 303 (2017).

¹¹ Michelle Mark, *Al Franken slams Gorsuch over 'absurd' dissent in frozen-trucker case: 'It makes me question your judgment.'* BUS. INSIDER (Mar. 21, 2017), <https://www.businessinsider.com/senators-grill-gorsuch-over-absurd-dissent-in-frozen-trucker-case-2017-3> [<http://perma.cc/9PEM-G6XY>].

¹² *Transam Trucking, Inc. v. Admin. Review Bd.*, No. 15-9504, 2016 WL 3909526, at *7 (10th Cir. July 15, 2016) (Gorsuch, J., dissenting).

Whether right or wrong on the merits, Justice Gorsuch precisely described the only legitimate ground for his decision. Critics of such principled textualism don't just misunderstand the role of the federal judge, but they also fail to see the pro-democratic benefits of the textualist approach.

B

Textualism's cousin, originalist constitutional interpretation, gets regularly maligned as somehow deeply anti-democratic—the traditional name for the objection being the “dead hand” problem.¹³ The objection goes something like this: The Constitution claims to speak for “We the People,” but “We did not adopt the Constitution, and those who did are dead and gone.”¹⁴ Originalism, they say, does not secure a “government of laws and not of men,” but a government of the dead and not of the living.

Originalists have a series of responses. The first, of course, is that the dead hand argument fails *any* form of law, or at least anything short of rule by continuous and unanimous consent. I've been on enough three-judge panels over the last thirty-two years to know that *that* won't work. However, I don't want to focus on the *reductio ad absurdum* response to the dead hand problem. Instead, I want to make the positive case that this “rule of the dead” is *good* for the “rule of the living.”

Indeed, the Constitution's foundational nature sets in place the *structural* and *electoral* pre-requisites of democratic governance. In this age when the Court is better known for its decisions in *Roe v. Wade* and *Obergefell* than it is for *Myers v. United States* and *Noel Canning*,¹⁵ we often forget that the Constitution pays careful attention to the unglamorous details of nation-building—for instance, how many votes does it take to demand that the Senate or the House record the “Yeas and Nays of the Members?”¹⁶ Likewise, while we simply assume the requirements of bicameralism and presentment, the Founders carefully calibrated this system of lawmaking.¹⁷

¹³ Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1998); Reva Siegel, *Heller and Originalism's Dead Hand*, 56 UCLA L. REV. 1399, 1405 (2009).

¹⁴ Siegel, *supra* note 13, at 1399.

¹⁵ *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (same-sex marriage); *Myers v. United States*, 272 U.S. 52 (1926) (presidential removal authority); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (recess appointments).

¹⁶ See U.S. CONST. art. I, § 5, cl. 3. Note: A one-fifth vote will suffice. *Id.*

¹⁷ See generally *INS v. Chadha*, 462 U.S. 919, 946–51 (1983).

With these and many other such rules, the Constitution determines *who* gets to act on behalf of the nation, *what* they may do, and *how* they have to go about it. And settling those preliminary structural questions frees up today's political actors to focus on the questions of the day. Judge Michael McConnell offers a useful analogy: "The rules of basketball do not merely *constrain* those who wish to play the game, but also make the game possible."¹⁸ Speech without grammar is gibberish, and democracy without structure is mob rule. The Founders wrote the rules of the game in 1787, and their rulebook makes democratic politics possible in 2018.

But such response to the dead hand problem does not *entirely* dispense with the objection. The judicial branch, of course, has the authority to "say what the law is,"¹⁹ and when the Constitution's higher law conflicts with an act of Congress or a state legislature, then the Supremacy Clause—to say nothing of our oaths of office—dictate that such law must be set aside. The "rules of the game" response to the dead hand problem cannot easily explain cases like *Brown v. Board*,²⁰ or *West Virginia v. Barnette*,²¹ or even *Heller*.²² In these cases, the judge's role is quite simply to declare the will of elected officials null and void. How can judicial review be anything but a constraint on the right of the people to govern themselves?

Well, perhaps the best response is that we embrace the rule of the dead so as to affirm the possibility of the people's living sovereignty. With language echoing the Declaration of Independence, Chief Justice John Marshall explains as much in *Marbury v. Madison*: "The basis on which the whole American fabric has been erected" is that "the people have an original right to establish, for their future government, such principles as . . . shall be most conducive to their happiness."²³ But because the "exercise of this original right is a very great exertion," and because it neither "can [] nor ought [] be frequently repeated," the principles "are deemed fundamental" and are "designed to be permanent."²⁴ Put simply, We the People have the right to establish fundamental political commitments—like the freedom of speech and religion, or the equality of persons of every race. Enshrining these principles is a "very great exertion," and so those commitments cannot be rendered

¹⁸ Michael McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1130 (1997).

¹⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

²⁰ *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (school desegregation).

²¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (enjoining enforcement of regulation requiring students to say the Pledge of Allegiance).

²² *District of Columbia v. Heller*, 554 U.S. 570 (2008) (firearms for self-defense in the home).

²³ *Marbury*, 5 U.S. (1 Cranch) at 176.

²⁴ *Id.*

impermanent by *any* mere agent of the government—whether that agent be an unelected judge or an elected legislature.

C

These democratic benefits of faithful adherence to the written law, whether a congressional statute or the Constitution itself, should seem especially salient today, when judicial nominations have become so contested, so bitter, and so focused on the nominees' *political views*. For instance, Senator Cory Booker grabbed headlines when he suggested that supporting Judge Brett Kavanaugh's nomination made you "complicit in evil."²⁵ And of course, as I'm sure you all recall, there were the sordid anti-Catholic insinuations against Judge Amy Coney Barrett.

The most significant cause of today's political angst, I suspect, is the well-known Supreme Court cases that removed political questions from the democratic process without even a basis in the Constitution's text and structure. *Roe v. Wade*, the most egregious case of judicial fiat, compelled Professor John Hart Ely, who was anything but a right-wing hack, to say: "[*Roe*] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."²⁶ If the Supreme Court can do that, who needs Congress?

But mandated social change at the ukase of the Supreme Court doesn't *only* take politics away from the politicians; it also compromises judicial independence, because it turns courtrooms into partisan battlegrounds when those political battles *should* be happening across the street in the United States Capitol.

Nevertheless, I have hope that the courts will return to their proper role. With Justice Gorsuch, another principled textualist and originalist has joined court. And I also hope that one day these methodologies can be the default commitment of appointees of *both* political parties. After all, textualism and originalism are methodological commitments that *can*, and *should*, transcend political parties.

For instance, Yale Law School Professor Akhil Amar, described by the *New York Times* as a "liberal originalist," argued long before *Heller* that the Constitution included a personal right to keep a gun

²⁵ Igor Bobic, *Cory Booker Suggests Supporting Brett Kavanaugh Makes One 'Complicit' In Evil*, HUFFINGTON POST (July 26, 2018), https://www.huffingtonpost.com/entry/cory-booker-brett-kavanaugh-complicit-evil_us_5b59dce2e4b0fd5c73cbb0e [<http://perma.cc/RBG2-327R>].

²⁶ John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 947 (1973).

in one's home for self-defense²⁷—though some originalists, of course, might read the Second Amendment more broadly than he. He also testified on Judge Kavanaugh's behalf and has praised him for his "studious" attention to "the Constitution's original meaning."²⁸ To take another example, Justice Kagan often writes careful textualist opinions for the Court that show her methodological seriousness.

My point is *not* to say that originalism and textualism mean that judges will always agree on the meaning of the text. But shared methodologies offer a neutral and a-political basis for good-faith disagreement.

III

So far, then, I have advanced the argument that textualism and originalism are not just *compatible* with democratic self-rule, but rather that they're *good* for it.

To illustrate that point, let me briefly discuss a few of the Court's cases from last term. In these decisions, the Supreme Court reinforced the Constitution's structural and electoral protections. Fair warning: These are technical, structural, *lawyerly* opinions that may also, for the non-lawyers, be intensely soporific.

A

The first case is *Lucia v. SEC*.²⁹ There, the Court considered whether Administrative Law Judges (or, "ALJs" as they're called) at the Securities and Exchange Commission were "officers of the United States" or simply employees. The question mattered because Article II prescribes only two mechanisms by which a person can be appointed to an "office": First, the default rule is that a person must be nominated by the President and confirmed by the Senate; second, Congress "may by Law vest the Appointment of such inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments."³⁰ No one argued that the ALJs had been appointed in accordance with Article II. So by applying past precedent, the Court concluded that the ALJs were "officers of the United States" that were subject to the strictures of the Appointments Clause. Therefore, it vacated the order from the administrative adjudication.

²⁷ See, e.g., Akhil Reed Amar, *Second Thoughts*, NEW REPUBLIC (July 11, 1999), <https://newrepublic.com/article/73718/second-thoughts> [<http://perma.cc/6ZNW-9WU8>].

²⁸ See, e.g., Akhil Reed Amar, *A Liberal's Case for Brett Kavanaugh*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/brett-kavanaugh-supreme-court-trump.html>.

²⁹ *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

³⁰ U.S. CONST. art. II, § 2, cl. 2.

Lucia reinforces the Constitution's pro-democratic structural protections. As Justice Thomas's concurrence elaborated, the Appointments Clause "maintains clear lines of accountability—encouraging good appointments and giving the public someone to blame for the bad ones."³¹ In other words, the Constitution sets in place structural rules that make sure that elections matter: If the Department of Defense, or Housing and Urban Development, or the Environmental Protection Agency is behaving badly, then you know it's the President's fault. Here, the Court issued a seemingly anti-democratic decision; it declared null a congressionally approved method of hiring ALJs. But the Court did so in order to further the Constitution's higher mandate: Meaningful accountability within the executive branch as expressed in the text itself.

Similarly, *Murphy v. NCAA* is a federalism case that ensures that *state* elections matter.³² In this case, the Court struck down the provision in the Professional and Amateur Sports Protection Act that makes it unlawful for a State to "authorize" sports gambling schemes. The problem with the statute was not that it concerned some subject matter beyond the reach of Congress's enumerated powers (does anything these days?), but that it specifically "dictate[d] what a state legislature may and may not do."³³ In the Court's language, the regulations "commandeered" the organs of state government.³⁴ Such commandeering violates the Constitution: While Congress may regulate *individuals*, it has no authority to regulate directly the conduct of *states*; such a directive would be incompatible with the Constitution's system of "dual sovereignty."³⁵

Like *Lucia*, the decision in *Murphy* strikes down a duly enacted congressional statute, but it does so in the service of the Constitution's commitment to democratic self-rule. As the Court mentions, the "anti-commandeering rule promotes political accountability" because it maintains clear lines of responsibility.³⁶ When Congress regulates individuals, citizens know that Congress is to blame for bad laws; when Congress tries to regulate states who *then* regulate individuals, the lines of responsibility become blurred. Citizens must know *which* politicians to vote out of office. Similarly, commandeering would have allowed Congress to pass the costs of regulating onto the states, who then would have to fund Congress's

³¹ *Id.* at 2056 (Thomas, J., concurring).

³² *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

³³ *Id.* at 1478.

³⁴ See generally *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress may not "commandeer" state governments); *New York v. United States*, 505 U.S. 144 (1992) (same).

³⁵ *Murphy*, 138 S. Ct. at 1475.

³⁶ *Id.* at 1477.

mandate. The anti-commandeering rule, however, ensures that Congress must bear the burden for the programs it enacts. Once again, the Court's decision in *Murphy* ensures meaningful accountability for Congress.

As an aside, it's also worth noting that the majorities in each of these two cases crossed traditional ideological lines. Justice Kagan's opinion in *Lucia* was joined by each of the Republican-appointed Justices, though Justices Thomas and Gorsuch concurred in a more-detailed originalist reading of Article II. Likewise, Justice Samuel Alito's opinion in *Murphy* was joined entirely by Justice Kagan and mostly by Justice Stephen Breyer. This cross-ideological agreement is a good sign; it tends to demonstrate the Court's independence.

IV

Before I close, I would like to return again to President Reagan's speech at the swearing-in of Chief Justice Rehnquist and Justice Scalia. There, the President mentioned at least two areas of ongoing struggle to nurture and to preserve the structure of government established by the Constitution.

The *first* struggle is within the judicial branch itself, as Judges and Justices attempt to stay true to their oaths to "bear true faith and allegiance" to the Constitution. President Reagan quotes Justice Felix Frankfurter: "The highest exercise of judicial duty is to subordinate one's personal pulls and one's private views to the law."³⁷ Indeed, Judges and Justices must resist the temptation to follow personal preferences over the Constitution. This temptation is especially great in hard cases, when it's important to have judges who *both* care deeply about the Constitution's text and structure *and* have the sharpest legal minds. President Reagan praised both qualities in Chief Justice Rehnquist and Justice Scalia, and he turned out to be right about both. So far, Justice Gorsuch also seems to have both qualities. He has not been afraid to write separately, and he has not been afraid to disagree with his colleagues on originalist grounds. This independence of mind will serve the Court well, and we can hope that Judge Kavanaugh, if and when he's confirmed, will share similar qualities.³⁸

The *second* struggle that President Reagan mentioned is one within the United States at large. President Reagan, at the close

³⁷ Reagan, *supra* note 1.

³⁸ Note, this Address was given prior to Justice Kavanaugh's confirmation and swearing in.

of the speech, pointed out that the entire citizenry must work to preserve the constitutional structure:

We the people are the ultimate defenders of freedom. We the people created the Government and gave it its powers. And our love of liberty and our spiritual strength, our dedication to the Constitution, are what, in the end, preserves our great nation and this great hope for all mankind.³⁹

Nurturing this dedication to the Constitution among citizens is a worthy and difficult task, but on it hangs the health of this nation's great constitutional system. I commend the Claremont Institute, and all of you in this room, for your dedication to sustaining our Founding principles, and I am honored to be recognized for my small part in this noble effort. Thank you all.

³⁹ Reagan, *supra* note 1.

Ronald Rotunda: Scholar, Teacher, Professor, Public Intellectual. An Appreciation.

*Hugh Hewitt**

Members of the Rotunda family, friends of Ron Rotunda, Dean Parlow, colleagues, students, judges, and members of the bar, welcome.

I was very honored to receive the invitation from the *Chapman Law Review* to deliver some remarks about Ronald Rotunda at this symposium today.

I did not know Professor Rotunda for the first forty years of his remarkable life. He was a decade ahead of me at Harvard College and had graduated from Harvard Law School before I set foot in Cambridge. If we ever discussed how Ron made it through those turbulent years, I don't recall it, but I am fairly certain that as the Students for a Democratic Society (SDS) members occupied Harvard Hall at the college in 1969, Ron was strolling into Langdell Hall at the law school, unperturbed, almost certainly wearing a bow tie, and most certainly prepared for whatever class it was in those "Paper Chase years."

I first met Ron in 1986, when I became a member of the Administrative Conference of the United States by virtue of my being named, at far too young an age, as General Counsel of the United States Office of Personnel Management (OPM). The conference, or "acus," is a nonpartisan independent agency of the United States government, established in 1964 by the Administrative Conference Act for the purpose of promoting "improvements in the efficiency, adequacy, and fairness of the procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform regulated governmental functions."¹

If agencies were ranked as colleges are, the Administrative Conference would most definitely not be a "party school." But its work was and remains important, and in 1986, the same year I

* Chapman University Dale E. Fowler School of Law, Law School Symposium, Keynote Address, January 25, 2019.

¹ *Administrative Conference Act*, ADMIN. CONF. OF THE U.S. (Nov. 12, 2010), <https://www.acus.gov/publication/administrative-conference-act> [http://perma.cc/DGU3-TVT9].

became a member, Ron was named our Chief Consultant on Legal Ethics, a hot seat on a hot topic at the time during and following Iran Contra, and just a decade after Watergate's thunderous conclusion, when every agency was looking to their codes of conduct.

So, when not toiling away at OPM on the hiring, firing and retiring of our two million federal civilian employees, I loved the conference meetings, and I loved to sit next to Ron Rotunda. It was then I learned, early on, the great advantage of sitting next to brilliant and prepared people. Other meeting participants, who do not quite know everyone in the room or at the table, simply assume that the smart, prepared people sit next to each other. It does not occur to them that the less gifted, but perhaps more Machiavellian among them, might purposefully sit next to the very, very smart and bright people to take advantage of this penumbra effect combined with confirmation bias so I tried as often as possible to sit next to Ron.

Our colleagues on the faculty here today may now just be recalling to themselves, "Oh, Hugh always used to sit next to Ron in faculty meetings." To which I must confess, yes. When I was on time or early and had the chance, I drew a bead on the seat next to Ron, who was almost invariably early, and whom almost inevitably had a neat lunch prepared.

That was not the only thing he had prepared. Faculty members come to faculty meetings, generally speaking, in three categories: (1) those who are well prepared to comment on everything on the agenda; (2) those who are *prepared* to speak on *nothing* on the agenda—this by the way says nothing about their willingness to speak, indeed joy in speaking, on agenda items but rather only their preparation to do so; and (3) those who are prepared to speak only on matters on which they are expected by committee assignment or decree of the Dean to have an opinion.

Ron was in the first category. Always prepared. On every subject. He'd studied the agenda. He had opinions. Opinions anchored in experience.

I hope it might be said that I am most often found in the third group, though being also a radio and television talk show host in my other life, I may sometimes slip in to the second category. In my other world of talking heads, the rule is "frequently wrong, never in doubt."

About Ron I must say not only was he part of the first category—"always prepared"—he too was rarely in doubt, and no matter the subject, I dare say looking over a decade of these incredibly *unique*—I will not allow any other adjectives

here—gatherings of the law faculty, Ronald Rotunda was not only always prepared but also had significant and important things to say and for us to ponder.

Faculty also fall somewhere within a four-square box: They are either opinionated or accommodatingly ambiguous, and they are either quite deferential and courteous or, as sometimes happens when lawyers gather, vigorous, indeed obstreperous, even sharp tongued. Ron was *always, always, always* in that quadrant marked *opinionated and courteous*. Rarely have I observed anyone maintain such extended equanimity towards everyone—no matter the issue or the agreement or disagreement—as Ronald Rotunda.

Thus, at the beginning of this appreciation of a giant of a scholar, a wonder of a teacher, and a prodigiously prolific and influential public intellectual, let me first stress that Ronald Rotunda was a gentleman of the old school, polite, happy, peripatetic to be sure, full of an astonishing energy, but always and everywhere a gentleman. It is said that Queen Elizabeth has said the essence of good taste is never to be offended by bad taste. Ronald Rotunda was never, in my experience, offended by bad taste.

Always, for his students, for his colleagues, for his academic leadership, for his processional acquaintances, Ron was a model of integrity, seriousness, charm, and yes, manners.

A. Rotunda the Scholar²

Ronald Rotunda was also a giant of a scholar. When Ron became part of what I call “the great John Eastman brain bank robbery of 2008” when then-Chapman law school Dean John Eastman heisted away from George Mason University, not just Ron Rotunda to add a star to our constitutional law and legal ethics faculty, but also Kyndra Rotunda to launch our Military Personnel Clinic, and 2002 Nobel Laureate Professor Vernon Smith to our numbers here at Chapman University, the bar was raised very high indeed for everyone.

Before becoming the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence here at Chapman University Dale E. Fowler School of Law, Ron had been the George Mason Foundation Professor of Law, and before that, at the University of Illinois College of Law, the Albert E. Jenner, Jr. Professor of Law where he spent more than two decades writing

² Note, throughout this Address I recite from the accomplishments listed on Ronald Rotunda’s curriculum vitae. See Curriculum Vitae of Ronald D. Rotunda (last updated Dec. 18, 2017) (on file with Chapman University Dale E. Fowler School of Law), <https://www.chapman.edu/our-faculty/files/curriculum-vita/Rotunda-Ronald-CV.pdf> [<http://perma.cc/K33X-T88D>].

and teaching, interrupted by visitorships at universities—literally around the world—and special assignments here and there.

He had come to teaching from the U.S. Senate Select Committee on the Presidential Campaign, where he had been the Assistant Majority Counsel. That is better known as the Senate Watergate Committee. And yes, Ron worked for the Democrats. Everyone can make a mistake—even Ron.

Prior to that Ron had been an associate at Wilmer, Cutler & Pickering in D.C., and a law clerk to a giant of the Second Circuit, Judge Henry Mansfield. Ron of course had been on the *Harvard Law Review* and had graduated magna cum laude in 1970, as he did from Harvard College in 1967, magna cum laude.

By now you may have noted that Ron had a knack for being at interesting places at interesting times.

Harvard, just as the Vietnam War and SDS were convulsing the college, and then Harvard Law in the era of Charles Kingsfields as played by John Houseman in the *Paper Chase*, then to Richard Nixon's Washington into the belly of that tumultuous era, back again to D.C. in time for Iran Contra and the ethics revolution sweeping the nation's capital, back to D.C. in time for Whitewater to serve on Ken Starr's independent counsel team.

Ron had a nose for the news, it seems, and a touch of Potomac fever, a love for what Teddy Roosevelt famously called "The Arena."

But he also had this incredible mind and this vast great lakes-sized reservoir of energy, and soon after his Watergate years took up teaching and research and never, ever stopped, first at Illinois, then George Mason, then here at Chapman. Along the way he compiled what can only be described as a prodigious legacy, and pyramid of treatises, casebooks, books, papers, essays, and columns all the while serving the profession in a dizzying array of special assignments.

I have mentioned his role for the Administrative Conference, but Ron served in a dozen or even two dozen such roles. He was, for three years in the 1990s, on the ABA's Standing Committee on Ethics and Professional Responsibility.

The year before he had been an advisor to the Supreme National Council of Cambodia.

For thirteen years he served as a member of the consultant group of the American Law Institute's *Restatement of the Law Governing Lawyers*.

He was a constitutional law advisor to the Supreme Constitutional Court of Moldova. This is, shall we say, a diverse indeed Disneyland of law experiences.

As mentioned, Ron was also special counsel to the Office of Independent Counsel, Judge Ken Starr, during the Whitewater Proceedings, after having had roles in the Watergate hearings and the Iran Contra investigations. That's the triple play of big time Washington D.C. scandals.

He was also a member of the advisory board to the International Brotherhood of the Teamsters. He advised the Czech Republic. He served numerous think tanks, the Federalist Society, and the Cosmos Club. He served and he served and he served. Here too, at Chapman, on committee after committee.

Tireless does not begin to describe Ron Rotunda. Indefatigable begins to approach. "Energizer bunny of the law" is perhaps the best summary for Professor Ronald Rotunda.

But always as a sidebar, always as an extension of his scholarship, to which I want to devote just a few words before getting to my main appreciation of Ron, that of his role as public intellectual which was in turn an extension of his calling as teacher.

When preparing for this talk, I requested Carlos Bacio of the law review if he might find for me a copy of Ron's CV, for I suspected, without having ever seen it, that it might be, how shall we say, "complete."

Carlos, God bless him, dug it up, and it indeed is complete. More than complete, it is staggering. It is a monument to industry. To work. To concentrated, focus application of mind to problem. It was, as of its last revision, which appears to me to have been in December of 2017, just three months before his untimely, wholly unexpected, and deeply saddening death. But this CV, my goodness, it is a humbling thing to peruse. It is fifty-five pages long, and there isn't much to the margins!

Fifty-five pages! His list of books alone is fifteen pages in full, with treatises and casebooks and supplements. Then it is on to articles!

Mind you, what I am about to cite is simply a skipping stone across the vast lake of Ronald Rotunda writings:

A 1970 *Virginia Law Review* article on the reform of presidential nominating conventions;³

A 1975 article for the *UCLA Law Review* on sponsors of real estate partnerships as brokers and investors;⁴

³ Reid Peyton Chambers & Ronald D. Rotunda, *Reform of Presidential Nominating Conventions*, 56 VA. L. REV. 179 (1970).

⁴ Ronald D. Rotunda & Robert C. Hacker, *Sponsors of Real Estate Partnerships as Brokers & Investment Advisors*, 23 UCLA L. REV. 322 (1975).

A year later, a *Georgetown University Law Review* article on Congress's ability to restrict federal court jurisdiction.⁵

In 1984, an *Oregon Law Review* assessment on "The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag."⁶

Four years later for the *Vanderbilt Law Review*, "Original Intent, the View of the Framers, and the Role of the Ratifiers."⁷

Three years after that, for his beloved *University of Illinois Law Review*, an article on "Exporting the American Bill of Rights: The Lesson from Romania."⁸

I skip ahead another half decade, to a favorite of Dean Parlow's, the *Marquette Law Review*, where Ron contributed "An Essay on Term Limits and a Call for a Constitutional Convention."⁹

Another half decade forward and into the new millennium, we find Ron writing for the *Richmond Law Review* an article of lawyer advertising and the philosophical origins of the commercial speech doctrine.¹⁰

And though I could go on and on, I have to conclude this sprint through the Rotunda hall of articles. My favorite, and not because it was in the *Ohio State University Law Journal*, but because of its 2003 title, is "Yet Another Article on *Bush v. Gore*."¹¹ Ron's sense of self esteem was healthy, but his sense of irony was as sharp as his often very dry asides.

These scholarly pieces do not of course begin to match for his influence on students, practitioners, and judges, his comprehensive treatises and casebooks on constitutional law and legal ethics. This is where Ron Rotunda was Chapman's Ted Williams, baseball's last .400 hitter, the gold standard, the one whose output was equaled in earlier eras, but not so recently. Even as Williams racked up base hit after base hit, our own "splendid splinter" of a scholar racked up citation after citation.

⁵ Ronald D. Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts & the Problem of School Busing*, 64 GEO. U. L.J. 839 (1976).

⁶ Ronald D. Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 OR. L. REV. 455 (1984).

⁷ Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507 (1988).

⁸ Ronald D. Rotunda, *Exporting the American Bill of Rights: The Lesson from Romania*, 1991 U. ILL. L. REV. 1065 (1991).

⁹ Ronald D. Rotunda, *An Essay on Term Limits and a Call for a Constitutional Convention*, 80 MARQ. L. REV. 227 (1996).

¹⁰ Ronald D. Rotunda, *Lawyer Advertising & the Philosophical Origins of the Commercial Speech Doctrine*, 36 U. RICH. L. REV. 91 (2002).

¹¹ Ronald D. Rotunda, *Yet Another Article on Bush v. Gore*, 64 OHIO ST. L.J. 283 (2003).

Did I mention along the way he wrote for the *New York Post* and the *Washington Post*, the *Washington Times* and the *Chicago Sun Times*, for the *Atlanta Journal-Constitution*, *National Review*, *Fox News*, *The Hill*, and of course his beloved *Orange County Register*, as well as for every legal professional outlet on scores of occasions and whenever the spirit moved him, which was usually monthly or perhaps even weekly. My favorite entry in this category of pieces is his tribute to Justice Scalia in the *Champaign Urbana News Gazette*. When Justice Scalia died, everyone, and I mean close to everyone, had something to say, and by God, Ron wasn't going to be left out, so he sought out his home state and paid his compliments to the departed "lion of the law."

I mentioned that Ron did not lack for confidence. His penultimate entry among his writings? A *Washington Post* column, from December 6, 2017, title "Justice Ginsburg has some explaining to do."¹² You can be sure that one had at least nine readers.

If you wish to see the first and last entries in his writing CV, you shall have to look for yourself. Ron was a great believer in making his students work for it.

I am going to move to the consent calendar that this CV be included in the proceedings, and hearing no objection, conclude it so moved, for it is itself a work of scholarship: precise, deep, illuminating, but the CV illumines a life in the law as a scholar, professor, teacher, and public intellectual.

B. Rotunda the Public Intellectual

Which brings me to my last section of remarks and the matter on which Ron genuinely deserves your appreciation. He was a pioneer in the rise of the legal scholar and law teacher as public intellectual.

For decades, indeed for centuries, the law was quite literally robed in mystery. Grab your copy of *Bleak House* and refresh your memory of the opinion of lawyers in the era of Dickens where it had improved a bit from centuries earlier. Or revisit the character of Jaggers in *Great Expectations*. Lawyers were men of mystery in the old days, gradually becoming men *and* women of mystery, and law professors the seraphim above the cherubim of the practitioner and just below the archangels in robes. For every back-woods honest Abe Lincoln, there were a hundred cloistered clubby and vested white shoes lawyers, and professors at the

¹² Ronald Rotunda, *Justice Ginsburg has some explaining to do*, WASH. POST (Dec. 6, 2017), https://www.washingtonpost.com/opinions/justice-ginsburg-has-some-explaining-to-do/2017/12/06/224d8f0e-da0c-11e7-b859-fb0995360725_story.html?utm_term=.7aa43e1bf31b [<http://perma.cc/XSA5-9H9U>].

great citadels of legal education, well they didn't mix much with the lower angels of the profession much less with—deep breath and furrowed brow—clients.

This paradigm held well past the upheavals of the 1960s. Rewatch *The Paper Chase*. Kingsfield alone, grading his exams. Kingsfield high above the proletariat of the students. Law professors did not deign to write down, except rarely to practitioners. They wrote for each other and they wrote for judges. This was a tradition, but being a tradition, it would fall to modernity.

In 1897, Oliver Wendell Holmes, Jr. wrote “The Path of the Law” for the *Harvard Law Review*.¹³ Damn, but it is dry and hard going, and it most definitely wasn't going to get a read out of Josiah Quincy, the then incumbent mayor of Boston, a Democrat, or Edwin Upton Curtis, the former mayor of Boston, a Republican, who were battling it out for mayor when Justice Holmes's famous, and famously dense, law review article first appeared. I can't imagine a local political campaign ever giving much notice to the opinions of professors, or a statehouse race, though perhaps a few presidential elections might have cared a tiny bit for a law professor's views.

But Justice Holmes wouldn't have cared that the politicians didn't care for his majestic if dense prose. He was writing for . . . well, for whom was he writing? What was he trying to achieve? *Goodreads*, a review site, says of “The Path of the Law” that it “is the single most important essay about law ever written” and that it “defines the responsibilities of the legal profession”¹⁴

Perhaps it once was, and perhaps it once did, but why then did the scholarship machine simply not stop?

You don't discover $E=mc^2$ twice after all. If “The Path of the Law” was dispositive of anything at all, why Ronald Rotunda's prodigious outpouring of scholarship on constitutional issues legal ethics? Why the 120 years since of 5-4 decisions? Why the sudden turn of members of the Supreme Court to popular books and memoirs for popular consumption? On September 15, 2011, Associate Justice of the Supreme Court Stephen Breyer came to my humble radio studio for two hours. Why? He wasn't consulting me. He was flogging his book, *Making Our Democracy Work*, which is terrific. I mean bravo. Justice Thomas has appeared on the radio show as well, and they all are welcome any time. Justices should talk to people, not just other judges and

¹³ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

¹⁴ *The Path of the Law (Little Books of Wisdom)*, GOODREADS, https://www.goodreads.com/book/show/1596899.The_Path_of_the_Law.

professors, and lawyers. They were not intended to be a priesthood, despite the robes.

And that is because the law is, as Justice Holmes tipped his hand in his essay's title, "a path," an ultimately democratic path in its making and paving.

For a long, long time that path was laid out almost exclusively by lawyers and especially judges and law professors, with an occasional bothersome interruption from Congress and the President, but in recent decades, professors and lawyers found themselves not so much leading as left behind in charting the life of the law because of the galloping race called public opinion. Judges, of course, still get to lay out the broad plans for the path, but many more hands are involved in the work, and relatively few of them are now JDs, much less law professors.

Now lawyers are not shy, neither are most law professors, and they are not conformed to this new reality, not at all. In this refusal to stay "professional" and in their towers, they have an example. The same Oliver Wendell Holmes, I have just mentioned. Justice Holmes who wrote this magisterial essay and five years later would be named to the United States Supreme Court where he would serve thirty years from 1902 to 1932. Justice Holmes was no soft spoken, shy and retiring jurist. For twenty years before his appointment to the U.S. Supreme Court, he'd been teaching at Harvard Law and on the Massachusetts Supreme Court.

But all those years on the Supreme Court and the state court and at Harvard Law, and for all the copies sold and unread of "The Path of the Law," Justice Holmes's greatest contribution to the life of the republic came in a very short speech he delivered in public in 1864.

Justice Holmes had been in the Union Army since the beginning of the Civil War. He fought in some of the bloodiest battles of that long war for freedom, in the peninsula campaign, at Fredericksburg and the wilderness, and was wounded three times, at the battles of Bull Run, Chancellorsville, and Antietam. Weakened by dysentery and wounded so often, Justice Holmes was on garrison duty in D.C. as Grant marched on Richmond in the spring and summer of 1864.

In the hope of lessening the pressure on Richmond, Robert E. Lee ordered General Jubal Early to leave the Shenandoah Valley with the Confederate Army there and threaten Lincoln's base in D.C., thinly defended because of Grant's intention to, quote,

“fight it out on this line if it takes all summer.”¹⁵ Grant followed through and had drained the parapets and forts surrounding the capital of all but the older troops and the convalescing. But, Grant rushed some troops back to D.C. that got there before they arrived, though it was a close-run thing.

It was when rebel General Early got within sight of the capital’s defenses, specifically at the battle of Fort Stevens in July of 1864, that Justice Holmes made his greatest contribution to the life of the republic.

Princeton historian and Pulitzer Prize winner James M. McPherson relates the story in his magisterial *Battle Cry of Freedom: The Civil War Era*:

During the skirmishing on July 12, a distinguished visitor complete with a stovepipe hat appeared at Fort Stevens to witness for the first time the sort of combat into which he had sent a million men over the past three years. Despite warnings, President Lincoln repeatedly stood to peer over the parapet as sharpshooters’ bullets whizzed nearby. Out of the corner of his eye a 6th Corps captain—Oliver Wendell Holmes, Jr.—noticed this ungainly civilian popping up. Without recognizing him, Holmes shouted “get down you damn fool before you get shot!” Amused by this irreverent command, Lincoln got down and stayed down.¹⁶

Thus, it was not as a professor, writer, state supreme court or United States Supreme Court jurist that Justice Holmes did his best work, but rather in a short, profane command to the Commander in Chief that would preserve him to win re-election after the fall of Atlanta, then deliver the Thirteenth Amendment through the Congress and off to the states for ratification of the command to abolish slavery, then his magisterial second inaugural address, and then the tragedy and yet mystically unifying assassination and funeral procession in April of the next year, after Lee had surrendered to Grant.

Some say that story is apocryphal, but not Professor McPherson. It seems Justice Holmes did not want too much credit, and eschewed the footnote there. But no matter. It illustrates a point: We do not know what the most significant thing we do is, or when we do it. Thus the best course is to do as much as we can, for as many as we can, in all the ways we can, for as long as we can. And that is what Ron Rotunda did.

So I honestly cannot tell you what the most significant thing Ronald Rotunda did is. That he taught thousands of law

¹⁵ *Ulysses S. Grant Chronology*, ULYSSES S. GRANT HOMEPAGE, <https://www.granthomepage.com/grantchronology.htm> [http://perma.cc/N8TX-5QS6].

¹⁶ JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 757 (2003).

students . . . and lawyers . . . and judges the finer points of constitutional law and of course his influence on the actual practice of ethics within the bar cannot be doubted. But are his treatises and his widely recognized stature in various fields the most significant thing he did?

No one can answer that, but I can point to one thing he did quite well: He entered the public lists.

For the Steelers fans among us, let me explain the term, “the lists.”

In the Late Middle Ages, jousting was the rage among the nobility in England and on the continent. Indeed it had been so for hundreds of years. The lists, or list field, was the arena, often just a roped off field with grandstands, where the fighting took place. To enter the fray was “to enter the lists.”

And sometimes it was a fray, with vast teams of knights bouncing and banging each other around on horseback and foot. In T.S. White’s magnificent *The Once and Future King*, the basis for the movie *Camelot*, Sir Lancelot would have to fight anonymously, for it was considered a done deal to spot the side in a melee on which Lancelot, the Lebrun of his day, played. But almost everyone, even the worst of the horsemen and most uncoordinated of the swordsmen, got into the lists.

These days in our country, we have a militarized media industrial complex, which serves as the list field for politics. At present, it consists of a handful of cable news channels, the traditional networks, *60 Minutes*, a half dozen nationally syndicated radio shows, a score of influential podcasts, and of course a handful of agenda-setting newspapers, which are not so much newspapers as websites with old papers attached to them, and yes, a thousand websites.

It has become, to borrow and modify a bit from Ike, a militarized industrial media complex.

There remain among this complex some great law blogs, such as *Instapundit*, *Law Professors Blog*, *Lawfare*, *TaxProf Blog*, and many other name brand blogs/websites. The law professors are back in the game. Sort of. They continue to write for each other, indeed in a vast, vast array of law journals. And AALS has its sections, and the ABA its conferences, and the circuits gather annually and professors speak.

Former Dean Eastman and Berkeley Dean Erwin Chemerinsky often appear together as the so-called “smart guys,” which I humbly take credit for naming and launching fifteen or sixteen years ago, and which they now take on the road like an

old Bing Crosby and Bob Hope road movie, except they don't dance. At least I hope they don't dance.

That's where we are in 2019, a 120 years after "The Path of the Law." How did the scholars cross over the field from their cloistered towers into the lists?

It's a complicated answer. But one part of that answer is most definitely Ron Rotunda.

For the past many years—really since the close of World War II—public intellectuals have argued about the most prestigious "placement" for their opinions on matter of public importance. There are only three contenders for most prestigious placement among them. Everywhere else is "tier two" or lower to use *U.S. News and World Report* terminology.

Those three are: the "paper of record," the *New York Times*; the "paper of power," the *Washington Post*; and the "paper that makes and moves markets," the *Wall Street Journal*. For the Manhattan left-leaning elite, and those who think like them or desire to be thought to think like them, there is the *New Yorker*, but that's a weekly, and always a beat late to the party unless it blows up the party as Ronan Farrow has done with #MeToo or Lawrence Wright with Islamic Fundamentalism or Scientology. Long form journalism still, as it has for years since Joseph Pulitzer cleaned up the craft of scribbling, it still makes and leaves marks.

It is the view of many that, under first Vermont Royster, then Robert Bartley, and now Paul Gigot, that the most influential of the dailies is the *Wall Street Journal's* editorial page. That is because of its quality. Its seriousness. The fact that it is read left, right, and center, and because it does in fact make arguments that change minds.

Twenty-two years ago, Ron Rotunda appeared on the editorial pages of the *Journal* for the first time on September 9, 1987. The headline of his op-ed: "Bork's Firing of Cox: What Really Happened."¹⁷ This provocatively titled essay appears fourteen plus years after the October 20, 1973 firing of Archibald Cox, the first Watergate special prosecutor, by then-Solicitor General Bork. Why then, in 1987 this Rotunda article?

Because September of 1987 marked the opening battle in the thirty years war for the Supreme Court, a war just concluded—or at least temporarily won—with the confirmation of Justice Kavanaugh and the seating of a fifth so-called "conservative"

¹⁷ Ronald D. Rotunda, *Bork's Firing of Cox: What Really Happened*, WALL ST. J., Sept. 9, 1987, at 32.

Justice on the Supreme Court, or so most observers believe. The war that began in 1987 was over the nomination of Judge Bork to join the Court. Justice Antonin Scalia had made the relatively short walk from the D.C. Circuit a year earlier and was confirmed 98-0 on September 17, 1986.

These were unusual times, and I had a front row seat. I had had the great good fortune to clerk on the D.C. Circuit for Judge Roger Robb in 1983 and 1984, but when the judge had fallen ill, as was the tradition of the court, his clerks were adopted by the entire circuit for a period of weeks while it was determined if the illness was a disabling one. During that time I received cases on which to work from then-Judges Scalia, Bork, Ruth Bader Ginsburg and Spotswood Robinson—they were an extremely collegial bunch back then, and obscure in the way circuit court judges are but never Supreme Court Justices.

That utility infielder role continued until it became obvious that Judge Robb's return would be delayed and then halting, and I was adopted by Judge George MacKinnon, a great man, whose daughter Catharine is every bit to the left as Judge MacKinnon was to the right. His enormous pride in her groundbreaking scholarship and entering into the public fray was my first glimpse of the changing role of the scholar-professor in the public square, and she is in it today. Professor MacKinnon was never out of it. Our most recent Dean prior to Dean Parlow, Dean Tom Campbell, can regale you with stories of Judge MacKinnon's incredible intellect and wonderful great good humor, and of Catharine MacKinnon's not quiet entry into the public debates, and of the judge's enormous pride in that entry.

If Professor MacKinnon had a parallel partner in pushing scholars into the public arena, it was Ron Rotunda and in that, (in retrospect though not at the time) obviously significant era of turning, very few professors would sally forth on an issue as contentious as the nomination of Judge Bork.

This first of Professor Rotunda's fifteen significant contributions to the editorial pages of the *Wall Street Journal* concluded thus, after a spirited defense of Judge Bork's actions in 1973—recall this is 1987, in the middle of the Bork hearings:

Some senators have suggested they will not vote for Judge Bork unless he tells them how he will vote on particular cases or promises not to overturn certain cases. The senators can't constitutionally do that. Article III of the Constitution prohibits a nominee from giving advisory opinions. He may tell us that some opinions are drafted poorly (constitutional commentators have done that for years), but he can't say how he would decide particular issues. Nor can the senators attach any conditions to his appointment. An opinion of the U.S.

attorney general made clear 150 years ago that senators cannot place any “qualifications or alteration” on an appointment.

Justice Joseph Story, an early-19th century Supreme Court [J]ustice, tells us in his influential “Commentaries on the Constitution” that senators may withhold “their advice and consent from any candidate” only if the candidate “in their judgment does not possess due qualifications for office.” Story acknowledges that the Senate may act “from party motives, from a spirit of opposition,” but he hoped that “such occurrences will be rare.”¹⁸

“Let us hope that in Judge Bork’s confirmation hearing,” Ron concluded in 1987, “we will not be witness to one of those rare occurrences.”¹⁹

Now consider that brace of paragraphs from thirty-one years ago from Ron. It is the foreshadowing of what would become colloquially known as “the Ginsburg Rule” adopted by then-judge, now Justice Ginsburg in her 1993 confirmation hearings five years after the Bork fiasco, and adopted by every single nominee since.

Was Ron’s 1987 *Journal* op-ed his equivalent of Justice Holmes shouting at Abe Lincoln to get “your god damned fool head down”—but less profane but also to a wider audience of all future Supreme Court nominees—Ron’s most influential bit of writing? It might well have been. I can guarantee you that everyone watching the Bork proceedings was reading the *Journal* editorial page everyday, certainly Judge Bork’s friend Judge Ginsburg was, and I suspect every federal judge who considered themselves a potential Supreme Court nominee, which is usually pretty much every federal judge not in senior status, read Ron Rotunda’s advice.

And note as well the foreshadowing of the increasing bitterness of the confirmation mess. Ron quoted Joseph’s Story, who worried or at least speculated a century and a half earlier that confirmations might become a matter of party, but not too often. Ron hoped it would not be so, in the case of the Bork nomination, that it would not be one of those “rare occasions.” Of course it was, and now it seems every nomination by a Republican President is an occasion for the brass knuckles to come out in print and cable. Way back in 1987, Ron Rotunda provided every future nominee with the sorcerer’s stone on how to survive the new gauntlet Ron saw taking form in 1987. Refuse to commit to conclusions on cases that might come before you and refuse conditions on your confirmation. He made the suggestion. Justice Ginsburg embraced it. It is now the rule. Any serious

¹⁸ *Id.*

¹⁹ *Id.*

consideration of that policy will find a genesis story with Ron's op-ed of September 9, 1987.

Not surprisingly, this important piece marks a beginning and a midpoint for Ron. It was the beginning of an almost annual, important contribution to the *Journal's* op-ed pages, and it is roughly at the beginning of the midpoint of his career, when a scholar-public intellectual might best begin to forward opinions on public controversies, equipped with not just learning but experience and hopefully humility.

I do not propose to review each of these fifteen significant essays—I omit Ron's January 1993 letter to the editor upbraiding a columnist for getting wrong a point about law firm partnerships in California and anticompetitive partnership agreements, except to note the good professor's vigilance—and a book review, yes he did those as well, but to again alert you that once he took to the public lists, Ron never retired from them.

In November 1994, he essayed on the constitutionality of term limits. A year later, he blasted the young lawyers of the ABA for attempting to legislate among their number against discriminatory words or conduct.

In March of 2000, he proclaimed “[p]erhaps the Clinton presidency will claim as its greatest victim the reputation of the federal courts for integrity and impartiality.”²⁰ Agree or disagree, there is a blunt-force-object bit of opinionating.

Ron would go on to write essays titled (and it is important to recall that rarely do writers write their headlines, though we have been known to nudge the header one way or the other), “Rubbish about Recusal,” “The Case for a Libby Pardon,” “Egypt's Constitutional Do-Over: This time around, take a closer look at America's Bill of Rights,” “Endangering Jurors in a Terror Trial,” “Hillary's Emails and the Law,” “Thin-Skinned and Upset? Call a Lawyer” and his last contribution to those pages, in August of 2016, headlined “The ABA Overrules the First Amendment.”²¹

Ron was a civil libertarian of the old school sort—a freedom man. He also had quite a big heart. As an undergraduate at Harvard, it led him to volunteer at the college's social services organization, the Phillips Brooks House, where he was assigned to teach a class at the Massachusetts Correctional Institution at Bridgewater, a prison for the criminally insane. This experience is the basis for Ron's most arresting *Wall Street Journal* essay,

²⁰ Ronald D. Rotunda, *Another Clinton Victim: The Integrity of the Federal Courts*, WALL ST. J., Mar. 20, 2000, at A35.

²¹ See Rotunda, *supra* note 2, at 24–49.

titled “The Boston Strangler, the Classroom and Me.” It ran on July 26, 2013, and I recommend it to you all. My favorite, very Ron-ish line is “[s]econd, what your mother told you is true: You can’t judge a book by its cover.”²² DeSalvo—the Boston strangler was Albert DeSalvo—“DeSalvo did not look at all like Jack Nicholson’s demented character in ‘The Shining,’ or even like most of the other inmates I taught. He looked normal. What was so abnormal was his mind.”²³

Suddenly a light opens onto Ron’s perpetual equanimity and not just in faculty meetings or the classroom, but everywhere and always. He was imperturbable. It is perhaps an advantage that falls to everyone who teaches classes in such institutions, or perhaps it is unique to those who have taught sociopaths of the highest rank, but wherever gained, whether in 1966 when Ron taught the serial killer or through the years, it came to define Ron in my mind. He was rather fearless, even contemptuous of public opinion. Like an umpire in a baseball game—Chief Justice Roberts’ now famous analogy from his confirmation hearings—he called them as he saw them, in print, in meetings, in the classroom. Most of the time the recipient would accept the verdict, even if disagreeing in his mind and muttering as they left a called third strike behind. But sometimes arguments break out. Sometimes managers and players are ejected. Sometimes in the public square the elbows get very sharp indeed, and few punches are pulled.

To my knowledge, none ever landed on Ron, at least he never let it show if one did. As just noted, he took on the most controversial subjects, and did so with typically specific, well-formed and complete arguments that led to the only conclusion Ron could see. Then he left it out for all to read, and walked away, apparently unconcerned with the reaction one way or the other.

And in so doing, Ron cut down a path through the thicket of the public square for other law scholars and law professors to follow, and boy have they. Just a week ago the formidable Jack Goldsmith, the Shattuck Professor of Law at Harvard University, joined me on air to discuss the conduct of the Federal Bureau of Investigation in 2016, days after Professor Goldsmith, a former assistant attorney general at the Office of Legal Counsel in the DOJ, had opined on the same topic for the *Lawfareblog*—not the *Harvard Law Review*, but a blog! On a most crucial matter from one of the country’s leading if not pre-eminent experts on the subject.

²² Ronald D. Rotunda, *The Boston Strangler, the Classroom and Me*, WALL ST. J., July 26, 2013, at A11.

²³ *Id.*

A few months earlier Akhil Reed Amar, one of Yale Law's giants, had joined me to discuss whether a President ought to be indicted. I've already told you Former Dean Eastman and Dean Chemerinsky meet in the public arena to wrestle more often than Andre the Giant and Bobo Brazil ever did. For goodness sake, Laurence Tribe tweets and Glenn Reynolds is by far the most read law professor in the land because of his blog *Instapundit*.

What did Ron Rotunda, if not unleash, at very least rank as a pioneer in doing?

Amplify put, he helped bring scholars into the public fray. He modeled and lived the life of a public intellectual concerned about the here and now, and the great debates, often debates that unfolded at the speeds of light and sound and into which law reviews could not hope to timely intervene. He built his reputation as a scholar via the traditional means, but he used it as a lance, sword, and shield in these public lists for more than two decades.

Is that a good thing, what Ron Rotunda and his like-minded colleagues have done? Was it a good thing that the future Justice Holmes presumed to shout at the then President Lincoln? Now I draw close to my conclusion, but before that, a word on Ron as a teacher.

Ron was as a teacher what football used to call a two-way player. He could and did play both ways, offense and defense, or in the case of the law, students and practitioners.

As I never know how my colleagues actually teach, or what their students think of them, I consulted Former Dean Eastman. Deans are supposed to know these things. That's what deans do, that and raise money and preside over faculty meetings intended to test their sanity and prove if someday they are deaf enough to run a college or a university.

Former Dean Eastman replied, "I never sat in on a class, but the buzz is that the students loved him, both his antics and his command of the material, and particularly is ability to convey to the students clear rules of law."

As a teacher himself attached to antics—mine almost always are connected digressions about the movies (have you seen *Cold War*, the story of star-crossed lovers in Stalin's Poland of the early 1950s? But I digress)—I know that showmanship is part of successful teaching. Do not expect other than Ferris Bueller if all you serve them is Ben Stein. That would not be Ron Rotunda. I had assumed what Former Dean Eastman confirmed to me because Ronald Rotunda could not turn off the energy, and energy is everything. Hamilton said it about the presidency in *Federalist* No. 70—that energy in The Executive would be

necessary for the republic to succeed²⁴—and Ron’s energy guaranteed without my seeing that he would charm, and far more importantly instruct students.

C. Rotunda the Teacher and Professor

His second undertaking was to teach practitioners ethics, and this he did in countless articles, conversations, and consultations. When the subject of legal ethics comes up, I am reminded of the 1981 movie, *Chariots of Fire*.

That movie debuted while I was a law student at the University of Michigan in April of 1982, and I saw it with a dozen or so other law students, including our recent first lady of California Anne Gust, we collectively had invented “bad movie night.” Tuesday nights were given over to attending the worst movie we could find. In retrospect, this may have been a commentary on the quality of our teaching or just on the second year of law school, those dreary middle miles of a marathon being run in the rain. Anyway we went and were shocked. Here was a fine movie, no, a great movie. As we staggered out, dazed by the sudden exposure to quality art in Ann Arbor in the middle of my second year of law school, one scene stuck with me.

The would-be fastest man on the planet, the fellow who intended to win the gold in the 100-meter dash at the Paris Olympics, Harold Abrahams, played by Ben Cross, approaches legendary professional track coach Sam Mussabini, played by Ian Holm, with the request that Mussabini train him, that he make Abrahams fast. Mussabini replied, “I can’t put in what God left out,” but agreed to try. He succeeded.

Now about lawyers, and people generally, by the time they reach their 20s, their ethical make-up is set. The mold is made so to speak. So why bother teaching and writing about ethics? You cannot put in what God left out after all.

Because if they are built ethically, they can be coached to superiority. If they aren’t, then, true, no scholar can put in what God left out. But if they are built for ethics, they can be coached. They can be made “fast” in the terminology of the film.

That is what Ron did. He assumed you were ethical, but that you needed coaching. How do you handle a married couple’s client trust fund when husband and wife divorce? (Does anyone here remember?) What is the obligation of a lawyer who suspects their client is, if not lying outright, then dancing on a cliff over which they might both fall? Upon taking the decision to leave a

²⁴ See THE FEDERALIST NO. 70 (Alexander Hamilton).

law firm partnership, what are the duties owed to your partners? These are questions of ethics, yes, but they presume the lawyers involved want to do the right thing. Ron was very good in teaching from the wholesome and happy perspective, that those consulting an ethics expert wanted to learn to do the right thing.

Here is where Ron Rotunda truly advised tens of thousands. How many lawyers there are who have looked up from a Rotunda commentary or article on some ethical quandary and said, “so that’s what to do?” There must be legion. And if they followed the advice of Ron Rotunda, they would have served the bar, the client, and themselves well. That’s a giant testimony to Ronald Rotunda.

But now what about this entering into public debates matter. Was that a good thing?

Ron could have stayed in the ivory tower and have been deemed very influential. Any given work of law scholarship can be evaluated roughly with the formula: Perceived status of the publication times obscurity of the subject matter equals influence of the opinion rendered by the scholar divided by the number of readers times the influence of those readers. It makes a difference, after all, if the Chief Justice is reading your piece on a Sunday afternoon or if a second year doing research for a note for a somewhat obscure law journal is doing so.

A lifetime’s work requires a bigger scale on which to weigh, a much bigger scale in fact, but the formula is the same: What topics did you cover and where did you cover them work together to equal the influence they might have had cabined by the readers they actual did have and the political and legal authority and power of those readers.

Ron’s influence as a scholar was immense. And standing alone would have always been immense. Every legal scholar’s importance fades with time because the famous path changes course I mean, for goodness sakes, somewhere down the line Prosser won’t matter, or he will matter in the way Lord Coke matters. Everyone gets ground down. Vanity, vanity, “[a]ll is vanity and a chasing after wind,” says Ecclesiastes, and that’s one of a handful of works that’s genuinely stood the test of time.²⁵ The writer might have added to the chasing after wind part “and tenure.”

But as for the age in which we live on this earth, and the few years or decades thereafter, influence depends on what you write, with what authority, for which audience, and in a timely fashion.

²⁵ *Ecclesiastes*, 1:14.

Are you moving the debate? People with bullhorns and posters rarely if ever do. People who persuade often do.

It was Lincoln, after all, who in his seven debates with Stephen Douglas in 1858, systematically demolished the Supreme Court's worst decision ever, the *Dred Scott* decision. It was Lincoln, this time alone, who in the Cooper Union speech of 1860 demolished Calhoun and his progeny's hateful ideology of racial superiority and the alleged untouchable status of slavery under the Declaration of Independence and Constitution. Words spoken into public debates matter. Not slogans, or placards, or shouts, but arguments.

And while it was Justices of the Supreme Court who began the inevitable slide towards civil war with a ruling in the *Dred Scott* decision, the worst in the Court's history, it was a lawyer wielding words in an extended public debate covered by the papers of the day, that not only won the presidency, but the war, and freedom for the enslaved. So, yes, lawyers wielding words matter. Arguments matter.

I don't know for sure if Ron Rotunda is truly the father of the Ginsburg Rule, but having mused on this for quite some time, I think he was. And I don't know who read his writings then, but I am certain when he wrote for the *Washington Post* or the *Wall Street Journal*, he had an audience of at least nine and in fact far, far more. Ron's role as a public intellectual was important and groundbreaking and a testament to him. That he conducted himself in that role as a gentleman and a scholar, as a *good* man, is more important still, and a credit to Chapman that he was among our number. He will be missed. Thank you.

The Admirable Republican Constitutional Heroism of Ronald Rotunda

*Stephen B. Presser**

In our time, law professors are not commonly regarded as heroic warriors. Indeed, when Leon Panetta, former Secretary of Defense, former Congressman, and former head of the CIA, wanted to disparage his boss, Barack Obama, he accused him of relying more on the “logic of a law professor,” than the apparently requisite “passion of a leader.”¹ I will argue, however, that Ronald Rotunda, in whose honor this *Chapman Law Review* symposium is held, was, in fact, a hero,² and that we are at a point in history when an academic such as Professor Rotunda can actually be a warrior, a warrior for social justice, but a social justice warrior of the right, rather than the more commonly observed species from the left.³

Ronald Rotunda’s scholarly output and activities could quite properly be the stuff of heroic legend. Few legal academics can match what is contained in his fifty-five-page curriculum vitae (“CV”).⁴ More importantly for our purposes here, however, Ronald bravely stood against the politically correct tide⁵ that has

* Raoul Berger Professor of Legal History Emeritus, Northwestern Pritzker School of Law, Visiting Scholar in Conservative Thought and Policy University of Colorado, Boulder 2018–2019.

¹ LEON PANETTA WITH JIM NEWTON, *WORTHY FIGHTS: A MEMOIR OF LEADERSHIP IN WAR AND PEACE* 442 (2014).

² For a stimulating argument that part of what is great in Western Culture is the recurrence of the search for and the celebration of the “heroic,” that is to say those engaged in the never-ending battle between good and evil, see MICHAEL WALSH, *THE DEVIL’S PLEASURE PALACE: THE CULT OF CRITICAL THEORY AND THE SUBVERSION OF THE WEST* 3 (2015).

³ There is a contemporary disparaging definition of a social justice warrior of the left, to wit, “A person who uses the fight for civil rights as an excuse to be rude, condescending, and sometimes violent for the purpose of relieving their frustrations or validating their sense of unwarranted moral superiority.” *Social Justice Warrior*, URB. DICTIONARY, <https://www.urbandictionary.com/define.php?term=Social%20Justice%20Warrior> [<http://perma.cc/SXU4-YYCG>].

⁴ Curriculum Vitae of Ronald D. Rotunda (last updated Dec. 18, 2017) (on file with Chapman University Dale E. Fowler School of Law), <https://www.chapman.edu/our-faculty/files/curriculum-vita/Rotunda-Ronald-CV.pdf> [<http://perma.cc/K33X-T88D>] (illustrating the staggering details of Ron Rotunda’s academic history).

⁵ As an example, take Professor Rotunda’s learned mockery of an English professor who required her students to use the term “humankind” instead of “mankind,” usage that Ron Rotunda maintained wrongly and implicitly denigrated Shakespeare and the drafters of the Constitution. Ronald D. Rotunda, *An English Teacher Corrects Shakespeare*, VERDICT (Apr. 10, 2017), <https://verdict.justia.com/2017/04/10/english-teacher-corrects-shakespeare> [<http://perma.cc/F378-DCYY>]. For those so imbued with the dictates of political

drenched our universities,⁶ our courts, and our media. Instead of embracing the now dominant (and politically correct) view of the Constitution as a “living document,” Ronald Rotunda championed “originalism,” and the traditional view of the rule of law.⁷

In law schools now, the favored judges are those who change the law, from the purportedly authentic “only sage” of American law, Justice Oliver Wendell Holmes, Jr.⁸ (whose famous aphorism “The Life of the Law . . . is not logic, but experience” did more than almost anything else to undermine the basis of our law and legal institutions)⁹ through the famous Warren Court (whose bench remade the Fourteenth Amendment into a tool to undermine the constitutional scheme of federalism and separation of powers),¹⁰ and finally to Justices Sandra Day O’Connor and Anthony Kennedy (whose notorious and

correctness, a step back to gain some perspective might be necessary. The effect of the insistence on the politically correct was nicely summed up by Michael Walsh:

The stifling of debate and the outlawing of basic concepts of right and wrong, of social propriety, is the purpose of political correctness; and dissent, once the highest form of patriotism, is no longer to be tolerated. Like “tolerance,” “dissent” was only a virtue when it was useful to the Left.

WALSH, *supra* note 2, at 153.

⁶ See the description of the situation in our universities recently posted on the Heritage Foundation website:

Our universities are now overwhelmingly dominated by a radical identity-based grievance culture in which a growing number of victim groups, whose priorities and assertions are rarely challenged, are given free rein to disparage, drown out, and silence views they deem offensive. As a result, our universities no longer value fearless inquiry, but rather seek to impose a reigning orthodoxy that offers an ungracious and tendentious view of our intellectual traditions and politics.

The Perilous Quest for Equal Results, HERITAGE FOUND. (Nov. 8, 2018), <https://www.heritage.org/event/the-perilous-quest-equal-results> [<http://perma.cc/LRJ9-YSKJ>] (regarding an upcoming lecture by Professor Amy Wax).

⁷ See, e.g., Hans A. von Spakovsky & Elizabeth Slattery, *Heritage Mourns the Passing of Legal Scholar Ronald Rotunda*, HERITAGE FOUND. (Mar. 15, 2018), <https://www.heritage.org/the-constitution/commentary/heritage-mourns-the-passing-legal-scholar-ronald-rotunda> [<http://perma.cc/GF5F-DNJX>] (“Ron had long been a leader in the fight to reestablish the rule of law and reinvigorate our adherence to the Constitution and an originalist understanding of constitutional interpretation.”). For a piece of commentary in which Professor Rotunda indicated that the right thing to do was “follow the law, not the law professor,” see Ronald D. Rotunda, *Ignoring the Supreme Court When You Don’t Like the Result*, VERDICT (Apr. 13, 2015), <https://verdict.justia.com/2015/04/13/ignoring-the-supreme-court-when-you-dont-like-the-result> [<http://perma.cc/S7Z9-GEAJ>] (criticizing the advice of a law professor from the University of Chicago to President Obama to ignore a possible adverse decision from the United States Supreme Court).

⁸ For a typical hagiographic portrayal of Justice Holmes, see generally G. EDWARD WHITE, *OLIVER WENDELL HOLMES: SAGE OF THE SUPREME COURT* (1999).

⁹ For the argument that what went wrong in American law schools started with Justice Holmes and his aphorism, see generally STEPHEN B. PRESSER, *LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW 77–94* (2017).

¹⁰ For that story, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 407–08* (2nd ed. 1997) and STEPHEN B. PRESSER, *RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED 290* (1994).

idiosyncratic “balancing jurisprudence” did so much to erode any remaining difference between judging and legislating).¹¹

When a Supreme Court led, in effect, by the “swing Justice” Anthony Kennedy, can decide, for example, that millennia of experience can be overthrown, and marriage can no longer be limited to one man and one woman, by virtue of a creative reading of the Constitution’s Equal Protection and Due Process Clauses,¹² we are witnessing not the rule of law, but rule by ideologues wearing robes.¹³

Justice Kennedy was the most famous victim of the “Greenhouse effect”¹⁴—the tendency to try to earn the praise of the left-leaning *New York Times* Courtwatch reporter, Linda Greenhouse¹⁵—but he was not alone. Nor was Linda Greenhouse the only commentator who bestowed her blessing on Justice Kennedy. When Justice Kennedy came to be honored at his and Ron Rotunda’s alma mater, Harvard,¹⁶ the then Dean, now Justice Elena Kagan, lauded him for his independence and his refusal to adhere to either the conservative or liberal strands of jurisprudence.¹⁷ Judicial independence, of course, may be a worthy constitutional goal insofar as it insulates judges from popular pressure, but it was never intended to shield

¹¹ For a sadly typical paean to judges, like Justices Oliver Wendell Holmes, Jr., Earl Warren, and Anthony Kennedy, who make, rather than interpret the law, see, for example, RONALD K. L. COLLINS & DAVID M. SKOVER, *THE JUDGE: 26 MACHIAVELLIAN LESSONS* (2017), which argues that Justices, while going about their law-making task, ought to employ the same techniques of deception and cunning as Machiavelli recommended to Italian autocrats.

¹² See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

¹³ The problem is not a new one. For Learned Hand’s complaint that rule by judicial ephors is not the democratic government we are supposed to have, see *LEARNED HAND, THE BILL OF RIGHTS* (1958), reprinted in *THE SPIRIT OF LIBERTY PAPERS AND ADDRESSES OF LEARNED HAND*, 108–09 (Irving Dilliard ed., 3rd ed. 1974).

¹⁴ On the “Greenhouse Effect,” see, for example, Martin Tolchin, *Press Is Condemned By a Federal Judge For Court Coverage*, N.Y. TIMES (June 15, 1992), <https://www.nytimes.com/1992/06/15/us/press-is-condemned-by-a-federal-judge-for-court-coverage.html> [<http://perma.cc/5RZ5-NJME>].

¹⁵ On the activist nature of her jurisprudence, see Greenhouse’s autobiography, LINDA GREENHOUSE, *JUST A JOURNALIST: ON THE PRESS, LIFE, AND THE SPACES BETWEEN* 4–5 (2017).

¹⁶ Justice Kennedy graduated from Harvard Law School. *Anthony Kennedy, BIOGRAPHY* (last updated June 28, 2018), <https://www.biography.com/people/anthony-kennedy-9362868> [<http://perma.cc/Q4R8-EZBV>]. Professor Rotunda was a magna cum laude graduate of both Harvard Law School and Harvard College. For a fine, brief biography of Ron Rotunda, see *Ronald D. Rotunda, VERDICT*, <https://verdict.justia.com/author/rotunda> [<http://perma.cc/5DUF-AGDJ>] (including pieces written by Ronald Rotunda, and from which much of what appears in this Article is derived).

¹⁷ See *Justice Kennedy comes back to HLS to mark 20 Years on the Supreme Court*, HARV. L. TODAY (Mar. 12, 2008), <https://today.law.harvard.edu/justice-kennedy-comes-back-to-hls-to-mark-20-years-on-the-supreme-court/> [<http://perma.cc/8KAR-2J4R>]. It is notable that both Ronald Rotunda and I appeared at the invitation of Republican members of the Senate to testify against the confirmation of Elena Kagan as a Supreme Court Justice. *Continuation of The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States*, COMMITTEE ON THE JUDICIARY (July 1, 2010), <https://www.judiciary.senate.gov/meetings/continuation-of-the-nomination-of-elena-kagan-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-2010-07-01> [<http://perma.cc/87GX-4UET>].

Justices from their obligation to restrain from the temptation to ignore the law. This was a temptation, unfortunately, to which Justice Kennedy frequently succumbed.

Ron Rotunda, thankfully, properly abhorred the impenetrable, arbitrary, and opaque jurisprudence of Justice Anthony Kennedy, and others like him. He could do that with gentle mocking, as he did once, when he wrote, “Let us be blunt: Reading about law is not often fun.”¹⁸ In a heroic act that took much more courage, however, Ron Rotunda could demonstrate his disdain for those who cared little for the rule of law by being only one of eight law professors willing to publicly support candidate Donald Trump,¹⁹ who expressly ran on a platform of promising to appoint judges and Justices “in the mold of Justice Scalia.”²⁰ Donald Trump promised to appoint jurists that would be faithful to the original understanding of the Constitution and the traditional separation of powers notion that judges should not be legislators. The few of us from the legal academy who endorsed the Republican nominee

¹⁸ Ronald Rotunda, *Book Review*, 65 J. LEGAL EDUC. 434, 438 (2015) (reviewing F.H. BUCKLEY, *THE ONCE AND FUTURE KING: THE RISE OF CROWN GOVERNMENT IN AMERICA* (2014)).

¹⁹ The eight individuals teaching in law schools who went on record as “Scholars and Writers” for Trump, according to my count, were F.H. Buckley, George Mason University, Thomas E. Brennan, former Dean at Cooley Law School, and former Chief Justice of the Supreme Court of Michigan, John C. Eastman, Chapman University Fowler School of Law, Bruce Frohnen, Ohio Northern University School of Law, Lino Graglia, University of Texas School of Law, Allen Mendenhall, Faulkner University School of Law, Stephen B. Presser, Northwestern Pritzker School of Law, and Ronald Rotunda, Chapman University Fowler School of Law. See Chris Buskirk, *Scholars and Writers for Trump*, AM. GREATNESS (Sept. 28, 2016), <https://amgreatness.com/2016/09/28/writes-scholars-for-trump/> [<http://perma.cc/P2PC-EPTB>]. To put this into proper perspective, there are approximately 10,000 individuals holding full-time positions in American law schools, presumably teaching law. Eugene Kuznetsov, *How many law professors are There in the USA?*, QUORA (Oct. 7, 2018), <https://www.quora.com/How-many-law-professors-are-there-in-the-USA> [<http://perma.cc/6CNJ-78BR>] (“As of the fall of 2017, U.S. law schools employed 10,232 full-time faculty . . .”). More than 1400 of such individuals signed a letter opposing the traditionalist Jeff Sessions’ appointment as attorney general. See Marjorie Corman Aaron et al., *Statement From Law School Faculty Opposing Nomination of Jeff Sessions for the Position of Attorney General* (Jan. 9, 2017) (unpublished manuscript), https://docs.google.com/document/d/167Ci3pVqwzOUe7_e7itlpew1qGcTo0ZD5dNIClbLQWA/pub [<http://perma.cc/VZF3-Q776>]. And more than 2400 of them signed a letter opposing the confirmation of Brett Kavanaugh to the Supreme Court. See Mark N. Aaronson et al., *Open Letter to the United States Senate from Law Professors Around the Country* (Oct. 4, 2018) (unpublished manuscript), https://www.scribd.com/document/390196814/Open-Letter-to-the-U-S-Senate?secret_password=IoF5vZqqJ5zO5QituuTk [<http://perma.cc/B5U7-T7PU>]. The empirical studies appear to indicate that the vast majority of law professors are not Republicans or conservatives. See, e.g., Adam Bonica, Adam Chilton, Kyle Rozema & Maya Sen, *The Legal Academy’s Ideological Uniformity* 4 (Nw. Pub. Law Research, Working Paper No. 17-12, 2017), <https://ssrn.com/abstract=2953087> [<http://perma.cc/4KEH-X8MH>].

²⁰ Indeed, it was that pledge that Donald Trump believes was instrumental in his election victory. See Jess Bravin, *Justice Scalia Spoke Favorably of Trump’s Presidential Run, Author Bryan Garner Says*, WALL ST. J. (Jan. 15, 2018, 8:03 AM), <https://www.wsj.com/articles/justice-scalia-spoke-favorably-of-trumps-presidential-run-author-bryan-garner-says-1516031467>. For Ron Rotunda’s praise for Justice Scalia’s humanity and his humor, see Ronald D. Rotunda, *Nino Scalia, R.I.P.*, VERDICT (Feb. 22, 2016), <https://verdict.justia.com/2016/02/22/nino-scalia-r-i-p> [<http://perma.cc/8MU8-32AU>].

were ridiculed by our colleagues,²¹ but, of course, the President's judicial nominees have been just as he promised, and have been selected in consultation with the Federalist Society for Law and Public Policy and the Heritage Foundation.²²

In a statement that he wrote published on the *American Greatness* website, a site unabashedly supportive of Donald Trump, Ron Rotunda explained why he favored Trump and was against Mrs. Hillary Clinton. That stand flowed from the unvarying commitment to reality and truth that characterized all of Ronald Rotunda's writing:

Shortly before the first Presidential debate, former Secretary of State Hillary Clinton said that half of those who opposed her candidacy and supported Donald Trump were "Racist, sexist, homophobic, xenophobic, Islamophobic, you name it"—they were a "basket of deplorables." The other half suffered from "economic anxiety," what one might call losers. They are, in fact, neither. They are people who see the need for change, appreciate the importance of economic growth, and who cannot trust Clinton, who (the FBI Director told us) repeatedly lied to the American people about the emails she destroyed and the computer server she created.²³

A subtler respect for Constitutionalism,²⁴ as we now have come to call the jurisprudence that relies on the original understanding of the document,²⁵ was demonstrated by Ronald Rotunda when he undertook, as one of his last projects, an abridgement of the greatest judicial biography of all time, Albert Beveridge's four volume work, *Life of John Marshall*.²⁶ This project²⁷ is not as

21 For example, see the comments of the highly-respected Brian Leiter, a philosopher and law professor at the University of Chicago, who observed that "it is embarrassing that educated people would vote for Trump," whom he disparaged as "Dopey Donald Chump." See Brian Leiter, *There are about 10,000 philosophy professors in the U.S. . . .*, LEITER REPORTS, PHIL. BLOG (Sept. 30, 2016, 6:14 AM), <http://leitereports.typepad.com/blog/2016/09/there-are-about-10000-philosophy-professors-in-the-us.html> [<http://perma.cc/82K8-AA42>]. Leiter further elaborated, pulling no punches, "Every educated person not in the grips of a religious or political ideology--or, in any case, not pathetically naïve--realizes that the guy [Trump] is both incompetent and mentally unstable, facts that have been obscured only by the fortune he inherited and lots of lawyers." *Id.*

22 For one of the first mainstream media reports of such consultation, see Alan Rappeport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), <https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html> [<http://perma.cc/9P27-WPJF>].

23 *Conservatives For Trump: A Symposium Featuring Scholars & Writers For Trump*, AM. GREATNESS (Sept. 28, 2016), <https://amgreatness.com/2016/09/28/conservatives-for-trump-a-symposium-featuring-writers-and-scholars-for-trump/> [<http://perma.cc/49MK-EFTC>].

24 On the notion of "Constitutionalism" as a means of containing arbitrary power, see SCOTT GORDON, CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY 5 (1999).

25 For one important articulation of the concept of "Constitutionalism" as adherence to an original understanding of liberty as the core of republicanism, see RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 62–63 (2016).

26 See generally ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL (1919).

original an accomplishment, obviously, as Ron Rotunda's wonderful multi-volume treatise with John Nowak on Constitutional Law²⁸ or his seminal work on professional responsibility.²⁹ Nevertheless, in that obvious labor of love, the revision of Beveridge, Ron Rotunda gave a new generation of lawyers and law students easy access to the formative era and formative struggles, as Chief Justice Marshall and the earliest occupants of the Supreme Court bench sought to implement popular sovereignty in the manner Alexander Hamilton had promised they would.³⁰

While the effort to revise Beveridge's work came near the end of Ron Rotunda's life, quite a bit earlier in his career, he had striven mightily to keep politicians bounded by their constitutional oaths and true to the rule of law. This aim was evident when he served as assistant majority counsel on the Senate Watergate Committee (1973–1974),³¹ and when he drafted his May 13, 1998 memorandum to Independent Counsel Kenneth Starr,³² explaining that it was possible to indict a sitting President, because, as the Supreme Court has repeatedly affirmed, no one is above the law.³³

²⁷ See generally RONALD D. ROTUNDA, JOHN MARSHALL AND THE CASES THAT UNITED THE STATES OF AMERICA (2018).

²⁸ RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE (5th ed. 2012).

²⁹ See, e.g., RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE (2013); see also RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY (2017–2018 ed. 2017).

³⁰ For that promise, see THE FEDERALIST NO. 78, at 498–99 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (1961) (arguing that when the Justices exercised judicial review they would simply be implementing the will of the people expressed in the Constitution, and that thus the Justices would be restraining the agents of the people, the legislatures, pursuant to the directions of their principals, the people themselves).

³¹ For some basic biographical data on Ron Rotunda, see Debra Cassens Weiss, *Constitutional and legal ethics scholar Ronald Rotunda dies at 73*, ABA J. (Mar. 20, 2018, 7:00 AM), http://www.abajournal.com/news/article/constitutional_and_legal_ethics_scholar_ronald_rotunda_dies_at_age_73 [<http://perma.cc/7U2D-BRYH>].

³² Letter from Ronald D. Rotunda, The Albert E. Jenner, Jr. Professor of Law, to Kenneth W. Starr, Indep. Counsel, Office of the Indep. Counsel 3–4 (May 13, 1998) (on file with the *N.Y. Times*), <https://www.nytimes.com/interactive/2017/07/22/us/document-Savage-NYT-FOIA-Starr-memo-presidential.html?module=inline>. See also *id.* at 3 n.6 for the listing of Supreme Court authority on the point.

³³ For the most famous recent determination that no President is above the law, see *Clinton v. Jones*, 520 U.S. 681, 708–10 (1997). For Ron Rotunda's pithy summation of the point, see Ronald D. Rotunda, *Indicting the President: President Clinton's Justice Department Says No*, VERDICT (Aug. 14, 2017), <https://verdict.justia.com/2017/08/14/indicting-president-president-clintons-justice-department-says-no> [<http://perma.cc/6VZ8-6G7N>] (“Some argue that criminal prosecution would distract the president and make him unable to perform his duties. The 25th Amendment answers that objection, by offering a mechanism to keep the Executive Branch running if the president is temporarily unable to discharge his powers. In this country, no one is above the law.”).

The work on the Watergate committee, of course, was an effort to restrain a Republican President, but Ron Rotunda's 1998 memorandum was targeted at a Democrat. Thus, these professional episodes could be taken as a demonstration that for Ronald Rotunda, what we might describe as a heroic fidelity to the Constitution and to the rule of law was more important than partisan politics. It is a further indication that Ron Rotunda's professionalism and honesty were unusual and laudable, in the term used here, "heroic," that a heartfelt encomium to Ron Rotunda was published, shortly after his untimely death, by John Dean, the counsel to the President who exposed the foibles of the Nixon Administration,³⁴ and who wrote touchingly of his valued friendship with Rotunda.³⁵ Dean emphasized, quite properly, not just that Ron Rotunda was a "brilliant dynamo of legal scholarship," but that he also possessed "wonderful erudition, and wily wit . . ."³⁶ Similarly, one of Professor Rotunda's former students, Josh Blackman, reported that Ron Rotunda "was able to seamlessly blend probing questions, compelling lectures, and uproarious humor."³⁷

Ron Rotunda's fidelity to the rule of law in general, and to the Constitution in particular, marks him as an "originalist," or what, as I indicated earlier, we are now popularly calling a "Constitutionalist." But heroic or otherwise, can that view be seriously defended these days? It is, again, as I have suggested, ridiculed in the academy, where it is said that "we really are all legal realists now,"³⁸ meaning that we are more sophisticated than simply to believe naively that adherence to precedent does in fact govern what happens in our courts, particularly the Supreme Court. The implication is that only a fool or a naïf could seriously embrace the rule of law.

³⁴ See generally JOHN W. DEAN, *BLIND AMBITION: THE WHITE HOUSE YEARS* (1976); see also JOHN W. DEAN, *THE NIXON DEFENSE: WHAT HE KNEW AND WHEN HE KNEW IT* (2014).

³⁵ John Dean, *R.I.P. Ron Rotunda—A Man Responsible for Watergate's Most Lasting Positive Impact*, VERDICT (Mar. 16, 2018), <https://verdict.justia.com/2018/03/16/r-p-ron-rotunda-man-responsible-watergates-lasting-positive-impact> [<http://perma.cc/QMB6-GK7C>].

³⁶ *Id.* Indeed, Ron Rotunda's anonymous reviewer name for Amazon.com was "Wily Reader." For his graceful review of my law professors' book, see Review of *Law Professors: Three Centuries of Shaping American Law* by Stephen Presser, AMAZON (Feb. 23, 2018), https://www.amazon.com/gp/customer-reviews/R22QNGQ5I2DJXH?ref=pf_vv_at_pdcetrw_srp [<http://perma.cc/7VQE-JFR4>].

³⁷ Josh Blackman, *Remembering Professor Ronald Rotunda*, JOSH BLACKMAN'S BLOG (Mar. 18, 2018), <http://joshblackman.com/blog/2018/03/18/remembering-professor-ronald-rotunda/> [<http://perma.cc/PY6Q-RRD2?type=image>]. For an example of Ron Rotunda's splendid dry wit, note his observation that, "One might think of the individual [J]ustices of the Court as a group of prima donnas united only by a common parking lot." Ronald D. Rotunda, *The Fall of Seriatim Opinions and the Rise of the Supreme Court*, VERDICT (Oct. 9, 2017), <https://verdict.justia.com/2017/10/09/fall-seriatim-opinions-rise-supreme-court> [<http://perma.cc/6LG5-AWKW>].

³⁸ See Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 503 (1988) ("To a great extent, we really are all legal realists now.").

That cannot be correct, but if Constitutionalism is, in fact, the belief that adherence to precedent is how we ought to operate, how then can one still venerate and subscribe to the principles, rules, and structures of a prescription for government composed by fifty-five white men, many of whom were slaveholders, in Philadelphia more than two centuries ago? For most modern law professors, Democrats, and media practitioners, the question answers itself. For them, the 1789 document is the product of racism, classism, sexism, homophobia, and other despised forms of bigotry, and thus, the original understanding deserves little or no deference. This appears to be the view of titans such as Supreme Court Justice Thurgood Marshall³⁹ and Harvard Law Professor and founder of Critical Legal Studies, Mark Tushnet.⁴⁰ Is there any convincing reply to such an argument?

There must surely be, or Ron Rotunda got it wrong, and the legal profession is composed of hypocrites greater than we have yet imagined. The problem, obviously, as already mentioned, is that even *Federalist* No. 78, Alexander Hamilton's famous defense of judicial review, is bottomed on the notion of popular sovereignty, of the ultimate constitutional power as vested in the people,⁴¹ so that Justices who nullify Congressional or Executive Acts that go beyond what the Constitution authorizes are only carrying out the will of the people expressed in the Constitution. If this is true, then Constitutionalism is the only appropriate judicial and political philosophy since it is the only one consistent with the principle of popular sovereignty, which is the foundation of our democratic republic. But if the Constitution is not the product of the people—and how can it be, if it was drafted by a tiny all-white male minority, and ratified by a process that excluded women, blacks, and the relatively property-less from participation—why should it be given contemporary binding authority? Could it be that Ronald Rotunda and the Originalists and Constitutionalists like him are basing their theories on a fundamental, dangerous, pernicious, and chimerical misconception?

³⁹ For Justice Marshall's view see Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 1–5 (1987).

⁴⁰ There are many works on the Constitution in which Mr. Tushnet has elaborated his views, but for a recent monograph arguing that the Constitution is best understood simply as the product of our politics at any given time, see generally MARK TUSHNET, *WHY THE CONSTITUTION MATTERS* 1 (2010).

⁴¹ *Federalist* No. 78 provides, in pertinent part, “that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority.” THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (1961).

When our politics appear to be as shifting and evanescent as what Burke called “the flies of a summer,”⁴² this is a poignant question. When all that seems to matter is the redress of racial, ethnic, or economic grievances, accumulated over centuries of slavery, misogyny, and a myriad of other oppressions, of what moment is that old 1789 parchment?

In an earlier time, one could simply subscribe to Benjamin Franklin and George Washington’s notion that the hand of Providence itself was guiding the Philadelphia Framers, and that it was divine inspiration, ultimately, that dictated the content of the Constitution.⁴³ Those of us still inclined to understand that a spiritual power does indeed dwell within us⁴⁴ might be able to accept this notion. This will not satisfy all, because ours is an increasingly secular age, and given the current tendency to reject the formerly well-known precept that the United States was a self-consciously Christian nation—a precept even acknowledged and apparently accepted by the Supreme Court itself⁴⁵—a religious basis for the Constitution would not be welcomed by all. There are those who try—unsuccessfully in my view—to claim that ours is a Godless Constitution.⁴⁶ That atheistic assertion would clearly not have been acceptable to those like Supreme Court Justice Samuel Chase, who frankly declared in the beginning of the nineteenth century that there could be no order without law, no law without morality, and no morality without

42 Ron Rotunda is probably best understood as a Burkean conservative, who, like Burke, saw society in general, and our English common law tradition in particular, as a compact among those who came before us, us, and those who are to follow. *See, e.g.*, EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 99 (1987). For example, Mr. Burke explains:

By this unprincipled facility of changing the state as often, and as much, and in as many ways, as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer.

Id.

43 For one of the most notable and popular efforts implicitly suggesting the influence of supernatural forces in the forming of the Constitution, see generally CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787 (1966).

44 For that argument from a traditional Christian perspective, see generally C.S. LEWIS, MERE CHRISTIANITY 225 (1952), and for an intriguingly similar argument made by one of most important thinkers of what became the critical legal studies movement, see generally ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 290 (1975).

45 *See* Holy Trinity Church v. United States, 143 U.S. 457, 471 (1892) (“These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.”).

46 *See generally* Stephen B. Presser, *Some Realism About Atheism: Responses to The Godless Constitution*, 1 TEX. REV. L. & POL. 87, 89–91 (1997).

religion.⁴⁷ Something like that spiritual foundation appears also to have rested at the core of Ronald Rotunda's beliefs.⁴⁸

Perhaps one could still argue for a natural law basis for the Constitution, even if one were inclined to reject the explicitly Christian view of the matter. The animating force of Thomas Jefferson's Declaration of Independence, that there are certain inalienable rights conferred on us by nature and nature's God, is, after all, thought to undergird the Constitution itself.⁴⁹ Surely there are some timeless principles of good government, as Hamilton, Madison, and Jay believed, and that what the authors of the *Federalist Papers* described as the emerging late eighteenth century "science of politics," as described in the work of such authors as the Baron de Montesquieu, Hugo Grotius, William Blackstone, and other European thinkers, could have pointed the way and was, in effect, incorporated in our charter of fundamental law.

Thus, as the *Federalist Papers* explained,⁵⁰ the constitutional structure sought, by employing checks and balances, the separation of governmental powers, and dual state and federal sovereignty, to provide a means by which arbitrary power would be restrained. As Madison put it in the famous *Federalist* No. 51, men not being angels, some sort of government was necessary, and, indeed, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."⁵¹ The principles of self-government and

⁴⁷ For the details of Justice Chase's views, see generally STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS, AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* 141–49 (1991) and PRESSER, *supra* note 10, at 84–91.

⁴⁸ Thus, in a learned meditation on Dante, and the question whether it is possible for lawyers to get to heaven, Ron Rotunda observes:

What empire meant to Justinian, Dante tells us, is not personal glory or family riches but peace under a rule of law that is just. Just laws are the earthly symbols of the divine. The great truths of the world are found in the great literature of the world. If modern day politicians and lawgivers seek Paradise, they should give us peace and just laws.

Ronald D. Rotunda, *Can Lawyers, Politicians, and Lawgivers Go to Heaven?*, VERDICT (July 17, 2017), <https://verdict.justia.com/2017/07/17/can-lawyers-politicians-lawgivers-go-heaven> [<http://perma.cc/8p2x-AZBU>].

⁴⁹ See SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 2–3 (1995) (reflecting on the Constitution as simply securing the rights enumerated in the Declaration).

⁵⁰ The *Federalist Papers* are not easy reading, but fortunately there is an inexpensive, readily available edition from Signet books that contains a fine introduction by Charles Kesler and the topical summaries for each essay. See generally Charles R. Kesler, *Introduction and Notes* to ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST PAPERS* (Clinton Rossiter ed., 2003) (1961) (Introduction and Notes 1999). For interpretive assistance, see also ANTHONY A. PEACOCK, *HOW TO READ THE FEDERALIST PAPERS* (2010), a guide published by the Heritage Foundation. A reading of the *Federalist Papers* suggests the profound influence of European thinkers.

⁵¹ *THE FEDERALIST NO. 51*, at 319 (James Madison) (Clinton Rossiter ed., 2003) (1961).

self-restraint contained in the Constitution were designed to solve these problems, and did so using the latest and most sophisticated political theory available.

But still, those theories are now centuries old, and, so the argument of those who would champion a “Living Constitution” goes, our society is different, our needs are different, and the elite aristocracy of government by one’s betters, the idea in which such as Alexander Hamilton surely believed,⁵² is now generally regarded as completely unsuitable. It’s no surprise, then, that the “Living Constitution” view, the set of beliefs that maintains that it is the job of Justices, aided by academics, perhaps, to alter the meaning of the Constitution, according to the evolving modern standards of decency, equity, dignity, and fairness, to fit the needs of the times is in the ascendance, and is so dominant that one risks ridicule to champion Originalism.⁵³

How then to account for the fact that someone like Ronald Rotunda was willing heroically to risk that ridicule, and to defy the conventional “Living Constitution” platitudes of the academy and the times? One explanation is that Ron Rotunda, who was taken from us too early, still lived long enough to remember a different set of assumptions and behaviors that allowed him to question the “politically correct” manifestations of our age. He was a critic, for example, of the contemporary condemning of “microaggressions,” and the concomitant attempt to silence proponents of views unpopular on the ideologically-driven campuses and left-dominated cities of our time.⁵⁴ Another explanation is that Ron Rotunda was deeply steeped in the wisdom available in the Western Canon,⁵⁵ and was able to deploy, in support of the arguments he made, examples furnished from such as Virgil, Justinian, and Dante.⁵⁶ A third explanation, already alluded to, is that the same moral and

⁵² For the best introduction to Alexander Hamilton’s beliefs, see the magisterial RONALD CHERNOW, *ALEXANDER HAMILTON* 4 (2004), the inspiration for the popular Broadway play.

⁵³ For a fine study of the notion of a “Living Constitution,” and its defects, see generally BRADLEY C.S. WATSON, *LIVING CONSTITUTION, DYING FAITH: PROGRESSIVISM AND THE NEW SCIENCE OF JURISPRUDENCE* (2009).

⁵⁴ See, e.g., Ronald D. Rotunda, *George Wallace at Harvard – The Good Old Days of Campus Free Speech*, VERDICT (May 8, 2017), <https://verdict.justia.com/2017/05/08/george-wallace-harvard-good-old-days-campus-free-speech> [<http://perma.cc/UK7D-VGLC>] (pointing out that when Ron Rotunda was in college speakers such as George Wallace could be heard on campus and their thoughts freely evaluated, and, where appropriate, ridiculed and condemned, and criticizing the modern tendency to silence speakers whose ideology or views one finds distasteful); see also Ronald D. Rotunda, *Higher Education and Teaching English*, VERDICT (Aug. 3 2015), <https://verdict.justia.com/2015/08/03/higher-education-and-teaching-english> [<http://perma.cc/VD3M-S5QV>] (criticizing the trend in higher education to avoid “microaggressions” and issue “trigger warnings”).

⁵⁵ See generally HAROLD BLOOM, *THE WESTERN CANON: THE BOOKS AND SCHOOL OF THE AGES* (1994).

⁵⁶ See Rotunda, *supra* note 48.

spiritual understanding that served as a source of reinforcement of the beliefs of our Framers must have moved Ron Rotunda, who, for example, lamented what he saw as a pernicious trend on the part of state and federal governments to weaken religion,⁵⁷ and warned against the movement to legalize assisted suicide and promote euthanasia.⁵⁸ A fourth and final reason is that Ronald Rotunda had a healthy distaste for “experts” who thought they knew better than the American people, and, indeed, he understood the value of the “wisdom of crowds,” the basic principle of popular sovereignty that is the essence of our Republic.⁵⁹

There are, then, some hints of what sustained Ron Rotunda in his views, and perhaps it is appropriate, since my views are basically the same as his, to suggest why I, too, have chosen to resist the dominant legal academic consensus and cling to the earlier Constitutional ethos. Ron Rotunda and I shared the idea that in the 2016 Presidential election we were making a choice between continuing with a political party, the Democrats, that increasingly seemed to be straying from the rule of law in general and Constitutionalism in particular, and, instead, going with a Republican candidate, Donald Trump, who pledged that he would return the courts and the polity to an earlier traditional view. It was not clear that then-candidate Trump was deeply influenced by, much less had ever read the *Federalist Papers*, but the fact that he was influenced by the Federalist Society in his picks for the judiciary was comforting. And it wasn’t just a change in our politics that Donald Trump represented for us.

At some level, it seemed that then-candidate Trump was expressing the increasingly evident understanding that our culture made a disastrously wrong turn, in the late sixties and early seventies, and that the molders of our public opinion, probably unduly influenced by trendy European Marxist theories,⁶⁰ simply embarked on a program of wildly misperceiving reality. In our own time, this difficulty has become so acute that what formerly seemed obvious to virtually all, one or two generations ago, is now anything but accepted in the academy, in the media, and in at least one of our

⁵⁷ Ronald D. Rotunda, *The Government Campaign to Weaken Religion*, VERDICT (June 9, 2015), <https://verdict.justia.com/2015/06/09/the-government-campaign-to-weaken-religion> [http://perma.cc/92M2-YVLT].

⁵⁸ Ronald D. Rotunda, *The Way of Death in the Netherlands, Oregon, and, Perhaps, California*, VERDICT (Apr. 27, 2015), <https://verdict.justia.com/2015/04/27/the-way-of-death-in-the-netherlands-oregon-and-perhaps-california> [http://perma.cc/UM4A-R6GT].

⁵⁹ On Ron Rotunda’s embrace of the wisdom of crowds and the rejection of experts, see his wonderful blast at Jonathan Gruber, the Obamacare architect who denigrated the wisdom of the American people. Ronald D. Rotunda, *Jonathan Gruber and the Wisdom of Crowds*, VERDICT (Dec. 29, 2014), <https://verdict.justia.com/2014/12/29/jonathan-gruber-wisdom-crowds> [http://perma.cc/X3DX-9SRS].

⁶⁰ For that story, see WALSH, *supra* note 2.

political parties. And yet, as Michael Walsh recently wrote, attempting to invoke some much-needed common sense, in the manner Ron Rotunda often did:

[W]e need not argue that traditional norms, maintained across centuries, are the product of “oppression” or conspiracy: we can experience their fundamental truths in everything from *The Epic of Gilgamesh*, which dates from before 2500 B.C., to the literature, poetry, films, and stage works of our own time. What we find is a remarkable consensus about basic principles of right and wrong; of the proper, if imperfect, relations between the sexes; of the importance of children to the health and future of a culture; of the nature, meaning, and need for heroism.⁶¹

It is that kind of common sense, then, that kind of simple recognition of the obvious, that kind of acknowledgement of the consensus expressed by our literary, cultural, and legal traditions, and that innate sense of the heroic, that was so important to Ron Rotunda’s beliefs, and I think he got it right. There is more. One can find in Ron Rotunda’s writing, particularly the short essays he did for the *Verdict* website, an echo of the views stumbled upon by Old Etonian and former Marxist David Goodhart, who, as a mature man, came to understand:

The belief, for example, that men and women are equal but not identical and that some sort of gender division of labour in the home and the broader society remains popular. That order and legitimate authority in families, schools and the wider society are a necessary condition of human flourishing, not a means of crushing it. That religion, loyalty and the wisdom of tradition deserve greater respect than is common among “blank sheet” liberals who tend to focus narrowly on issues of justice and harm. As [Jonathan] Haidt points out — contrary to the old claim that the right is the stupid party — conservatives can appreciate a wider range of political emotions than liberals: “It’s as though conservatives can hear five octaves of music, but liberals respond to just two, within which they have become particularly discerning.”⁶²

I think Goodhart could have been channeling Ronald Rotunda.

What then, might one conclude about the future of our polity, influenced by what I have here described as Ron Rotunda’s Constitutionalist heroism? I think one would be led to ruminate not only what conservatives understand that liberals do not with

⁶¹ MICHAEL WALSH, *THE FIERY ANGEL: ART, CULTURE, SEX, POLITICS, AND THE STRUGGLE FOR THE SOUL OF THE WEST* 14 (2018).

⁶² David Goodhart, *Why I left my Liberal London Tribe*, *FIN. TIMES* (Mar. 17, 2017), <https://www.ft.com/content/39a0867a-0974-11e7-ac5a-903b21361b43>. The reference to Jonathan Haidt is to his book, *JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 153–54 (2012), in which he argues that Conservatives function along five moral dimensions: (1) care/harm, (2) fairness/cheating, (3) loyalty/betrayal, (4) authority/subversion and (5) sacredness/degradation, while Liberals function only pursuant to the first two. *Id.*

regard to human flourishing, but also on how best to preserve our form of government, and to recognize the enduring meaning of the fact that ours is a republic and not a democracy.

Thus, underlying much of our recent debate over the law and the proper constitutional perspective is a deeper anxiety over just what form of government we actually have or ought to have in this country. Democrats, as the name of their party implies, favor democratic government, and there has even been an op-ed in the *New York Times* claiming that the Supreme Court is now illegitimate because the President who nominated them, and the senators who confirmed Justice Brett Kavanaugh and Justice Neil Gorsuch actually represent less of the popular vote than their opponents.⁶³ The obvious difficulty with this argument, of course, is that we are not now, nor have we ever been a democracy where only the numerical majority of voters prevail.

Ours, as the pledge of allegiance, recited by so many school children and new citizens for so long, makes clear, is a republic, and not a democracy.⁶⁴ Bearing in mind the obvious impossibility of conducting a direct democracy in a nation of millions of people, there are positive features in a republic which dictated its choice to our Framers and still sustains it. The most obvious and popular meaning of “republic” is representative government, which solves the difficulty of direct democracy by creating an indirect method of rule which can reduce the required participation in government to manageable levels.

There is a second, older meaning of the word “republic,” however, often forgotten these days, but which ought to be borne more in mind in these fraught and dangerous times, when demagoguery rises to a fever pitch. That second meaning flows directly from the Latin derivation of the term, *Res publica*, which we might freely translate as “public thing,” or “what is in the best interests of all of us,” or, perhaps, “what is natural and best for any government,” or, in the manner that Rousseau⁶⁵ and others

⁶³ This is the argument made in Michael Tomasky, *The Supreme Court's Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html>. For the *New York Times* editorial board's continuing belief in the inappropriateness of Justice Kavanaugh, see The Editorial Board, *The High Court Brought Low*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/opinion/brett-kavanaugh-supreme-court-trump.html>.

⁶⁴ “I pledge Allegiance to the flag of the United States of America and to the Republic for which it stands, one nation under God, indivisible, with Liberty and Justice for all.” *The Pledge of Allegiance*, US HISTORY.ORG, <http://www.ushistory.org/documents/pledge.htm> [<http://perma.cc/8Q3J-F7A7>].

⁶⁵ See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 19 (Jonathan Bennett ed., 2017) (1762), <https://www.earlymoderntexts.com/assets/pdfs/rousseau1762.pdf> [<http://perma.cc/38YG-F4F9>] (“So I give the name ‘republic’ to any state governed by laws, whatever form its

understood the term, as a government *that adheres to the rule of law*. That is what John Adams meant when he wrote into the Massachusetts Constitution of 1780 that its aim was to secure a “government of laws and not of men.”⁶⁶ That is what republican government is supposed to be all about, that’s why so many Americans appear to have reacted adversely in 2016 to a government that seemed to be favoring redistribution and regulation in the interests of favored causes and cronies, and that’s why the Constitutionalist Ronald Rotunda found himself a happy and heroic partisan of the Republican party and its candidate.

administration takes; for only when the laws govern does the public interest govern, and the public thing is something real.”)

⁶⁶ See MASS. CONST. art. XXX, drafted by John Adams in 1780:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Id.

**Ronald D. Rotunda: An Advocate for
Standards of Professional Conduct in the
Legal Profession:*
*The Relentless Pursuit of the Professional
Responsibility of Lawyers Holding America's Lawyers
Accountable***

*John S. Dzienkowski***

I. INTRODUCTION

Ronald D. Rotunda was an excellent student at Harvard College and Harvard Law School, and he became a lifelong student of the law.¹ For over forty years, he continued to research and write on so many varied topics in constitutional law and legal ethics.² Ronald Rotunda taught thousands of students how to become better lawyers. His body of works made him one of the most frequently cited legal academics in the country.³ Early on in Ronald Rotunda's academic career, he decided to take on some of the most controversial topics directly, and that mantra continued throughout his life.⁴

After law school, Ron Rotunda clerked on the Second Circuit for Judge Mansfield and began his legal career at Wilmer, Cutler & Pickering in Washington.⁵ Two years later, he accepted a position that would help shape his entire career. In April 1973, Ron became Assistant Majority Counsel for the Senate Select

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** Professor of Law & Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process, The University of Texas at Austin. I would like to thank Donald Rotunda for his help in preparing this Article.

¹ See Curriculum Vitae of Ronald D. Rotunda 2 (last updated Dec. 18, 2017) (on file with Chapman University Dale E. Fowler School of Law), <https://www.chapman.edu/our-faculty/files/curriculum-vita/Rotunda-Ronald-CV.pdf> [<http://perma.cc/K33X-T88D>].

² See *id.* at 5–52.

³ See Brian R. Leiter, *Brian Leiter's Top 119 Cited Faculty 2002–03*, BRIAN LEITER'S L. SCH. RANKINGS, http://www.leiterrankings.com/faculty/2002faculty_impact_cites.shtml [<http://perma.cc/DJT6-ZBZA>] (listing Professor Rotunda as the eleventh most cited law faculty member in the U.S.).

⁴ Note, throughout this Article, I refer to many of my own personal experiences and conversations in working with Professor Rotunda. Throughout this Article I refer to my dear friend and colleague as Ron.

⁵ See Rotunda, *supra* note 1.

Committee on Presidential Campaign Activities.⁶ In his work for the Senate, he developed interests in constitutional law and legal ethics.

This Article focuses on Ron Rotunda's views on legal ethics developed through a lifetime of teaching, writing, and consulting in this subject. I am privileged to have met Ron in an interview at the University of Illinois. The judge I clerked for, Robert Keeton, told me in 1985 to make sure to develop teaching and writing interests in legal ethics, and Ron decided to become my mentor. Over the years, we corresponded and met at various conferences and, eventually, he asked me to join his American Bar Association (ABA) treatise on professional responsibility.⁷ Eventually, Ronald Rotunda and Thomas Morgan asked me to join their casebook on the same subject.⁸ My thirty year friendship with my mentor, Ron, has taught me so much about writing and thinking about legal ethics problems. In this Article, I present to you my views on Ronald Rotunda's perspective on the subject of legal ethics.

First, I will examine Ron Rotunda's role in elevating the subject of legal ethics into a legal discipline central to lawyers and legal education. Second, I will explain how Ron Rotunda believed that rules and norms are needed to constrain human frailties, and his adherence to clearly written and transparent standards. Finally, I will examine his belief in accountability and civility. Each of these sections will give examples from his writing and life to illustrate his philosophy of legal ethics.

II. PROFESSIONAL RESPONSIBILITY AS A LEGAL DISCIPLINE

Before Watergate, the subject of professional responsibility was an elective in law school.⁹ Most lawyers in the 1900s had developed their practices skills under the 1908 ABA Canons of Professional Conduct.¹⁰ Those original 32 Canons tended to focus upon clear wrongs and aspirational standards.¹¹ As law practice became more complex to reflect the industrialization of the

⁶ *See id.*

⁷ *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY (2005–2006 ed. 2005).

⁸ *See* THOMAS D. MORGAN, RONALD D. ROTUNDA & JOHN DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS (11th ed. 2011).

⁹ *The Legacy of Watergate: Rethinking Legal Ethics*, LANDMARK CASES OF THE U.S. SUP. CT., http://landmarkcases.org/en/Page/728/The_Legacy_of_Watergate_Rethinking_Legal_Ethics [<http://perma.cc/PCQ4-A2SG>] (following Watergate, “[f]or the first time, by the late 1970s, every law school in the country offered a course on professional responsibility”).

¹⁰ *See* Am. Bar Ass'n, *Report of the Thirty-First Annual Meeting of the American Bar Association* 567, 575–86 (1908); *see also* James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2395–96 (2003) (discussing the history of the 1908 Canons).

¹¹ *See* Am. Bar Ass'n, *supra* note 10.

nation, the ABA added Canons 33 through 47 to address the expanded role of lawyers.¹²

The organized legal profession realized that the 1908 Canons needed more than the mere addition of a few rules—the profession needed a different approach to regulating lawyers altogether. Between 1924 and 1964, the ABA organized five different committees to propose a complete revision to the 1908 Canons.¹³ Four of these groups disbanded without any proposals.¹⁴ The fifth group, the Wright Committee, created in 1964, managed to develop the Model Code of Professional Responsibility, which was adopted by the House of Delegates in 1969.¹⁵ Ron was a second and third year student at Harvard Law School at this time.

By the time Ron Rotunda entered law practice at Wilmer, Cutler & Pickering,¹⁶ the states began to consider the adoption of the Model Code.¹⁷ The shift from the Canons to the Model Code represented an evolution in the regulation of lawyers. The Canons merely contained prohibitions of clear wrongs and aspirational standards, while the Model Code had Canons (aspirational broad statements), Disciplinary Rules (specific mandatory guidance for lawyers to follow), and Ethical Considerations (suggested—but not mandatory—broader guidance for lawyers).¹⁸ The Model Code sought to give lawyers far more detail in how to represent clients in an adversary system.¹⁹ Ron's formative training as a young lawyer introduced him to this new code of conduct for regulating lawyers.

Ron Rotunda, as a lawyer for the Senate Committee investigating President Nixon, gained a unique window into a lawyer President by supervising government lawyers for the Executive Branch and President Nixon's private lawyers, led by Professor Charles Alan Wright, who argued for a broad view of executive privilege before the United States Supreme Court.²⁰ The summer of 1974 witnessed the unanimous decision of the

¹² Altman, *supra* note 10, at 2396 n.8.

¹³ See John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 60–64 (2013).

¹⁴ See *id.* at 61.

¹⁵ See *id.* at 61–62.

¹⁶ See Rotunda, *supra* note 1.

¹⁷ See Douglas R. Richmond, *Why Legal Ethics Rules are Relevant to Lawyer Liability*, 38 ST. MARY'S L.J. 929, 935 (2007) (explaining how the Model Code of Professional Responsibility became effective in January 1970 and was subsequently adopted by most states).

¹⁸ See MODEL CODE OF PROF'L RESPONSIBILITY (AM. BAR ASS'N 1980).

¹⁹ See, e.g., *id.* at EC 7–19.

²⁰ See Rotunda, *supra* note 1; see also Charles Alan Wright, *Law Expert Who Aided Nixon*, L.A. TIMES (July 8, 2000), <https://www.latimes.com/archives/la-xpm-2000-jul-08-me-49649-story.html> [<http://perma.cc/59LN-NEZR>].

Court, holding that executive privilege based upon grounds of general interests of confidentiality must yield in a criminal case involving the President.²¹ And, the rule of law prevailed in the Watergate case to lead to many positive changes.²²

The Watergate scandal involved so many members of the legal profession that Marc Galanter noted that this incident accelerated the decline in the legal profession.²³ One of the lawyers working for President Nixon during the Watergate scandal, Egil “Bud” Krogh, Jr., said, “In law school, I took this curious course on ethics . . . [b]ut there was nothing about conflicts or the role of lawyers. We were in completely unknown territory. I was completely unprepared. My loyalty to Richard Nixon was personal and total.”²⁴ John Dean echoed similar thoughts, “When I was White House counsel, I thought Richard Nixon was my client.”²⁵ Perspectives such as these have undergone dramatic change since the 1970s.

The lessons of Watergate influenced Ron Rotunda’s views on how lawyers should be governed by the rule of law, developed through careful consideration of all of the relevant policies.²⁶ In one of his first writings on the subject of legal ethics, Ron reviewed a book by Monroe Freedman on legal ethics.²⁷ Monroe Freedman was well-known for his position on how lawyers should deal with a criminal defendant client’s decision to commit perjury on the stand in a criminal trial. Monroe Freedman argued that, because of the power of government prosecution and the defendant’s constitutional rights, lawyers should never disclose client perjury in a criminal trial.²⁸ Ron Rotunda, as an assistant professor, critiqued this view as not taking into account important legal rules and failing to consider the policy

²¹ See *United States v. Nixon*, 418 U.S. 683, 713 (1974).

²² See Tom Brokaw, *Politicians come and go, but rule of law endures*, NBC NEWS (Aug. 6, 2004, 12:12 PM), http://www.nbcnews.com/id/5593631/ns/us_news-nixon_anniversary/t/politicians-come-go-rule-law-endures/#.XliCVihKiM8 [<http://perma.cc/MN8Z-4JF7>].

²³ Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 812 (1998).

²⁴ Mark Curriden, *The Lawyers of Watergate: How a ‘3rd-Rate Burglary’ Provoked New Standards for Lawyer Ethics*, ABA J. (June 2012), http://www.abajournal.com/magazine/article/the_lawyers_of_watergate_how_a_3rd-rate_burglary_provoked_new_standards [<http://perma.cc/8BQF-J7HG>].

²⁵ *Id.*

²⁶ See John Dean, *R.I.P. Ron Rotunda—A Man Responsible for Watergate’s Most Lasting Positive Impact*, VERDICT (Mar. 16, 2018), <https://verdict.justia.com/2018/03/16/r-p-ron-rotunda-man-responsible-watergates-lasting-positive-impact> [<http://perma.cc/R734-3MQ7>].

²⁷ See Ronald D. Rotunda, *Review of Freedman’s ‘Lawyers’ Ethics in An Adversary System,’* 89 HARV. L. REV. 622, 622 (1976) (reviewing MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* (1975)).

²⁸ Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1477–78 (1966).

considerations on both sides of the issue.²⁹ Although Ronald Ron's critique was forceful, it was done with respect and eloquence. He acknowledged that these issues were difficult ones which needed careful debate and consideration.³⁰

Ron Rotunda went to law school at a time when legal ethics was an optional course,³¹ and just a few years later, legal ethics became a mandatory course for all law students graduating from ABA-accredited schools.³² At the Illinois College of Law, Ron and Tom Morgan set out to develop materials for the teaching of legal ethics in this post-Watergate world.³³ They witnessed the ABA's passage of the Model Code and saw the development of standards far more detailed than in the 1908 Canons. Ron Rotunda and Tom Morgan needed to balance the teaching of mandatory disciplinary rules with aspirational ethical considerations. They saw the evolution of legal ethics as it developed into a substantive law field addressing the professional responsibility of lawyers.³⁴

Ronald Rotunda and Tom Morgan decided the best way to teach law students who had no experience in the practice of law was to develop narrative problems and to ask questions.³⁵ At that time, there were only a handful of published cases dealing with ethics issues. Thus, they organized their casebook on professional responsibility into eight chapters illustrated by forty problems.³⁶ Their casebook soon carved out a niche in the teaching of professional responsibility that has remained dominant for almost half a century. In Ron's words, "[t]hose problems and the basic organization of the book have remained very similar over the years, even though the answers to many of the questions have changed because the rules have changed."³⁷ The narratives presented mere hypotheticals to students, and now decades later, Ron noted, "Sadly, life imitates art, and at this point, we have

²⁹ See Rotunda, *supra* note 27, at 623 (stating that Freedman's "conclusions are suspect").

³⁰ See *id.*

³¹ See Ronald D. Rotunda, *Teaching Professional Responsibility and Legal Ethics*, 51 ST. LOUIS U. L.J. 1223, 1224 (2007) ("During law school, I never took a class in Professional Responsibility or Legal Ethics. There was no requirement to take such a course, and, like most students, I never did.").

³² See Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 148 (1996) (noting that the ABA adopted, in August 1973, the requirement that law schools teach legal ethics to students).

³³ See Rotunda, *supra* note 31, at 1224–25.

³⁴ See *id.* at 1225–26.

³⁵ See *id.* at 1226.

³⁶ See generally RONALD D. ROTUNDA & THOMAS D. MORGAN, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* (1st ed. 1976).

³⁷ See Rotunda, *supra* note 31, at 1226.

many examples of lawyers paying the price for ethical violations that the past punished less harshly or not at all.”³⁸

Ron Rotunda continued to teach and write about professional responsibility.³⁹ His scholarship focused on the intersection of client misconduct, lawyer duties to clients and the legal system, and confidentiality and privilege issues. These are the very issues that confronted President Nixon’s lawyers. Ron Rotunda wrote on topics such as insider trading, representing corporations, and whistleblowing.⁴⁰ When lawyers represent entities, whether they are government clients or corporate clients, the issues and questions are very similar. His work forced lawyers, scholars, and the regulators to examine these issues in detail. Ron Rotunda frequently criticized the organized bar when he believed they had failed to properly address a pressing issue for lawyers.⁴¹ He chastised the American Law Institute for failing to faithfully restate the law governing lawyers.⁴² Ron Rotunda spoke his views, even when they were unpopular. In the end, he wanted a better legal profession, in a better society.⁴³

In 2000, the American Bar Association Center for Professional Responsibility, sought an author to write a book on professional responsibility. They turned to Ronald Rotunda and he produced a work with over five hundred pages of commentary on the law of lawyering.⁴⁴ *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility*, published annually, has become a standard reference text for lawyers and judges researching the field.⁴⁵

³⁸ *Id.* at 1227.

³⁹ See Rotunda, *supra* note 1, at 5–52.

⁴⁰ See, e.g., Ronald D. Rotunda, *When the Client Lies: Unhelpful Guidelines from the ABA*, 1 CORP. L. REV. 34 (1978); Robert C. Hacker & Ronald D. Rotunda, *The Reliance on Counsel Defense in Securities Cases: Damage Actions versus Injunctive Actions*, 1 CORP. L. REV. 1471 (1978); Robert C. Hacker & Ronald D. Rotunda, *The Duty to Take Remedial Action*, 2 CORP. L. REV. 159 (1979); Robert C. Hacker & Ronald D. Rotunda, *Waiver of Attorney-Client Privilege*, 2 CORP. L. REV. 250 (1979).

⁴¹ See, e.g., Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting “Diversity” But Not Diversity of Thought*, HERITAGE FOUND. (Oct. 6, 2016), <https://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought> [<http://perma.cc/KKN3-UCPV>].

⁴² See Ronald D. Rotunda, *Increased Controversy Over the Future of American Law Institute*, VERDICT (June 20, 2016), <https://verdict.justia.com/2016/06/20/increased-controversy-future-american-law-institute> [<http://perma.cc/45UV-5WA7>].

⁴³ See Rotunda, *supra* note 31, at 1224 (recounting three of Ron’s early memories of legal ethics that had an influence on his views: “Legal ethics told us that it was *unethical* to charge too low a fee; that it was *unethical* for banks to compete with lawyers—even when the bank used lawyers duly admitted to the bar to perform competently a service, at no charge, for its customers, who did not complain. And, finally, given the restrictions on competition with lawyers, it should not be surprising that lawyers can make a lot of money” (emphasis in original)).

⁴⁴ See ROTUNDA & DZIENKOWSKI, *supra* note 7.

⁴⁵ See *id.*; see also Lucian T. Pera, *In search of an ethics guide*, ABA BUS. L. SEC. (Nov./Dec. 2006), <https://apps.americanbar.org/buslaw/blt/2006-11-12/pera.shtml>

The ABA chose Ron Rotunda even though they knew he had criticized their positions in the past and would continue to do so. The ABA never once asked him to change a word, even when Ron Rotunda complained that a newly enacted rule was unconstitutional.

In conclusion, Ron Rotunda's experiences working on the Senate Watergate Committee influenced his views about lawyering in the wake of client crime.⁴⁶ His academic career was devoted to convincing others that legal ethics was a substantive field of law. And, that the individual rules needed to be properly crafted to give lawyers specific guidance. Ron Rotunda was an important agent of change for professional responsibility. His work in the field has left an important contribution to the legal profession.⁴⁷

III. THE IMPORTANCE OF CLEARLY WRITTEN AND TRANSPARENT RULES TO CONSTRAIN THE MORAL FRAILTIES OF LAWYERS

As a devout Catholic, Ron believed that, overall, human beings are good people capable of being tempted to commit sin, since self-interest can often cloud a human being's judgment. He witnessed a President and Vice President become involved in illegal activities, and, he saw well-educated lawyers make mistakes of law and judgment.⁴⁸ The number of lawyers involved in the Watergate scandal made an indelible impression upon Ron and that affected how he thought about the design of the ethics rules.⁴⁹

In discussing the attorney's duty to report misconduct of other lawyers to disciplinary authorities (currently codified in Model Rule 8.3), Ron Rotunda stated:

First, most lawyers do obey the law. The good apples still outnumber the bad apples; so if the law says that lawyers must report (even if the client instructs them not to report) and the information is not protected by the evidentiary privilege, then lawyers will report. Second, many lawyers who do come across truly serious misconduct by other lawyers want to report to the disciplinary authorities. They are normally reluctant, on mere suspicion or slight infractions, to raise their fingers and accuse their fellow lawyers, but when the action is serious enough and the evidence is convincing, the empirical data indicates that lawyers desire to bring corrupt members of the bar to the attention of the disciplinary authorities.⁵⁰

[<http://perma.cc/6WAD-KBQV>] (recommending Ron Rotunda's work for the regular lawyer in need of an ethics guide).

⁴⁶ Dean, *supra* note 26.

⁴⁷ See Pera, *supra* note 45 (noting Rotunda's guide "includes a pretty complete treatment of almost every ethics issue you will ever see").

⁴⁸ See Rotunda, *supra* note 31, at 1225.

⁴⁹ See *id.* at 1225–26.

⁵⁰ Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 992 (1988).

He argued that a clear rule requiring disclosure serves an important function. It reinforces the societal goal of bolstering the effectiveness of the disciplinary system.⁵¹ A rule requiring disclosure reduces the “internal debate” within the reporting lawyer’s conscience “to weed out the corrupt element” in light of the view that disclosure involves snitching, squealing, or tattling.⁵² In Ron Rotunda’s view, a rule is needed to tip the analysis in the direction for a properly functioning regulation of lawyers.⁵³

Ron Rotunda viewed many problems of ethics as issues that involved the balancing of binary interests. For example, in Watergate, the lawyers were balancing protecting their perceived client, Richard Nixon, even when they knew the conduct at issue involved crimes and fraud. In some instances, clients specifically ask lawyers to follow a directive. In other instances, the disclosure involves a confidence. Yet in others, the disclosure might injure the legal interests of the client. In some cases, the conflict can come from an interest of the lawyer—sometimes, another client or a personal interest of the lawyer. In each of these cases, Ron Rotunda wanted a debate of the policy considerations on each side and a clear rule to govern the lawyer’s conduct. And, throughout his career, the law clearly moved to protecting the tribunal, the rule of law, the legal profession, and society as a whole.

It is not an accident that some of Ron Rotunda’s early work involved client crimes, and, in some cases, corporate misdeeds. In his first work in the legal ethics area, he confronted Monroe Freedman’s view that lawyers should not violate client confidences and should not make any disclosures when a criminal defendant client intends to commit perjury on the stand.⁵⁴ Ron Rotunda confronted this argument in several different ways. First, he noted that confidentiality and privilege are not absolute and have many exceptions under the rule of law and when performing one’s professional employment.⁵⁵ Ron Rotunda complained that Monroe Freedman did not acknowledge any of these exceptions and did not make a normative argument for complete confidentiality in his criminal defense context.⁵⁶ Second, Ron Rotunda pointed out that the rules protect many

⁵¹ *See id.* at 978.

⁵² *Id.*

⁵³ *See id.* (“[M]alpractice suits and motions for disqualification are not the only way—nor are they supposed to be the primary way—to enforce the minimum ethics of the legal profession.”).

⁵⁴ Rotunda, *supra* note 27, at 622–23.

⁵⁵ *Id.* at 624.

⁵⁶ *Id.* at 625.

different interests.⁵⁷ Although clients are one important interest group, the rules must also consider “the lawyer’s responsibility to his fellow attorneys, to the public, to the court, and to himself.”⁵⁸ Ron Rotunda argued that rules of professional conduct balance those different interests in complex ways to resolve difficult ethics issues, and that a single interest analysis was incomplete.⁵⁹ Third, Ron Rotunda did not believe that clients will be less forthright with lawyers about the facts even if lawyers inform clients that they should not commit perjury on the stand and warn them that if they do, the lawyer has some obligation to the court.⁶⁰ And finally, Ron Rotunda was not so sure that a lawyer who elicits perjurious testimony from a client does not violate a statute that forbids subornation of perjury.⁶¹ In the end, Ron Rotunda did not want lawyers to continue to assist and represent individual, government, or corporate clients involved in crimes or frauds on the court.

When the ABA adopted the Model Rules in 1983, Ron Rotunda was similarly critical of the effort because it stopped short of requiring disclosure of client crime that did not involve death or bodily harm.⁶² His thorough article methodically goes through the duties of lawyers when their clients commit crimes under the 1908 ABA Canons, the 1969 Model Code, and the newly adopted 1983 Model Rules.⁶³ Ron Rotunda strongly disagreed with the voices within the ABA that stated any inroad into client confidentiality would significantly undermine the attorney-client relationship.⁶⁴ But, he accepted the difficult choices that the drafters had to balance and was content with the compromise:

The final draft of the Model Rules does forbid blowing the whistle on the client, but it allows the lawyer to wave the red flag. This final draft draws some very fine distinctions. But since the effect of a notice of withdrawal is to wave the red flag and put almost everyone on clear notice, the concept of a notice of withdrawal is a significant addition to the law of ethics. . . . The responsibility of a lawyer to blow the whistle, or to withdraw silently or noisily, or to continue representation as if nothing had happened, is an important matter for the courts and practitioners. The Model Rules tell us that a lawyer need not be a hired gun. Nor is the lawyer a Pontius Pilate, who tries to wash his or her hands of the whole affair and silently walk away. Nor is the lawyer a fifth columnist or an undercover cop on the

⁵⁷ *Id.* at 628.

⁵⁸ *Id.* (footnote omitted).

⁵⁹ *Id.*

⁶⁰ *Id.* at 630–31.

⁶¹ *Id.* at 632.

⁶² See Ronald D. Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 OR. L. REV. 455, 471 (1984).

⁶³ See generally *id.*

⁶⁴ See *id.* at 477.

beat. Instead, the Model Rules in this area attempt to balance complex and competing interests and to steer between disclosure and silence in order to assure that zealous representation does not become overzealous representation.⁶⁵

This demonstrates how carefully Ron Rotunda balanced the role of the lawyer as the advocate of the client, with the lawyer's duties to society. He steadfastly argued against lawyer complicity in client crimes and frauds, yet he understood the complications if the lawyer were to completely abdicate obligations to the client.⁶⁶ At least until the Enron, Worldcom, and Tyco scandals of the 2000s, withdrawal was a compromise he could live with for the modern lawyer confronted with client crimes and fraud.⁶⁷

IV. THE IMPORTANCE OF ACCOUNTABILITY AND CIVILITY

“Sunlight is said to be the best of disinfectants; electric light the most efficient policeman,” noted Ron Rotunda, quoting Justice Brandeis, in a discussion of how government can drain the swamp.⁶⁸ Ron Rotunda was a strong defender of transparency in government and in regulation.⁶⁹ In this discussion, I focus upon his views in the areas of professional responsibility, but these principles pervaded his thoughts regardless of the subject area. Ron Rotunda believed that open debate and discussion led to better decision making even when the discussions were difficult or heated.⁷⁰

In the late 1980s, the Illinois Supreme Court issued a very influential decision on a lawyer's duty to inform the disciplinary authorities about another lawyer's misconduct.⁷¹ The decision involved an attorney who had been hired by a client whose first personal injury lawyer had stolen a large portion of her tort settlement.⁷² The attorney negotiated a settlement that included an agreement not to report the first lawyer to the bar authorities.⁷³ When the first lawyer did not pay the settlement, a lawsuit was filed, and the court discovered the agreement not to report the first lawyer to the bar.⁷⁴

⁶⁵ *Id.* at 484 (footnote omitted).

⁶⁶ *See id.* at 474–75.

⁶⁷ MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2), 1.6(b)(3), 1.16 (AM. BAR ASS'N 2018).

⁶⁸ Ronald D. Rotunda, *How to Drain the Swamp? Use a Flashlight*, VERDICT (Mar. 27, 2017), <https://verdict.justia.com/2017/03/27/drain-swamp-use-flashlight> [<http://perma.cc?TN3K-QXNJ>].

⁶⁹ *See, e.g.*, Ronald D. Rotunda, *Cameras in the Supreme Court*, VERDICT (Nov. 9, 2015), <https://verdict.justia.com/2015/11/09/cameras-in-the-supreme-court> [<http://perma.cc/88LN-YS7V>] (arguing in favor of cameras in the courtroom because “[w]e deserve to know about the caliber of our [J]ustices without any reporters interpreting for us”).

⁷⁰ *See* Rotunda, *supra* note 50, at 996.

⁷¹ *See In re Himmel*, 533 N.E.2d 790, 795–96 (1988).

⁷² *See id.* at 791.

⁷³ *See id.*

⁷⁴ *See id.*

The Illinois Supreme Court ultimately suspended the second lawyer for making such an agreement when he possessed unprivileged information about the theft of client funds.⁷⁵ Ron Rotunda did not let the court escape with this single pronouncement. He challenged the court to answer several questions that its ruling created and to offer clearer guidelines for practicing lawyers:

(1) to what extent does the reporting rule apply to a lawyer who is asked to represent another lawyer accused of offenses like fraud or conversion, (2) how soon after the lawyer first learns of another lawyer's misconduct must the lawyer file the mandated report, (3) to what extent does the lawyer's duty of zealous representation of the client affect the lawyer's duty to report, especially in cases where the reporting might hurt the client's cause of action, and (4) how much knowledge must the lawyer acquire before the mandatory duty to report is created. These are serious and important issues, and the Illinois Supreme Court should discuss them in detail. Preferably, the court will proceed by carefully drafted rules; attorneys who have their livelihood on the line deserve fair warning rather than after the fact rule making by case law.⁷⁶

This is the craft of Ron Rotunda that made him so influential. One ruling leads to dozens of other issues, all of which need careful consideration. Sadly, the questions posed by Ron Rotunda in 1988 still have not been completely answered by the regulators of the legal profession. Lawyers continue to grapple with the questions raised by Ron Rotunda as they apply the current Model Rule 8.3 to their practices.⁷⁷

Ron Rotunda agreed with the underlying decision of the Illinois Supreme Court, pushing lawyers to remember their obligations to the bar.⁷⁸ However, he was not going to stop at one decision. Ron Rotunda decided to take a closer look at the disciplinary process and pointed out that “neither we nor the Illinois Supreme Court should naively think that the *Himmel* decision, by itself, will make any dramatic difference in lawyer discipline, because the number of lawyers who report is not the only bottleneck.”⁷⁹ Another issue in his view was the procedures and practices of the Illinois disciplinary system.⁸⁰ In Ron Rotunda's view, a process of abatement—waiting until any underlying lawsuit is completed—would have allowed the torts lawyer to continue to practice law as long as any other dispute

⁷⁵ *See id.* at 796.

⁷⁶ Rotunda, *supra* note 50, at 991.

⁷⁷ ROTUNDA & DZIENKOWSKI, *supra* note 7, § 8.3.

⁷⁸ *See* Rotunda, *supra* note 50, at 992.

⁷⁹ *Id.*

⁸⁰ *See id.* at 993.

was pending.⁸¹ In the regulators' views, to involve discipline would give one party undue leverage over the civil dispute.⁸² Ron Rotunda, using *Himmel* and another case where the Seventh Circuit noted that no disciplinary action had been taken against a real estate lawyer who committed fraud, critiques the disciplinary process as a major problem in regulating lawyers.⁸³

Ron Rotunda's solution is to revamp the entire process and,

[T]reat disciplinary complaints like civil cases, where the [regulatory body] presents its case to a real judge and a jury of lay people. Then, public scrutiny of such proceedings, open to the public and not held behind closed doors, will serve as an independent check of the fairness of attorney discipline procedures.⁸⁴

Ron Rotunda believed that transparency led to accountability, and we would all be better off if regulation took place in the open rather than behind closed doors.⁸⁵ He confronted sacred institutions and demanded that they act as they preach. And, he did so in the open, subject to both response and criticism.

About fifteen years after Watergate, in the late 1980s, the organized legal profession adopted a narrative that lawyers were "moving away from the principles of professionalism."⁸⁶ Many of these complaints were directed at changes in the legal profession: The rise of the big law firm, expanded use of advertising, increase in lawyer compensation, and the dramatic increase in litigation.⁸⁷ The organized profession's answer was to reintroduce concepts of professionalism to curtail this significant decline in the legal profession.⁸⁸ Ron Rotunda's response was consistent with his view that change is not a bad thing and that the legal profession needs to evolve with the times rather than hold on to outdated views of professionalism.⁸⁹ He opposed standards that were not grounded in current empirical standards and those that implemented amorphous rules.⁹⁰ But Ron Rotunda welcomed an open debate on how to improve the rules that guide the practice of law.

⁸¹ *See id.* at 993–94.

⁸² *See id.*

⁸³ *See id.* at 994.

⁸⁴ *Id.* at 996 (footnotes omitted).

⁸⁵ *See id.*

⁸⁶ Ronald D. Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOY. U. CHI. L.J. 1149, 1150 (1987) (noting the words of Chief Justice Burger).

⁸⁷ *See id.* at 1151–55.

⁸⁸ *See id.* at 1157.

⁸⁹ *See id.*

⁹⁰ *See id.* at 1157–58.

When many in the profession complained that we had too many lawyers in America, Ron Rotunda responded forcefully:

As the amount of economic activity increases, the number of lawyers needed to facilitate that economic activity increases proportionately. Lawyers go hand-in-hand with prosperity. Derek Bok was wrong. We have more lawyers because we have more prosperity. . . . Just producing more lawyers will not make us richer, any more than buying more Picassos will make us richer. But, as we become richer, we need more lawyers (and we develop a taste for acquiring Picassos). Lawyers neither cause prosperity nor stand in the way. Instead, they are more like grease that reduces friction in the economic machine. Lawyers implement economic activity even if they do not originate it. . . . As we get richer, we want better things, such as a cleaner environment, a safer workplace, and a more just society. For that, we need lawyers.⁹¹

This passion for lawyers pervaded his teaching and mentoring of students.

V. CONCLUDING REMARKS: A PERSONAL DRIVE TO CONFRONT TOMORROW'S CHALLENGES FOR THE LEGAL PROFESSION

So many established scholars make a choice to carve out an area and continue to write and research in their familiar territory. Such an approach makes sense because incremental jurisprudence in a scholar's area simply continues to reinforce that person's reputation. In the case of Ron Rotunda, he instead lived life taking on and embracing new challenges.

On a personal level, Ron was a first adopter of many new technologies. His love for classic cars, like Rolls Royce,⁹² turned into a love for the energy efficient Tesla. He loved art and had an impressive collection including Picasso, Dali, and Miró. He also had one of the early monitor screens that flashed images from his collection of photographs. When he bought a home in California, he installed a state-of-the-art solar energy system so he could sell power back to the local electricity company. Ron Rotunda was an environmentalist,⁹³ not because it was trendy, but because he believed that American dependence on foreign energy sources

⁹¹ Rotunda, *supra* note 31, at 1232–36 (footnotes omitted).

⁹² Many individuals recount Ron's vintage Rolls while he taught at the University of Illinois. See Debra Cassens Weiss, *Constitutional and legal ethics scholar Ronald Rotunda dies at 73*, ABA J. (Mar. 20, 2018), http://www.abajournal.com/news/article/constitutional_and_legal_ethics_scholar_ronald_rotunda_dies_at_age_73 [<http://perma.cc/7G9S-YFU3>].

⁹³ See, e.g., *Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas: Hearing Before the Comm. on Sci., Space, and Tech.*, 114th Cong. 121–22 (2016) (statement of Ronald D. Rotunda).

compromised our country. The vast majority of Ron's business affairs were completely paperless and online. Ron embraced change because he believed that the technological revolution helped to improve the lives of human beings.

Ron Rotunda also embraced change in our legal profession. He continued to identify new topics and examine how traditional legal ethics principles should apply. In 2017, some of his last commentaries were representative of his views about changes in lawyering. One of his last essays was about "Bitcoin and the Legal Ethics of Lawyers."⁹⁴ Ron Rotunda was responding to a recent ethics opinion from Nebraska that required lawyers to convert Bitcoin to dollars "immediately upon receipt[.]"⁹⁵ Ron Rotunda disagreed with the approach, and stated that whether lawyers were paid in dollars, euros, or Rolexes, the risk of volatility could be allocated between the lawyer and the client.⁹⁶ He believed the regulators had arrived at the wrong conclusion because they believed that only cryptocurrencies experienced volatility.⁹⁷ In Ron's words:

The future will bring us increasing change and an increase in the rate of change. We must examine the impact of these changes on lawyers, but we should not impose *special* rules on *novel* tools that are simply a new way of engaging in a traditional endeavor. Bitcoin is akin to an electric typewriter replacing a manual typewriter. We write the same things, but we do it faster.⁹⁸

Another one of his commentaries titled, "Can Robots Practice Law?" analyzed whether this would violate unauthorized practice of law principles.⁹⁹ Ron's conclusion—one that he often mentioned—was that "AI will not eliminate lawyers any more than ATMs eliminated bank employees. It will change the way lawyers work and, by making lawyers more productive, it may well change the number of lawyers society needs."¹⁰⁰

Ron Rotunda cared immensely about people, about law students, about our government officials, about the legal profession, and about the rule of law. He pushed each one of us to strive to be better on whatever we were working on. Ron Rotunda was so strong and vocal that we could not imagine that his life

⁹⁴ Ronald D. Rotunda, *Bitcoin and the Legal Ethics of Lawyers*, VERDICT (Nov. 6, 2017), <https://verdict.justia.com/2017/11/06/bitcoin-legal-ethics-lawyers> [<http://perma.cc/8FDT-E9UL>].

⁹⁵ Nebraska Ethics Advisory Comm., Formal Op. No. 17-03, at 3100 (Neb. Supreme Ct., Advisory Board 2017).

⁹⁶ See Rotunda, *supra* note 94.

⁹⁷ See *id.*

⁹⁸ *Id.* (emphasis in original).

⁹⁹ Ronald D. Rotunda, *Can Robots Practice Law?*, VERDICT (Sept. 11, 2017), <https://verdict.justia.com/2017/09/11/can-robots-practice-law> [<http://perma.cc/ER3H-PQQV>].

¹⁰⁰ *Id.*

was at risk.¹⁰¹ We honor his contributions to make the legal profession a better place. We respect his commitment to work and the rule of law. And, we are better off for his lifetime of passion and drive. It is difficult to imagine the field of professional responsibility without Ron Rotunda. Fortunately, his memory will continue to live on through his life work and the countless number of individuals he mentored.¹⁰²

[W]hen [he] shall die,
Take him and cut him out in little stars,
And he will make the face of heaven so fine,
That all the world will be in love with night,
And pay no worship to the garish sun.¹⁰³

¹⁰¹ Catie Kovelman, *In Memoriam: Ron Rotunda*, CHAP. U. (July 10, 2018), <https://news.chapman.edu/2018/07/10/in-memoriam-ron-rotunda/> [http://perma.cc/X4RG-KDX8] (quoting Professor Richard Redding, who remarked that Rotunda was “so vigorous and full of life”).

¹⁰² Dean, *supra* note 26 (noting that Rotunda’s “wit and wisdom” remain behind in his writings).

¹⁰³ Ronald D. Rotunda, *DEDICATION to Walter R. Mansfield: Remembering Judge Walter R. Mansfield*, 53 BROOK. L. REV. 271, 277 (1987) (quoting WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act III, sc. ii, lines 21–25 (Gordon McMullan ed. 2007)).

A Tribute to Professor Ronald Rotunda

*Denis Binder**

Hi Ron, how are you doing?

“So far, so good.”

8:00 AM: So far, so good.

4:00 PM: So far, so good.

“So far, so good” was Ron’s credo in life. He led a good life, although “good” does not do justice to his life. Great is a better word. Professor Brian Leiter found he was the seventeenth most cited law professor in a 1998 study.¹ A follow-up study two years later moved Professor Rotunda up to number ten on the list.² Professor Leiter’s later listings were by discipline. Professor Rotunda was not listed either in constitutional law or legal ethics, but was listed amongst “highly-cited scholars who don’t work exclusively in this area.”³ His constitutional law citations would have placed him number ten on that list and legal ethics citations would have placed him number two on the legal ethics/legal profession list.⁴

Law reviews have traditionally published essays on esteemed colleagues who have retired or passed on.⁵ This paean

* Professor of Law, Chapman University Dale E. Fowler School of Law. I would like to thank Don Rotunda and Professors Kathy Heller and Celestine McConville for their comments, and Sherry Leysen and Heather Joy of the Hugh & Hazel Darling Law Library at Fowler School of Law for their assistance in preparing this Article.

¹ Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451, 471 tbl.6 (2000). A Westlaw search on December 7, 2018 found 67 secondary sources for “Ron Rotunda,” 515 secondary sources and 37 cases for “Ronald Rotunda,” and 538 cases and 5264 secondary sources and 538 cases for “Ronald D. Rotunda,” as well as 992 downloads on SSRN.com. An additional 5177 downloads occurred on Bepress between October 9, 2011 and December 7, 2018.

² Brian Leiter, *Most Cited Faculty, 2000–02*, BRIAN LEITER’S L. SCH. RANKINGS, http://www.leiterrankings.com/faculty/2000faculty_impact_cites.shtml [<http://perma.cc/BH7P-LRZA>].

³ Brian Leiter, *Most Cited Law Professors by Specialty, 2000–2007*, BRIAN LEITER’S L. SCH. RANKINGS (last updated Dec. 18, 2007), http://www.leiterrankings.com/faculty/2007faculty_impact_areas.shtml [<http://perma.cc/X8W8-MG22>].

⁴ *See id.*

⁵ For example, Professor William L. Prosser wrote a wonderful tribute to Professor Warren Seavey, an expert in the overlapping areas of Torts, Equity, Damages, Remedies, and Restitution. *See* William L. Prosser, *Warren Seavey*, 79 HARV. L. REV. 1338 (1966).

is for Professor Ronald “Ron” Rotunda, who I view not only as a colleague, but more significantly, as a friend.

We could fill much of a volume of the *Chapman Law Review* with his fifty-five-page curriculum vitae, some of which I will highlight in this essay.⁶

Life is an incredible journey. Ron’s was a life well-lived. He lived it to the fullest, being an eyewitness to the two most colossal presidential debacles of our time. The young Ron Rotunda served as Assistant Majority Counsel to the United States Senate Select Committee on Presidential Campaign Activities, (the Watergate Committee) investigating President Nixon.⁷

The experienced Professor Rotunda served decades later as a consultant to Special Prosecutor Kenneth Starr in his investigation of President Clinton.⁸

A question which arose out of Watergate was posed by John Dean: “How in God’s name could so many lawyers get involved in something like this?”⁹

Ronald Rotunda graduated from Dwight D. Eisenhower High School in Blue Island, Illinois in 1963. He turned down scholarship offers from Georgetown, Johns Hopkins, and Notre Dame to attend Harvard College on a full ride scholarship at a time when Harvard didn’t offer many scholarships.¹⁰ He graduated magna cum laude in 1967 and remained at Harvard, also graduating magna cum laude from Harvard Law School in 1970, serving on the *Harvard Law Review*.¹¹

He clerked for Judge Walter Mansfield of the Second Circuit Court of Appeals from August 1970 to July 1971, and then

⁶ See generally Curriculum Vitae of Ronald D. Rotunda (last updated Dec. 18, 2017) (on file with Chapman University Dale E. Fowler School of Law), <https://www.chapman.edu/our-faculty/files/curriculum-vita/Rotunda-Ronald-CV.pdf> [<http://perma.cc/K33X-T88D>].

⁷ See John W. Dean & James Robenalt, *The Legacy of Watergate*, AM. BAR ASS’N (Sept. 18, 2018), https://www.americanbar.org/groups/litigation/publications/litigation_journal/2011_12/spring/watergate_legacy/ [<http://perma.cc/VW2G-7C7C>]. President Nixon technically resigned from office before the House of Representatives could formally impeach him, and the Senate could convict him, both of which were certainties. See *In 1974, Goldwater and Rhodes told Nixon he was doomed*, AZCENTRAL (Aug. 2, 2014, 2:27 PM), <https://www.azcentral.com/story/azdc/2014/08/03/goldwater-rhodes-nixon-resignation/13497493/> [<http://perma.cc/R2XU-YRML>].

⁸ See Charlie Savage, *Can the President Be Indicted? A Long-Hidden Legal Memo Says Yes*, N.Y. TIMES (July 22, 2017), <https://www.nytimes.com/2017/07/22/us/politics/can-president-be-indicted-kenneth-starr-memo.html>.

⁹ Bruce Walker, *A Scourge of Lawyers Post-Watergate*, AM. THINKER (April 8, 2015), https://www.americanthinker.com/articles/2015/04/a_scourge_of_lawyers_postwatergate.html [<http://perma.cc/DU6V-PVED>].

¹⁰ *Eisenhower Senior Wins Scholarship*, CHI. TRIB., June 2, 1963, at 3.

¹¹ Rotunda, *supra* note 6, at 2.

worked as an associate with Wilmer, Cutler & Pickering in Washington, D.C. from July 1971 to April 1973.¹²

He was a stalwart on the University of Illinois Law School faculty from 1974–2002, being the Alfred E. Jenner, Jr. Professor of Law from 1993–2002.¹³ He then moved to George Mason University School of Law as the George Mason University Foundation Professor of Law.¹⁴ We were fortunate at Chapman University Dale E. Fowler School of Law that Ron joined us in 2008 as the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence.¹⁵

Professor Rotunda was a scholar's scholar, a prodigious scholar, and a workaholic who never slowed down until complications arose from a routine surgical operation which resulted in aspiration pneumonia.

He was a giant in two legal fields: constitutional law and Legal Ethics.¹⁶ Either one would have occupied the full-time attention of most professors.

He authored a six-volume treatise on constitutional law,¹⁷ as well as a shorter one-volume treatise on constitutional law.¹⁸ He also co-authored a leading casebook on constitutional law.¹⁹

I consulted his treatise a few months ago during the Senate hearings on the appointment of then-Judge Kavanaugh to the Supreme Court. The question arose of impeaching the judge if he were confirmed to the Court. I found a forty-two-page section on impeachment,²⁰ including the impeachment of judges.²¹

He paralleled his constitutional law success in legal ethics. Success can come to those who see an opportunity, or more aptly seize the opportunity. The Dean of the University of Illinois Law School asked the young Professor Rotunda to teach a course in the critical, but mostly neglected, course in legal ethics because of the professor's involvement in the Watergate hearings.

¹² *Id.*

¹³ *Id.* at 1–2.

¹⁴ *Id.* at 1.

¹⁵ *Id.*

¹⁶ *See* Leiter, *supra* note 3.

¹⁷ RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE (5th ed. 2012 & Supp. 2018).

¹⁸ RONALD D. ROTUNDA & JOHN E. NOWAK, PRINCIPLES OF CONSTITUTIONAL LAW (5th ed. 2016).

¹⁹ RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES (11th abr. ed. 2015).

²⁰ *Id.* § 8.10.

²¹ *Id.* § 8.13(c).

His casebook, *Problems and Materials on Professional Responsibility*,²² is the most widely used in the field.²³ He also co-authored with Professor John Dzienkowski the ABA's *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*.²⁴ Additionally, Professor Rotunda chaired the American Bar Association Subcommittee on Model Rules Review from 1992–1997 that drafted *The Model Rules for Lawyer Disciplinary Enforcement*.²⁵

His law review articles appeared in seemingly every journal, including the *Harvard Law Review*, *Alabama Law Review*, *Arkansas Law Review*, *Brooklyn Law Review*, *California Law Review*, *Columbia Law Review*, *Corporation Law Review*, *Drake Law Review*, *Emory Law Journal*, *Florida International University Law Review*, *Fordham Law Review*, *Georgetown University Law Journal*, *Georgetown Journal of Legal Ethics*, *George Washington University Law Review*, *Hastings Law Journal*, *Hofstra Law Review*, *University of Illinois Law Forum*, *University of Illinois Law Review*, *Indiana Law Journal*, *Indiana Law Review*, *University of Kansas Law Review*, *Loyola University of Chicago Law Journal*, *Marquette University Law Review*, *McGeorge Law Review*, *Michigan Law & Policy Review*, *Northwestern University Law Review*, *Notre Dame Law Review*, *Ohio State Law Journal*, *Oklahoma City University Law Review*, *Oregon Law Review*, *University of Pennsylvania Law Review*, *University of Richmond Law Review*, *St. Louis University Law Journal*, *Santa Clara Computer & High Technology Law Journal*, *Southern Methodist University Law Review*, *Suffolk University Law Review*, *Syracuse Law Review*, *Texas Law Review*, *Texas Tech Law Review*, *University of California-Los Angeles Law Review*, *Vanderbilt Law Review*, *Virginia Law Review*, *Washington University Law Quarterly*, *Journal of Legal Education*, and the *Journal of Legal Studies*.²⁶

Professor Rotunda was also a giant in the modern American conservative movement. He published a steady stream of op-eds—mostly from a conservative perspective. He served as a Senior Fellow in Constitutional Studies from 2000 to 2009 at

²² THOMAS D. MORGAN, RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* (12th ed. 2014).

²³ *Professional Responsibility, Problems and Materials, Abridged*, WEST ACADEMIC, <https://faculty.westacademic.com/Book/Detail?id=131816> [<http://perma.cc/5PGR-TURH>].

²⁴ RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* (2017–2018 ed. 2017).

²⁵ Rotunda, *supra* note 6, at 53. These amended rules were adopted by the House of Delegates of the American Bar Association on August 11, 1993. See *Model Rules for Lawyer Disciplinary Enforcement*, AM. BAR ASS'N (June 28, 2017), https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/ [<http://perma.cc/45DE-UGR6>].

²⁶ Rotunda, *supra* note 6, at 21–48.

the Cato Institute and was on the editorial committee of the *Cato Supreme Court Review* from 2001 to 2008.²⁷ He was the faculty Advisor to the Federalist Society chapter at the University of Illinois.

His articles and op-eds appeared in the *ABA Journal*, *Atlanta Journal-Constitution*, *Chicago Sun-Times*, *Chicago Tribune*, *Christian Science Monitor*, *Defense Law Journal*, *Detroit News*, *Forbes*, *Legal Journal*, *Legal Times*, *Los Angeles Daily Journal*, *Los Angeles Times*, *National Law Journal*, *National Review*, *Newsday*, *Newsweek*, *New York Post*, *Orange County Lawyer*, *Orange County Register*, the *Professional Lawyer*, *Sacramento Bee*, *Texas Lawyer*, *Trial Magazine*, *USA Today*, *Wall Street Journal*, *Washington Post*, and *Washington Times*.²⁸ He even published a series of articles for *Justia*.²⁹

He served as a Commissioner on California's Fair Political Practices Commission from June 17, 2009 to January 31, 2013.³⁰ He also was called upon as an expert witness in cases.³¹

A well-researched, well-reasoned fifty-six-page memo³² he wrote in 1998 for Special Prosecutor Ken Starr's investigation of President Clinton received substantial media and professional attention last year.³³ He concluded "it is proper, constitutional, and legal for a federal grand jury to indict a sitting President for serious criminal acts that are not part of, and contrary to, the President's official duties. In this country, not even President Clinton, is above the law."³⁴

His points were:

- 1) The President "is subject to indictment and criminal prosecution," but may not be subject to imprisonment until after he leaves office;³⁵
- 2) No one "is above the law;"³⁶

²⁷ *Id.* at 2, 54.

²⁸ *Id.* at 21–52.

²⁹ *Columns by Ronald D. Rotunda*, VERDICT, <https://verdict.justia.com/author/rotunda> [<http://perma.cc/YY9W-5Z66>].

³⁰ Rotunda, *supra* note 6, at 1.

³¹ *See id.* at 52.

³² Ronald D. Rotunda, *Memorandum from University of Illinois College of Law Professor Ronald D. Rotunda to the Honorable Kenneth W. Starr Regarding Whether a Sitting President is Subject to Indictment [Portions redacted]*, U.S. DEP'T OF JUST. PUBLICATIONS AND MATERIALS (May 13, 1998), <http://digitalcommons.unl.edu/usjusticematls/32> [<http://perma.cc/6VHB-8477>].

³³ *See Savage*, *supra* note 8.

³⁴ Rotunda, *supra* note 32, at 55.

³⁵ *Id.* at 1.

³⁶ *Id.* at 55.

- 3) A President “may be impeached for actions that do not violate any criminal statute;”³⁷
- 4) No immunity exists for personal, private conduct;³⁸
- 5) A grand jury can investigate and indict a sitting President;³⁹ and
- 6) Neither a criminal investigation prosecution nor an impeachment proceeding will control the other proceeding.⁴⁰

He believed a sitting president could be indicted, but as he made clear to me several times, not by Special Prosecutor Robert Mueller because of Justice Department rules.⁴¹

Ron was a young seventy-three, still in his prime, when he left us on March 14, 2018. The indefatigable professor never slowed down until the medical complications from a routine surgical procedure. Treatises, casebooks, legal articles, op-eds—there was no stopping Professor Rotunda. He kept his publishers happy by publishing a stream of supplements to his casebooks.

Shortly before his death, Professor Rotunda published *John Marshall and the Cases that United the United States of America (Beveridge’s Abridged Life of John Marshall)*.⁴² The original edition by Albert Beveridge was four volumes.⁴³ He provided his own preface and an introduction to each chapter in his update. His new book is highly-rated on Amazon.⁴⁴

Professor Rotunda’s boundless energies could not be contained within America’s boundaries. His efforts crossed international boundaries. He served as the Constitutional Law Adviser to the Supreme Court of Cambodia in 1993 and assisted in the drafting of its first constitution.⁴⁵ He also consulted with the Czech Republic, Moldova, Romania, and Ukraine after the

³⁷ *Id.* at 4–5.

³⁸ *Id.* at 5.

³⁹ *Id.* at 6 (citing *Morrison v. Olson*, 487 U.S. 654 (1988)).

⁴⁰ *Id.* at 56.

⁴¹ See Ronald Rotunda, *The President Can Be Indicted – Just Not by Mueller*, WASH. POST (July 27, 2017), https://www.washingtonpost.com/opinions/the-president-can-be-indicted--just-not-by-mueller/2017/07/27/a597b922-721d-11e7-8f39-ebb7d3a2d304_story.html?utm_term=.d2df94adc689 [<http://perma.cc/RH3B-VJA2>].

⁴² RONALD D. ROTUNDA, *JOHN MARSHALL AND THE CASES THAT UNITED THE STATES OF AMERICA (BEVERIDGE’S ABRIDGED LIFE OF JOHN MARSHALL)* (2018).

⁴³ ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1916). Albert Beveridge’s book won the Pulitzer Prize in 1920. See *The 1920 Pulitzer Prize Winner in Biography*, PULITZER PRIZES, <https://www.pulitzer.org/winners/albert-j-beveridge> [<http://perma.cc/JW5X-WCEF>].

⁴⁴ See *John Marshall and the Cases that United the States of America (Beveridge’s Abridged Life of John Marshall)*, AMAZON, <https://www.amazon.com/Marshall-United-America-Beveridges-Abridged/dp/1946074144> [<http://perma.cc/3R5C-PHT8>].

⁴⁵ Rotunda, *supra* note 6, at 53.

collapse of the Soviet Empire.⁴⁶ His works have been translated into Czech, French, German, Japanese, Korean, Portuguese, Romanian, and Russian.⁴⁷

He was a Fulbright Professor in Venezuela in March 1986 and a Fulbright Research Scholar in Italy from January to June 1981.⁴⁸ Professor Rotunda was visiting lecturer at the Katholieke Universiteit Leuven in Belgium in November to December 2002 and a visiting lecturer at the Institute for Law and Economics at the University of Hamburg in May 2004 and December 2005.⁴⁹

His professional honors include membership in the American Law Institute since 1977 and a Life Fellow of the American Bar Foundation since 1991.⁵⁰ In 2012, Chapman University awarded him the Chapman University Excellence in Scholarly and Creative Work Award.⁵¹

If his professional activities weren't enough to fill twenty-four hours a day, he also had an interest in astronomy.⁵² He also published another book, *The Politics of Language*.⁵³

The professor had a great sense of humor. His Tesla had the personal license plate "E MUSK." His wardrobe contained a colorful collection of bow ties.

Was he perfect?

He could be a crusty curmudgeon and the bane of deans for Professor Rotunda could "cut to the chase" on proposals. If there was a weakness in a proposal, he would sense it intuitively. He would ask pointed questions at faculty meetings, questions that many did not want to answer.

Ron's intellect could be intimidating to many. Yet he was highly approachable. Ron and I had many long conversations about politics, law, life, and history, often interrupted by a phone call to Ron from a VIP. He was always helpful and willing to give freely of his time and his suggestions.

He may have seemed prickly to many, but that was a façade. He was overly sensitive to what he felt were personal attacks on him or his family.

⁴⁶ *See id.* at 54.

⁴⁷ *See, e.g., id.* at 14, 17, 19.

⁴⁸ *Id.* at 2.

⁴⁹ *Id.* at 1.

⁵⁰ *Id.*

⁵¹ *Id.* at 3.

⁵² *See, e.g., Ronald D. Rotunda, Mercury's Transit of the Sun (photograph), in ASTRONOMY, Feb. 1974, at 57.*

⁵³ RONALD D. ROTUNDA, *THE POLITICS OF LANGUAGE: LIBERALISM AS WORDS AND SYMBOL* (1986).

Professor Rotunda was “erudite”—to use a word rarely used today. He was also a Renaissance Man, a disappearing breed in today’s world of social media and Wikipedia.

The professor certainly had an ego, but he was not a braggart about his accomplishments. He was too busy doing.

We can measure one’s life by where they began, where they ended, and what they did in between. Professor Ronald Rotunda was a legal scholar who enriched the law, a political pundit, and a man of principle.

A cliché is that the only place success comes before work is in the dictionary. Professor Ronald D. Rotunda was ambitious. His success at least matched, if not exceeded his ambition. He succeeded because he worked extra hard.

His death is a loss to his family, friends, colleagues, the Academy, and the legal profession.

Ron, How’re you doing in Heaven?

So far, so good!

Remembering Professor Ronald Rotunda

*Josh Blackman**

In 2006, I walked into law school absolutely clueless.¹ I had never taken a class in constitutional law and could not tell you what the acronym “SCOTUS” meant. That cluelessness changed when I entered Professor Ronald Rotunda’s *Constitutional Law I* classroom. I was immediately hooked. Ron, as I would come to know him, was able to seamlessly blend probing questions, compelling lectures, and uproarious humor. One of my favorite Rotunda jokes concerned the Mann Act: “A zookeeper fed his long-lived dolphins sea gulls, which was the secret to their longevity. One night he was carrying the gulls, but he had to jump over a sleeping lion, and so he was arrested for transporting gulls across staid lions for immoral porpoises.” Even his one-paragraph syllabus was comical:

For the first day of class, please read the U.S. Constitution (pp. lv-lxxix), in Rotunda, MODERN CONSTITUTIONAL LAW (Thomson West, 8th ed. 2007). Then, we will read Chapters 1 & 2. Then we will read § 5-1 of Chapter 5. After that, we will read Chapters 3 & 4. Then, we will read Chapter 6, §§ 6-1 & 6-2. All pages include the associated pages in the 2007 Supplement. Finally, we will return to Chapter 5 and decide what parts of that chapter we will read next. For each class, please read about 30 pages beyond where we finished in the previous class. If you do that, you will often be ahead of the class but never behind.²

A few weeks into the semester, I invited Ron to participate in a Federalist Society debate on the Ninth Amendment with the Cato Institute’s Roger Pilon. Ron replied that he may not be the right person to participate. “I suppose you want someone who has a view of the [Ninth] Amendment more restrictive than Roger’s [. . .] I’m not

* Associate Professor, South Texas College of Law Houston. This memorial for the *Chapman Law Review* is based on my lengthy email correspondence with Professor Rotunda, as well as my best recollections of our personal interactions. I delivered a version of this memorial at Chapman University Dale E. Fowler School of Law on January 25, 2019. Josh Blackman, *Chapman Law Review Symposium on Ronald Rotunda*, YOUTUBE (Jan. 25, 2019), <https://www.youtube.com/watch?v=Ebc-iZyHDJw&t=1160s>.

¹ Josh Blackman, *From Being One L to Teaching One L*, in BEYOND ONE L: STORIES ABOUT FINDING MEANING AND MAKING A DIFFERENCE IN LAW (Nancy Levit & Allen Rostron eds., 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118335 [<http://perma.cc/G5NH-DV8X>].

² Syllabus, *Constitutional Law I*, Ronald D. Rotunda (on file with author).

sure,” he wrote.³ Eventually, Professor Nelson Lund indicated he would be willing to debate Roger. Ron agreed to moderate. “I’m a very moderate person,” he added. When we tried to figure out the timing, Ron joked, “My guess is that the students like to ask questions rather than watching us talking heads.”

The debate was a great success. It was the first event that I organized as a student, and it inspired my ongoing involvement with the Federalist Society. Eventually, I became fortunate to count Nelson and Roger, along with Ron, as friends and colleagues.

While I was a student, Ron and I would email quite frequently about the most arcane issues of constitutional law. And—unlike many law professors—he would always respond with clarity and care. Ron was always willing to engage with any questions I posed. At one point, Bill Clinton suggested he could run as Hillary Clinton’s Vice President. I asked Ron if that act was constitutional under the Twenty-second Amendment. Ron replied with his usual wit: “I don’t think answering legal questions is Bill’s forte.” He added, “[Bill] and Hillary are from the same state and the President and Vice President cannot be from the same state, amendment 12.”

In another email, I inquired about then-candidate Rudy Giuliani’s proposal to “brib[e] the states with money and power.” Ron replied, “Giving money to the states is ok if there are not strings. Sadly, there are always strings.”

Later in the semester, I asked him whether the Virginia GOP could require voters to sign a loyalty oath.⁴ This plan was designed to prevent Democrats from interceding in Virginia’s open-primary. He quickly wrote back and pointed me to the *Oaths Cases* in the textbook.⁵ Ron explained that “there is a real free speech problem.” A few days later, Ron emailed me again to note that the GOP dropped the pledge. He thought that much of his students: Unprovoked, he sent me items that would interest me.

Later in the semester, I missed a class in which Ron answered some question I asked earlier in the semester. Even years later, Ron would still carp that I missed the class where he answered my question. His memory was remarkable.

³ Throughout this Article, I reproduce some of my e-mail correspondences with Ron Rotunda.

⁴ *Virginia Briefing*, WASH. POST (Nov. 28, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/11/27/AR2007112702235_3.html [<http://perma.cc/48K3-JA5M>].

⁵ See, e.g., *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

After our *Constitutional Law I* class, Ron remained a strong presence in my life. During my 2L year, I asked him if he had some time to chat about clerkships at a certain time. He replied that my preferred day wouldn't work: "I will have a small private lunch with the President! I'm excited. It will be at a Georgetown restaurant." In a follow-up email, he wrote:

Speaking of the President, our lunch was great. Bush was in great form. He spoke, impromptu, for over an hour. We were about 6 feet from him the whole time. He told me that I have to obey Kyndra [Ron's wife] because she is a Major and outranks me. I told him that I already knew that.

Another time he apologized for being unable to attend an event at George Mason: "Tomorrow, I get two wisdom teeth extracted, so the next time we chat, I'll have less wisdom."

Occasionally, we even talked about law! After *Boumediene v. Bush* was decided,⁶ Ron quipped, "As for bin Laden, I think he would get habeas after this decision, although the case has a lot of fudge words in it (e.g., Justice Kennedy complained that people were detained for an 'undue' amount of time, with no definition of what amount of time is due)." Shortly before *District of Columbia v. Heller* was decided,⁷ Ron predicted "Scalia will write the majority." Hours after it was decided, Ron wrote back "I'm trying to edit the case now to put it in the casebook. It is too long. But, there is a lot of discussion of how to interpret. I'm editing Stevens now."

Even after Ron left George Mason for the Chapman University, Dale E. Fowler School of Law, we kept in touch. During my 3L year, when I attended a clerkship workshop at nearby-Pepperdine University, Ron and Kyndra picked me up in a snazzy Mercedes coupe. They graciously took me out to dinner. (In an earlier email, Ron joked that he had some car trouble: "There was a loose flux capacitor or something like that. They put in a new one.")

After I started teaching, Ron and I grew closer. I sent him copies of my articles, and he always sent back pithy comments. Most recently, I thanked him in the dagger note of my essay on ABA Model Rule 8.4(g).⁸

Ron not only affected my scholarship, but also made a significant impact on my teaching. Many of the specific points I make in class come directly from Ron. For example, he would

⁶ 553 U.S. 723, 795 (2008).

⁷ 554 U.S. 570 (2008).

⁸ See Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and "Conduct Related to the Practice of Law,"* 30 GEO. J. LEGAL ETHICS 241, 241 n.* (2017).

always complain that most *Constitutional Law* casebooks excluded Justice Blackmun's citation to *Buck v. Bell* in the excerpt of *Roe v. Wade*.⁹ He wrote in an email, "they excise it from the opinion. I guess they wanted Blackmun and the Court to look better than they really are. That is what acolytes do." (Ron had a fascinating exchange with Justice Blackmun about *Roe*.¹⁰) When I became an editor of *Cases in Context* with Professor Randy Barnett, I ensured that our casebook included that citation.¹¹

Ron would always send me copies of his latest writings. "Hot off the presses!" the subject line would usually say. His writings were always punchy. In a 2015 email about *Masterpiece Cakeshop*,¹² Ron offered a definition of the word "liberal": "someone who doesn't care what you do as long as it's compulsory."¹³

In 2016, I spoke at the Florida International University (FIU) Law Review Symposium on the Separation of Powers.¹⁴ It was my honor to be on the same program as both of my *Constitutional Law I & II* professors: Ron and David Bernstein.¹⁵ I remarked to both of them that much of what I teach came directly from their class. I was very fortunate to have such amazing professors at George Mason. I wouldn't be the professor I am today without having learned from them.

Though Ron is gone, his memory will live on in the hearts and minds of his students, his colleagues, and the rule of law, which he cared so deeply about.

⁹ *Roe v. Wade*, 410 U.S. 113, 154 (1973) ("The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past." (citing *Buck v. Bell*, 274 U.S. 200 (1927))).

¹⁰ Josh Blackman, *Rotunda Has Justice Blackmun's Off-the-Record Comments About Roe v. Wade*, JOSH BLACKMAN'S BLOG (Jan. 22, 2014), <http://joshblackman.com/blog/2014/01/22/rotunda-has-justice-blackmun-off-the-record-comments-about-roe-v-wade/>.

¹¹ CONSTITUTIONAL LAW: CASES IN CONTEXT 1177 (Randy E. Barnett & Josh Blackman eds., 3rd ed. 2017).

¹² *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

¹³ Ronald D. Rotunda, *Marriage Litigation in the Wake of Obergefell v. Hodges*, VERDICT (Sept. 28, 2015), <https://verdict.justia.com/2015/09/28/marriage-litigation-in-the-wake-of-obergefell-v-hodges> [<http://perma.cc/LB9H-73DS>].

¹⁴ Josh Blackman, "Government by Blog Post" *FIU Law Review Symposium on Separation of Powers*, JOSH BLACKMAN'S BLOG (Aug. 2, 2016), <http://joshblackman.com/blog/2016/08/02/government-by-blog-post-fiu-law-review-symposium-on-separation-of-powers>.

¹⁵ Josh Blackman, *Remembering Professor Rotunda*, JOSH BLACKMAN'S BLOG (Mar. 18, 2018), <http://joshblackman.com/blog/2018/03/18/remembering-professor-ronald-rotunda/>.

Ronald D. Rotunda (1945-2018): A Giant in the Law Whose Likes We Will Not See Again

*Richard E. Redding**

It's every lawyer's dream to help shape the law, not just react to it.

—Alan Dershowitz¹

I regret never telling him so, but Ron Rotunda was ultimately responsible for my coming to Chapman University. In 2008, I was happily ensconced as a law professor on the East Coast, teaching at the University of the Virginia and later at Villanova University. I had become restless, however, tired of the winters and wanting a change of environs. I had the itch to go west and was excited by the opportunity at Chapman University, which was establishing a name for itself as an entrepreneurial, up-and-coming law school and university in beautiful (and always sunny) Southern California. “It never rains in Southern California . . .”

But Chapman was relatively unknown in the east. With my deadline quickly approaching for giving Dean John Eastman my decision, one of my Villanova colleagues excitedly ran into my office to tell me, “You’ll never believe who is going to Chapman . . . Ron Rotunda!” Like virtually everyone else in legal education, I knew the name Ron Rotunda; but my colleague, who taught professional responsibility, knew of his work more intimately—he even used Ron Rotunda’s casebook. It did not take long after hearing this news for me to make my decision. If Chapman was good enough for such a big name in the legal academy, it was certainly good enough for me. I was excited about embarking on this new adventure at a young law school and doing so with the likes of the famous Ron Rotunda.

* Ronald D. Rotunda Distinguished Professor of Jurisprudence and Associate Dean for Research and Faculty Development (Dale E. Fowler School of Law), Professor of Psychology (Crean College of Health and Behavioral Sciences), and Education (Attallah College of Educational Studies), Chapman University.

¹ *Alan Dershowitz*, ENQUOTED, <https://alan-dershowitz-quotes.enquoted.com/it-s-every-lawyer-s-dream-to-help-shape-the-law-not-just-react-quote.html> [http://perma.cc/PN7F-2Z7U]. Ronald Rotunda was a student of Alan Dershowitz’s at Harvard Law School and many years later, Professor Dershowitz consulted his former student on legal ethics matters. See Dershowitz Dep. 17:9–10, Oct. 15, 2015.

Ron Rotunda and I thus went west—he from George Mason University in northern Virginia and I from Philadelphia.² Coincidentally, we arrived at Chapman on the very same day to find that we were office neighbors. I arrived at my office at around 9:00 AM that sunny July morning to see Ron unpacking his many boxes of books and files. (Little did I know that Ron likely had already been in the office for several hours before that.) Of course, I was struck by his signature bow tie (and matching pocket handkerchief) and humility. Here was this giant in the law, doing his own unpacking, and he was excited . . . to meet *me!*

Office geography and propitiousness can determine friendships. We often get to know best those who work closest to us. That July day was the start of our decade-long friendship that I will always treasure. Ron and I would visit with one another nearly every day at work and we would often exchange cocktail and dinner invitations.

Dear Reader, let me tell you a bit about my good friend Ron Rotunda: Like many of considerable accomplishment, Ron was a complex person. To say that he was a “character” is an understatement. He was famous for his bow ties (which he would change during commercial breaks on his many national TV appearances), and “E MUSK” was the vanity plate on his Tesla.³ Ron appreciated the finer things in life; he loved fine wines and used to drive a Rolls Royce Silver Cloud, don’t you know. But Ron was as much a fan of Star Trek as he was of country music. One could not help but be struck by his erudition, his razor-sharp intellect, and his equally sharp wit (all traits which he shares with his surviving twin brother Don). He was a true Renaissance Man. He had, for example, a passion for astrophysics and astronomy. Ron owned his own rather sophisticated telescope and would photograph the stars. *Astronomy* magazine printed several of his photos on its cover.⁴ Ron could engage in a deep discussion about virtually any topic, from string theory to Medieval Italian history. Perhaps it was divine providence that this brilliant legal intellect died the same day as another brilliant intellect who Ron admired and read, the celebrated astrophysicist Stephen Hawking, both at about the same age. Ron was always intellectually curious. He audited Professor and

² Curriculum Vitae of Ronald D. Rotunda (last updated Dec. 18, 2017) (on file with Chapman University Dale E. Fowler School of Law), <https://www.chapman.edu/our-faculty/files/curriculum-vita/Rotunda-Ronald-CV.pdf> [<http://perma.cc/K33X-T88D>].

³ See Don Rotunda, *About My Brother Ron Rotunda* (Apr. 2018), JOSH BLACKMAN’S BLOG (June 21, 2018), <http://joshblackman.com/blog/2018/06/21/about-my-brother-ron-rotunda/>.

⁴ See Ronald D. Rotunda, *Mercury’s Transit of the Sun* (photograph), in *ASTRONOMY*, Feb. 1974, at 57.

Nobel Laureate Vernon Smith's economics class not once but twice, and he did all the homework both times!

Ron was an incredibly hard worker, arriving at the office every morning at 6:00 AM and working diligently until 6:00 PM. I think he is the only legal academic I ever knew to keep the hours of a big law firm (too bad he couldn't bill for them). My cue to leave his dinner parties (for which it was always difficult to set a time, as we would haggle by e-mail over whether, for example, 6:48 PM or 6:53 PM would be more convenient) was his suddenly announcing, "Tomorrow is a school night, so I need to get to bed early."

Some found Ron a difficult personality, others charming. Indeed, he could be both, often at the same time. He sometimes reveled in challenging authority and was the bane of more than a few administrators. Underneath the sometimes-abrasive exterior was a soft, kind-hearted man who felt for others, including the little guy and those with whom he did not always get along. He was catholic in his professional ambition but a serious Catholic in his religion and charity, and he knew which was more important.

Dear Reader, shortly before his untimely death, Ron was trying to adopt a severely disabled boy. When he found out that he was not able to do so, he started to cry and said, "I would have really like to have helped the boy, in his wheelchair." He was known for his courtesies and friendship to the law school staff. Several years ago, one of our colleagues died tragically. It was no secret that she and Ron did not get along, to put it charitably. Yet he chose to sit in the first row of her remembrance service at the law school and teared up for much of it; later he remarked to me how affected he was by her death.

While at Harvard he volunteered to teach at the Massachusetts Correctional Institution, a prison for the criminally insane.⁵ One of his students, "the Boston Strangler,"⁶ was so appreciative of Ron's help that he painted a nice portrait that hung prominently in Ron's home. Ron would always tear up—you may be sensing a pattern, he could be as outwardly emotional as he was intellectual—when he talked about the difficult lives of the inmates he taught there. He wore his heart on his sleeve and was completely without guile—you knew exactly what Ron thought and felt, but as a lawyer he was the model of professional discretion and probity.

Ron's career, from his graduation from Harvard (*magna cum laude* from both college and law school, where he served on the

⁵ See Rotunda, *supra* note 3.

⁶ See Ronald D. Rotunda, *The Boston Strangler, the Classroom and Me*, WALL ST. J., July 26, 2013, at A11.

Harvard Law Review) until his untimely death, was remarkable and brilliant, in both the intellectual and British sense of the term.⁷ His fifty-five page curriculum vitae (CV) is perhaps really a 100-page CV considering how much he packs into every line on every page.⁸ His passing made national and international news,⁹ and when is the last time that ever occurred for a law professor? The depth, breadth, and innovativeness of his work is striking. And, not infrequently he had fun with the serious topics about which he wrote. One of his op-eds, for example, discussed how “[t]he motive for Russian interference [in the election] reflects an episode of Rod Sterling’s *The Twilight Zone* over a half century ago.”¹⁰ His books included *Six Justices on Civil Rights*¹¹ and *The Politics of Language: Liberalism as Word and Symbol*,¹² and he wrote on topics ranging from reforming presidential nominating conventions to commercial speech and the First Amendment to Shakespeare to, well, lawyer jokes (which he curated and loved).¹³

Ron authored over 500 articles, widely used casebooks that taught tens of thousands of law students professional responsibility and constitutional law, a number of seminal treatises, several other books, and scores of op-eds in the *Wall Street Journal*, *New York Times*, and various other newspapers, magazines, and blogs.¹⁴ Of course, the true measure of Ron’s scholarship is not its considerable volume but its impact. His work has been cited in the academic literature thousands of times.¹⁵ He was listed as one of the most cited law professors and among those most cited by jurists. He is among the most influential constitutional and legal ethics scholars and his treatises equally so.¹⁶

⁷ See Rotunda, *supra* note 2.

⁸ See *id.*

⁹ See Tony Mauro, *Ronald Rotunda, ‘Brilliant Dynamo’ of Con Law and Legal Ethics, Dies at 73*, NAT’L L. J. (Mar. 19, 2018, 3:21 PM), <https://www.law.com/nationallawjournal/2018/03/19/ronald-rotunda-brilliant-dynamo-of-con-law-and-legal-ethics-dies-at-73/>.

¹⁰ Ronald D. Rotunda, *Facebook, Russian Interference and the Monsters on Maple Street*, VERDICT (Dec. 18, 2017), <https://verdict.justia.com/2017/12/18/facebook-russian-interference-monsters-maple-street> [http://perma.cc/6MUP-JXV2].

¹¹ RONALD D. ROTUNDA, *SIX JUSTICES ON CIVIL RIGHTS* (1983).

¹² RONALD D. ROTUNDA, *THE POLITICS OF LANGUAGE: LIBERALISM AS WORD AND SYMBOL* (1986).

¹³ See Rotunda, *supra* note 2, at 6, 7, 21, 51.

¹⁴ See *id.* at 5–55.

¹⁵ Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451, 471 (2000).

¹⁶ See Rotunda, *supra* note 2, at 3. See also Symposium, *Interpreting Legal Citations*, 29 J. LEGAL STUD. (part 2) (2000) (listing Ron Rotunda as thirty-fourth in reputation among judges and legal scholars, and twenty-seventh in non-scholarly reputation); Fred R. Shapiro, *The Most-Cited Legal Books Published since 1978*, 29 J. LEGAL STUD. 397, 404 (2000) (listing Ron Rotunda’s constitutional law treatise as the seventh most cited legal treatises); Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451, 471 tbl.6 (2000).

Ron's work has not only national significance but international impact as well. He was a visiting professor at universities in Belgium and Germany, and a Fulbright Scholar in both Italy and Venezuela.¹⁷ Ron drafted the professional responsibility rules for the Czech Republic and advised the new democracies of Moldova, Romania, Ukraine, and Cambodia on the drafting of their constitutions.¹⁸ His writings have been translated into French, Portuguese, German, Romanian, Czech, Russian, Japanese, and Korean.¹⁹ That so many foreign countries found his work so relevant despite their very different legal systems is a genuine testament to its importance.

Ron also had a distinguished career as a practicing lawyer and legal advisor, and he was consistently listed among the "best lawyers" when he practiced in Illinois, Washington, D.C., and California.²⁰ In addition to advising foreign governments, he was a consultant to the Administrative Conference of the United States and was special counsel to Judge Kenneth Starr's Whitewater Investigation.²¹ Most recently, he served as special counsel to the Department of Defense and as a Commissioner on California's Fair Political Practices Commission.²² Of course, Ron's best-known public service is what really began his scholarly career, when after clerking for Judge Mansfield on the Second Circuit Court of Appeals and a brief stint at Wilmer, Cutler, and Pickering, he served as the Assistant Majority Counsel for the Senate Watergate Committee (while, incidentally, Hillary Clinton served in the same position for the House committee).²³ His Watergate experience is what motivated Ron to develop what was then the nascent field of legal ethics. He became good friends with John Dean, who wrote that Ron was the "man responsible for Watergate's most lasting impact"²⁴ through his groundbreaking work in legal ethics in response to the Watergate scandal that brought down a president. The preface to Ron's 2000-page *Legal Ethics: The Lawyer's*

(listing Ron Rotunda as the seventeenth most-cited law professor in the nation); Brian Leiter, *Brian Leiter's Top 119 Cited Faculty, 2002-03*, BRIAN LEITER'S L. SCH. RANKINGS, http://www.leiterrankings.com/faculty/2002faculty_impact_cites.shtml [<http://perma.cc/DJT6-ZBZA>] (listing Rotunda as the eleventh most cited law professor in the nation).

¹⁷ Rotunda, *supra* note 2, at 1, 2.

¹⁸ *Id.* at 30, 54.

¹⁹ *See, e.g., id.* at 11, 14, 27, 30.

²⁰ *Id.* at 3.

²¹ *Id.* at 53, 54.

²² *Id.* at 1.

²³ *See id.* at 2.

²⁴ John Dean, *R.I.P. Ron Rotunda—A Man Responsible for Watergate's Most Lasting Positive Impact*, VERDICT (Mar. 16, 2018), <https://verdict.justia.com/2018/03/16/r-p-ron-rotunda-man-responsible-watergates-lasting-positive-impact> [<http://perma.cc/D48B-8G5Y>].

Deskbook on Professional Responsibility,²⁵ published and updated yearly by the ABA since 2000, observes: “During the Watergate hearings, Congressional investigations disclosed political corruption, which led people to ask, where were the lawyers when politicians engaged in criminal and fraudulent acts?”²⁶

God broke the mold when he made Ron Rotunda. The likes of him we shall not soon see again. Very few have the rare combination of vision, mind, and work ethic to have the uniquely stellar career that Ron had. His life does hold lessons for all of us, however. Work hard, read widely, cultivate curiosity about a range of topics, be true to yourself, act with integrity, do not be scared to voice your opinions or to be politically incorrect and challenge the status quo, and be tough when necessary but have a good and kind heart.

And . . . it certainly never hurts to wear a bow tie.

It is difficult to grasp that Ron is gone. We have lost a true giant in the law. He was such a character—of the kind that one supposes will simply live forever, which he does through his lasting impact on the legal profession and the life of the law. Ron was so vigorous, so full of life, and always looking forward to his next project or adventure. I miss his good company, wit, and intellect. I am deeply honored and humbled to be the inaugural holder of the Ronald D. Rotunda Distinguished Professor of Jurisprudence, the chair that Ron endowed shortly before his death. To be sure, I cannot live up to the kind of career that Ron had. But I will take to heart the important lessons from his remarkable life and career.

Rest in peace, dear friend, Ron Rotunda.

²⁵ RONALD D. ROTUNDA & JOHN DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* (15th ed. 2017).

²⁶ Dean, *supra* note 24, at 2 (citing RONALD D. ROTUNDA & JOHN DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* (6th ed. 2008)).

ABA Model Rule 8.4(g): An Exercise in Coercing Virtue?

*Jack Park**

In August 2016, at its annual convention, which was held in San Francisco, California the American Bar Association (ABA) approved a revision to Rule 8.4(g) of its Model Rules of Professional Conduct.¹ That new rule is not self-executing. Instead, it will have to be submitted to the licensing authorities in the states.

To date, only Vermont has adopted the new rule.² A number of states, including Arizona, Idaho, Louisiana, Montana, Nevada, South Carolina, Tennessee, and Texas have rejected proposals to adopt the rule in their respective states.³ Several other states are considering its adoption. So, it's not off to a roaring start.

There are good reasons for the remaining states to look skeptically at the proposed rule. In this Article, I first introduce the ABA and point out why it embarked on this enterprise. Then, I explain the wide-ranging scope of the proposed new rule. The new rule represents a significant expansion in the scope of potential disciplinary authority and exposure. I then point to the First Amendment problems it raises. Finally, I explain how it presents problems for the disciplinary authorities.

I. THE ABA AND ITS ROLE

A. The ABA as Professional Regulator

At the outset we should keep in mind that the proposed rule is the product of the ABA, which represents only a small subset of the profession. In August 2018, Roy Strom reported that the

* Mr. Jack Park is a solo practitioner based in Gainesville, GA. He is a participating attorney for the Southeastern Legal Foundation and a Visiting Legal Fellow for the Buckeye Institute for Public Policy Solutions. Jack has written amicus briefs for a number of litigating foundations and continues that work along with other civil litigation.

¹ See generally Samson Habte, *ABA Delegates Overwhelmingly Approve Anti-Bias Rule*, BLOOMBERG (Aug. 10, 2016), <https://www.bna.com/aba-delegates-overwhelmingly-n73014446149/> [http://perma.cc/W46N-XREW].

² See *States split on new ABA Model Rule limiting harassing or discriminatory conduct*, ABAJ., http://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct/news/article/does_a_diverse_bench_really_matter/?icn=sidebar&ici=text [http://perma.cc/38AP-RM3D] [hereinafter *States Split on new ABA Model Rule*].

³ See *id.*

ABA had fewer than 200,000 dues-paying members and an estimated 400,000 total members.⁴ That's out of an estimated 1.3 million lawyers in the United States.⁵ To boost membership, the ABA has adopted "a simpler and less-expensive schedule of membership fees in an effort to revitalize the association's long-declining membership rates."⁶ If the plan works, it will have 268,812 paying members in 2024, instead of the expected 155,766.⁷ Either way, though, its membership will still be far less than a majority of the total number of lawyers in the United States.

That said, the ABA represents an outsized player in the legal world. As the late Professor Ron Rotunda observed, the ABA "is more than a trade association. It also has some governmental power, which makes its latest foray into political correctness of more than passing interest."⁸ It periodically, as here, considers and proposes changes in the ethical constraints on lawyers. In addition, the ABA's influence over federal judicial nominations waxes and wanes with changes in administrations.⁹

Moreover, the ABA has been given the power to accredit law schools. Those law schools must teach the ABA Model Rules of Professional Responsibility, and their students must pass a Multistate Professional Responsibility Exam, which incorporates those Rules, to be licensed.¹⁰ As a result, it is entirely possible that Rule 8.4(g) will appear on the test even if it has not been adopted by a particular state.

The proposed rule is an exercise in professional regulation. Professor Rotunda explained that, whenever lawyers draft rules to govern the practice of law, "[w]hatever advantage we lawyers have with intimate knowledge of the subject matter—the practice of law—we must counterbalance with the self-interest inherent when lawyers draft rules governing their own behavior."¹¹

⁴ Roy Strom, *ABA to Slash Dues Amid Membership Drop*, AM. LAW. (Aug. 6, 2018, 4:03 PM), <https://www.law.com/americanlawyer/2018/08/06/aba-to-slash-dues-amid-membership-drop/?slreturn=20181012120933> [<http://perma.cc/YMQ3-MDAM>].

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Ron Rotunda, *The ABA Overrides the First Amendment*, WALL ST. J. (Aug. 16, 2016, 7:00 PM), <https://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418>.

⁹ The significance of the ABA's "well qualified" rating for judicial nominees, which Senate Minority Leader Chuck Schumer has called the "gold standard by which judicial candidates are judged," also gets inconsistent treatment. See Ed Whelan, *Schumer Smears Judicial Nominee Thomas Farr*, NAT'L REV. (Nov. 27, 2018, 10:21 AM), www.nationalreview.com/bench-memos/schumer-smears-judicial-nominee-thomas-farr [<http://perma.cc/7UHT-2Q5F>].

¹⁰ Ronald D. Rotunda, *Legal Memorandum: The ABA Decision to Control What Lawyers Say: Supporting "Diversity" but not Diversity of Thought*, HERITAGE FOUND., Oct. 6, 2016, at A4, <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf> [<http://perma.cc/GMU2-2892>].

¹¹ Ronald D. Rotunda, *Applying the Revised ABA Model Rules in the Age of the Internet: The Problem of Metadata*, 42 HOFSTRA L. REV. 175, 176 (2013).

The ABA's inherent self-interest is, moreover, more likely to favor the interests of large law firms, not solo or small firms.¹²

One might think that lawyers who combine an “intimate knowledge of the subject matter” with experience in drafting documents and rules would avoid ambiguity and speak with clarity. That is not the case with Model Rule 8.4(g) and its Comments. Two practitioners concluded that the Model Rule “is riddled with unanswered questions, including but not limited to . . . the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanction should apply to a violation; as well as due process and First Amendment free expression infirmities.”¹³ For example, to what extent does the rule's coverage of “conduct related to the practice of law” reach a bumper sticker on a lawyer's car driven to and from depositions or court hearings, or a Washington Redskins t-shirt worn at a bar-sponsored 5K?¹⁴

B. The ABA's Reasons for Adopting Model Rule 8.4(g)

The ABA advanced a variety of reasons for adopting Model Rule 8.4(g).¹⁵ Some of the mandarins sought to turn lawyers into societal leaders and burnish the reputation of lawyers generally. Others saw the need for a rule that would deter sexual harassment that occurred outside the range of the administration of justice.

For her part, past ABA President Paulette Brown said that lawyers are “responsible for making our society better” and that because of lawyers' “power,” lawyers should be “the standard by which all should aspire.”¹⁶ In a similar way, representatives from the Oregon New Lawyers Division of the ABA's Young Lawyers Division proposed a resolution which pointed to “a need for a *cultural shift* in understanding the inherent integrity of people regardless of their race, color, national origin, religion, age, sex, gender identity, gender expression, marital status, or disability, to be captured in the rules of professional conduct.”¹⁷ In short, lawyers are supposed to lead, and the ethical rules should make us do it.

¹² See Steven Chung, *The ABA Is Losing Money Because It Does Not Provide Value To Small Firms*, ABOVE L. (May 7, 2018, 9:57 AM), <https://abovethelaw.com/2018/03/the-aba-is-losing-money-because-it-does-not-provide-value-to-small-firms> [http://perma.cc/8RP5-H6UA].

¹³ Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEGAL PROF. 201, 257 (2017).

¹⁴ See John J. Park, *More on the ABA's Threat to Free Speech*, FEDERALIST SOC'Y (June 19, 2017), <https://fedsoc.org/commentary/blog-posts/more-on-the-aba-s-threat-to-free-speech> [http://perma.cc/8L5W-7UML].

¹⁵ See *States split on new ABA Model Rule*, *supra* note 2.

¹⁶ Rotunda, *supra* note 8.

¹⁷ ABA Standing Comm. on Ethics and Prof'l Responsibility, Memorandum on Draft Proposal to Amend Model Rule 8.4 at 2 (Dec. 22, 2015), <http://www.americanbar.org/content/>

At a 2016 hearing, though, “several witnesses expressed their concerns about sexual harassment that occurs during the practice of law, and in particular at after-hours social functions.”¹⁸

The ABA’s report, justifying the final version of Rule 8.4(g), cited the “substantial anecdotal information” provided to the Standing Committee of “sexual harassment” at “activities such as firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with the practice of law.”¹⁹

The general effect was to broaden the reach of the new rule from conduct “prejudicial to the administration of justice” to “conduct related to the practice of law.”²⁰

The Standing Committee summed it up this way, suggesting that the need for the new rule “transcends the Model Rules of Professional Conduct.”²¹ That is true whether “such conduct is or is not common in our [legal] profession.”²² It explained, “It is time that harassment and discriminatory conduct by a lawyer based on race, religion, sex, disability, LGBTQ status or other factors, be considered professional misconduct when such conduct is related to the practice of law.”²³ In sum:

[T]he public has a right to know that as a largely self-governing profession we hold ourselves to normative standards of conduct in all our professional activities, in furtherance of the public’s interest in respect for the rule of law and for those who interpret and apply the law, the legal profession.²⁴

We are often reminded how remarkable it is that the ABA believes itself entitled to speak for all lawyers, especially given the relatively small number of lawyers who are actually members. Model Rule 8.4(g) is just another iteration of that tendency. Its desire to bind them all to its self-improvement regime is breathtaking.

dam/aba/administrative/professional_responsibility/rule_8_4_language_choice_memo_12_22_2_015_authcheckdam.pdf [http://perma.cc/M8NV-MNFZ] [hereinafter Language Choice Memo] (emphasis added); see also Rotunda, *supra* note 10, at A3 (“We must change the Model Rules not to protect clients, not to protect the courts and the system of justice, and not to protect the role of lawyers as officers of the court. No, the purpose is much more grandiose: to create a ‘cultural shift.’”).

¹⁸ See Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241, 244 (2017).

¹⁹ *Id.*

²⁰ *Id.* at 251.

²¹ Language Choice Memo, *supra* note 17, at 7.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

II. PROPOSED NEW MODEL RULE 8.4(G)

Under amended Model Rule 8.4(g), it would be misconduct for a lawyer to engage in conduct that he or she “knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”²⁵ The covered conduct can be either “verbal or physical conduct,” including “unwelcome verbal or physical conduct of a sexual nature.”²⁶

The text of the proposed rule alone represents a massive expansion in the scope of disciplinary authority. Model Rule 8.4(d) currently provides, “it is professional misconduct for a lawyer to engage in conduct that is ‘prejudicial to the administration of justice.’”²⁷ Comment 3 to Model Rule 8.4 was added in 1998.²⁸ It states that a lawyer who, “*in the course of representing a client, . . . knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status . . .*” violates the rule when such actions are “*prejudicial to the administration of justice.*”²⁹

Significantly, the comment did not impose discipline; only the rules did. In 2015, the ABA observed that adding the comment “was a compromise result reached after six years of proposals and counterproposals.”³⁰ It explained, though, “[b]y addressing this issue in a comment . . . the compromise did not make manifestations of bias or prejudice such as discrimination or harassment a separate and direct violation of the Model Rules.”³¹

The new rule creates a violation in circumstances in which the old rule did not. It starts by adding characteristics to the previous list of eight. The new rule’s text expressly covers eleven separate characteristics to be protected from demeaning or derogatory speech.³² That’s three more than old Comment 3, with the addition of ethnicity, gender identity, and marital status.³³ The ABA said

²⁵ MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2018).

²⁶ *Id.* at r. 8.4(g) cmt. 3.

²⁷ See Language Choice Memo, *supra* note 17, at 2.

²⁸ See Handel Destinvil, *ABA Committee Proposes New Model Rule of Professional Conduct*, AM. BAR ASS’N (Jan. 17, 2016), <https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2016/aba-committee-proposes-new-model-rule-professional-conduct/> [http://perma.cc/3UQ6-SYNK].

²⁹ Language Choice Memo, *supra* note 17, at 2 (emphasis added).

³⁰ *Id.* at 1.

³¹ *Id.*

³² *Id.* at 2.

³³ See *id.* at 2–3; see also *id.* at 5 (“‘Gender identity’ is relevant as a new social awareness of the individuality of gender has changed the traditional binary concept of sexuality.”).

that the “additional categories reflect current concerns regarding discriminatory practices.”³⁴

New Comment 3 expands the definition of “harassment” to include “derogatory or demeaning verbal . . . conduct.”³⁵ That means that, as Josh Blackman notes, the rule’s scope is not limited to sexual harassment, but reaches derogatory or demeaning speech touching on any of the protected classes.³⁶ That said, “speech that satisfies *any* of these definitions is entirely protected by the First Amendment”³⁷

Comment 3 does state, “[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).”³⁸ That part of the Comment is not entirely clear. If the substantive law does apply, the speech at issue should have to be sufficiently “severe or pervasive” to constitute an “abusive working environment” before it can be the basis for discipline.³⁹ If it “may” (or “may not”) apply, then what happens with a single remark that is perceived to be “harassing?”

“Conduct related to the practice of law” also has an expansive reach. Comment 4 states, in part:

Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.⁴⁰

The representation of clients and a lawyer’s interactions with witnesses, court personnel, other lawyers, and others fit neatly into conduct that might be prejudicial to the administration of justice. “Conduct related to the practice of law” reaches far more broadly to cover a lawyer’s “bar association, business or social activities.” The new rule could be applied to speech at dinners hosted by bar associations or similar legal groups, teaching at law schools, and a lawyer’s speaking “at career day at his or her child’s Catholic school about the role of faith in the practice of law.”⁴¹ “The important question is not whether a [listener’s] reaction is ‘reasonable,’ but

³⁴ *Id.* at 4.

³⁵ MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS’N 2018).

³⁶ Blackman, *supra* note 18, at 244–46.

³⁷ *Id.* at 245 (emphasis in original).

³⁸ MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS’N 2018).

³⁹ Blackman, *supra* note 18, at 245 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998)).

⁴⁰ MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 4 (AM. BAR ASS’N 2018).

⁴¹ Blackman, *supra* note 18, at 247–48.

whether a [speaker] should ‘reasonably’ know a [listener] will be triggered by disrespectful speech.”⁴²

Of course, the ABA’s mandarins made sure to protect their own. Comment 4 states, in part, “[l]awyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.”⁴³ Josh Blackman notes, “[t]his comment amounts to an unconstitutional form of viewpoint discrimination.”⁴⁴ It “explicitly sanctions one perspective” on the divisive issue of affirmative action, while exposing the other side to potential discipline.⁴⁵

III. PROPOSED MODEL RULE 8.4(G) AND THE FIRST AMENDMENT

In recent years, offended observers have pursued a variety of claims directed at clothing they have found offensive. In 2015, a federal judge upheld the revocation of the Washington Redskins’ trademark by the U.S. Patent and Trademark Office’s Trademark Trial and Appeal Board, which concluded that the trademark was disparaging to Native Americans.⁴⁶ In 2016, the U.S. Equal Employment Opportunity Commission remanded a claim that the wearing of a cap bearing the Gadsden Flag insignia (“Don’t Tread on Me”) in a workplace for consideration of whether that made for a racially discriminatory work environment.⁴⁷

Events like those prompt consideration of whether Model Rule 8.4(g) would reach the wearing of a Washington Redskins championship t-shirt at a bar-sponsored 5K run. What about a lawyer with Gadsden Flag license plates, which Virginia will issue, or a Gadsden Flag bumper sticker on his or her car? If driven to a bar convention or work, would that make the lawyer’s actions “conduct related to the practice of law”?

Certainly, one might think that the First Amendment would have a bearing on the propriety of enforcing Model Rule 8.4(g) in

⁴² *Id.* at 248.

⁴³ MODEL RULES OF PROF’L CONDUCT, r. 8.4(g) cmt. 4 (AM. BAR ASS’N 2018).

⁴⁴ Blackman, *supra* note 18, at 259.

⁴⁵ *Id.*

⁴⁶ In 2018, after the Supreme Court issued its decision in *Matal v. Tam*, 137 S. Ct. 1744 (2017), the Fourth Circuit vacated the order to revoke the trademark. See Erik Brady, *Appeals Court Vacates Decisions that Canceled Redskins Trademark Registrations*, USA TODAY (Jan. 18, 2018, 8:58 PM), <http://www.usatoday.com/story/sports/nfl/2018/01/18/appeals-court-vacates-decisions-canceled-redskins-trademark-registrations/1046758001/> [http://perma.cc/6UUY-78EF].

⁴⁷ See Eugene Volokh, *Wearing ‘Don’t Tread on Me’ insignia could be punishable racial harassment*, WASH. POST (Aug. 3, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/03/wearing-dont-tread-on-me-insignia-could-be-punishable-racial-harassment/?utm_term=.10ab86ecdaf6 [http://perma.cc/QUM9-EBKD].

those cases, among others involving speech. But, “[t]he most striking aspect of the adoption of Model Rule 8.4(g) is how little awareness the ABA expressed about the boundless scope of prohibited speech.”⁴⁸

An earlier draft of Comment 3 from December 2015 “stressed that the rule ‘does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment.’”⁴⁹ It also recognized a “private sphere” in which “personal opinion . . . religious expression, and political speech” would receive First Amendment protection.⁵⁰

At the February 2016 hearing, however, a former ABA president complained that allowing for First Amendment protection of some speech would make it very difficult to enforce the rule because such protection would “take away” from its purpose.⁵¹ In the end, her “position prevailed, and the proviso was *removed* in the second draft.”⁵² Josh Blackman observes, “[n]either the final rule, nor the comments, nor the ratified report, makes any reference to the First Amendment. This regrettable omission was deliberate.”⁵³

Contrary to that record, though, the First Amendment protects speech even when it is unpopular, harmful, derogatory, or demeaning. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”⁵⁴ The First Amendment protects offensive, disagreeable, and even hurtful speech.⁵⁵

Just last term, in *Minnesota Voters Alliance v. Mansky*,⁵⁶ the Court found a Minnesota law banning the wearing of political apparel at the polling place facially unconstitutional. The apparel in question was a t-shirt bearing the Tea Party logo and the words “Don’t Tread on Me” and a button saying “Please I.D. Me.”⁵⁷ Even though Minnesota had a permissible objective in limiting distractions in the polling place, its law swept too broadly and indeterminably to be constitutionally applied.⁵⁸ If Minnesota cannot

⁴⁸ Blackman, *supra* note 18, at 248.

⁴⁹ *Id.* (citing ABA Standing Comm. on Ethics & Prof'l Responsibility, Notice of Public Hearing 14 (2015)).

⁵⁰ *Id.* at 248–49.

⁵¹ *Id.* at 249 (quoting former ABA President Laurel Bellows).

⁵² *Id.* at 250 (emphasis in original).

⁵³ *Id.*

⁵⁴ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

⁵⁵ *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 458 (2011); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis.*, 774 F. Supp. 1163, 1169 (E.D. Wis. 1991).

⁵⁶ 138 S. Ct. 1876, 1891–92 (2018).

⁵⁷ *Id.* at 1884.

⁵⁸ *Id.* at 1880, 1888.

regulate political speech in polling places, the ABA should not be able to regulate it in activities related to the practice of law.

More generally, Josh Blackman and others have pointed to the Court's decision in *National Institute of Family and Life Advocates v. Becerra (NIFLA)*,⁵⁹ as authority for concluding that Model Rule 8.4(g) is unconstitutional.⁶⁰ In comments submitted to the Disciplinary Board of the Supreme Court of Pennsylvania, Professor Blackman argued that, even as modified by Pennsylvania, Model Rule 8.4(g) "raise[d] constitutional concerns" that were "highlighted" by *NIFLA*.⁶¹ In its comment letter of July 17, 2018, urging the Disciplinary Board of the Supreme Court of Pennsylvania not to adopt that modified version of Model Rule 8.4(g), the Christian Legal Society pointed to both *NIFLA* and *Matal v. Tam*.⁶²

In *NIFLA*, the Court held that challengers who contended that a California law requiring licensed and unlicensed pregnancy-related clinics to make specified disclosures violated the First Amendment were likely to prevail on their challenges.⁶³ It reversed the Ninth Circuit decision affirming the denial of injunctive relief.⁶⁴ The law required the licensed clinics to display messages concerning the availability of public funding for abortions, a practice that those clinics opposed.⁶⁵

The Court determined that the California law was a content-based regulation of speech because it "compel[led] individuals to speak a particular message . . . 'alter[ing] the content of their speech.'"⁶⁶ It rejected the contention that the clinics' speech was entitled to less than strict scrutiny because professional speech was involved.⁶⁷ While professional speech and conduct may be regulated in some circumstances, neither of those circumstances was present.⁶⁸ First, to the extent that "more deferential review"

⁵⁹ 138 S. Ct. 2361 (2018).

⁶⁰ See, e.g., Letter from Josh Blackman, Assoc. Professor, S. Tex. Coll. of Law Hous., to Office of the Sec'y, The Disciplinary Bd. of the Supreme Court of Pa. (July 13, 2018), https://www.christianlegalsociety.org/sites/default/files/site_files/Letter-Pennsylvania-Blackman.pdf [http://perma.cc/E6RP-MGU3].

⁶¹ See *id.*

⁶² See Letter from David Nammo, CEO & Exec. Dir. Christian Legal Soc'y, to Office of the Sec'y, The Disciplinary Bd. of the Supreme Court of Pa. (July 17, 2018), https://www.christianlegalsociety.org/sites/default/files/site_files/Christian%20Legal%20Society%20PA%20Comment%20Letter%20Submitted.pdf [http://perma.cc/WA9S-TGQU].

⁶³ *NIFLA*, 138 S. Ct. at 2378.

⁶⁴ *Id.*

⁶⁵ *Id.* at 2368.

⁶⁶ *Id.* at 2371 (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

⁶⁷ *Id.* at 2371–72.

⁶⁸ *Id.* at 2372.

may be applied “to some laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech,’” the required notices did not relate to the services the clinics provided, but to “state-sponsored services—including abortion”⁶⁹ Second, to the extent professional conduct incidentally burdens speech can be regulated, the law regulated “speech as speech.”⁷⁰

Accordingly, the California law was subjected to strict scrutiny as a content-based regulation of speech.⁷¹ The Court noted that, as for the regulation of licensed clinics and the desire to educate low-income women, the required notice was “wildly underinclusive.”⁷² As for the unlicensed clinics, any justification offered by California was nothing more than “purely hypothetical.”⁷³

In a concurring opinion, Justice Kennedy, joined by Chief Justice Roberts and Justices Alito and Gorsuch, saw “viewpoint discrimination [as] inherent in the design and structure” of the California law.⁷⁴ Justice Kennedy characterized the law as “a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression.”⁷⁵

NIFLA’s treatment of professional speech is particularly important. As the Court notes, “[p]rofessionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields.”⁷⁶ For example, in a way that touches on the hot rail of marital status, “lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce”⁷⁷ Restricting the range of lawyer speech denies access to the test of the market, which the Court sees as “[t]he best test of truth.”⁷⁸

Matal v. Tam may well have put another nail in the coffin bearing this line of attack.⁷⁹ In *Matal*, the Court resoundingly

⁶⁹ *Id.* (emphasis in original).

⁷⁰ *Id.* at 2372, 2374.

⁷¹ *Id.* at 2366.

⁷² *Id.* at 2375.

⁷³ *Id.* at 2377.

⁷⁴ *Id.* at 2379 (Kennedy, J., concurring).

⁷⁵ *Id.* (Kennedy, J., concurring).

⁷⁶ *Id.* at 2374–75.

⁷⁷ *Id.* at 2375. Or, as Josh Blackman proposes, “A speaker remarks over dinner that unmarried attorneys are better candidates for law firms because they will be able to dedicate more time to the practice.” Blackman, *supra* note 18, at 246. Put simply, there is a myriad of ways to run afoul of Model Rule 8.4(g).

⁷⁸ See *NIFLA*, 138 S. Ct. at 2375 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919)).

⁷⁹ See *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

concluded that 15 U.S.C. § 1052(a), which prohibits the “registration of trademarks that may ‘disparage . . . or . . . bring into contempt[t] or disrepute’ any ‘persons, living or dead.’ . . . violates the Free Speech Clause of the First Amendment.”⁸⁰ The U.S. Patent and Trademark Office relied on that statute in denying a trademark application for an Asian-American band named the “Slants” because of the offensive nature of the band’s name.⁸¹

Announcing the judgment of the Court, Justice Alito wrote, the statute “offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”⁸² Joined by Chief Justice Roberts and Justices Thomas and Breyer, Justice Alito rejected the contention that the ban was narrowly tailored, noting that it also reached trademarks like “Down with racists,” for example.⁸³ Viewed in that light, the disparagement clause could not be “an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted.”⁸⁴ Accordingly, Justice Alito concluded that the disparagement clause was unconstitutional.⁸⁵

Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, concurred in part and concurred in the judgment.⁸⁶ Justice Kennedy wrote separately to “explain[] in greater detail why the First Amendment’s protections against viewpoint discrimination apply to the trademark here.”⁸⁷ In that regard, “[t]he test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed.”⁸⁸

In that regard, “[t]he Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker’s audience.”⁸⁹ Justice Kennedy explained, “[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. The danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive”⁹⁰ Put simply,

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 1765.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

⁸⁸ *Id.* at 1766.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1767.

“a speech burden based on audience reactions is simply government hostility and intervention in a different guise.”⁹¹

That is precisely what Model Rule 8.4(g) contemplates: Measuring the propriety of speech by the reaction of individuals listening to or observing it. Someone offended by a discussion of “mismatch” theory that includes a suggestion that affirmative action in higher education should be banned because it can hurt minority students by placing them in an educational setting where their chances of success are lower than they might be at a different institution, can complain that the speaker said something demeaning on the basis of race.⁹² Model Rule 8.4(g) is a recipe for viewpoint discrimination.

Finally, the wide reach of Model Rule 8.4(g), both as to its live-wire subject areas and as to the range of activities covered, will inevitably chill both speech and association. For example, Professor Rotunda points to the St. Thomas More Society, “an organization of ‘Catholic lawyers and judges’ who strengthen their ‘faith through education, fellowship and prayer.’”⁹³ Any St. Thomas More Society event, like the Annual Red Mass or a Continuing Legal Education (CLE) program, would fit within the definition of “conduct related to the practice of law.” Discussion of issues like gay marriage that does not include both sides may lead a state bar to conclude that Society membership violates Model Rule 8.4(g) because it opposes gay marriage and is not “inclusive.”⁹⁴

Professor Rotunda notes that, if a state bar opined that membership in the St. Thomas More Society could violate Model Rule 8.4(g), “many lawyers may decide that it is better to be safe than sorry, better to leave the St. Thomas More Society than to ignore the ethics opinion and risk a battle.”⁹⁵ Professor Rotunda also saw the potential for viewpoint discrimination: If a lawyer belongs to an organization that opposes gay marriage, he or she “can face problems,” but belonging to an organization that favors gay marriage brings the lawyer “home free.”⁹⁶

⁹¹ *Id.*

⁹² *See* Blackman, *supra* note 18, at 246.

⁹³ Rotunda, *supra* note 10, at 4 (citing ST. THOMAS MORE SOC'Y OF ORANGE COUNTY, <http://www.stthomasmore.net> [<http://perma.cc/M7FK-VU2T>]).

⁹⁴ *Id.* at 5.

⁹⁵ *Id.*

⁹⁶ *Id.*

IV. PROPOSED MODEL RULE 8.4(G) AND THE REGULATORS

A. The Regulatory Difficulty

Vesting discretion in the hands of bar regulators and trusting to their judgment is no solution. Regulators in some state bars have day jobs, so it makes little sense to load more on them. If adopted, Model Rule 8.4(g) would do precisely that because of its broad reach. Moreover, regulatory bodies are capable of disappointing the trust placed in them.

But, trusting the discretion of regulators is precisely what the ABA wants us to do. At the Federalist Society's 2016 National Lawyers Convention, Professor Deborah Rhode defended Model Rule 8.4(g) in a debate with Professor Eugene Volokh.⁹⁷ She asserted that, because local disciplinary bodies "don't have enough resources to go after people who steal from their clients' trust fund accounts," there is little likelihood of their vigorously enforcing limitations on speech.⁹⁸ She acknowledged that anyone offended by a remark made in connection with the practice of law might make a complaint, but suggested that such complaints would go nowhere because "we as a profession, I think, have the capacity to deal with occasional abuses."⁹⁹

The problem is more complex than Professor Rhode gives it credit. The bar disciplinary bodies have no principled way of dismissing a complaint that arises from a statement that addresses one of the eleven live-wire categories in a way that offends someone. They will have to call for a response from the speaker.

On December 17, 2017, the Disciplinary Board of the Supreme Court of Pennsylvania echoed one of Professor Rhode's observations: It noted that the "breadth" of the proposed rule "will pose difficulties for already resource-strapped disciplinary authorities."¹⁰⁰ It noted, "the rule subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment."¹⁰¹ Even if no discipline is imposed, the process will be the punishment.

⁹⁷ Federalist Soc'y, *Ninth Annual Rosenkranz Debate: Hostile Environment Law and the First Amendment*, YOUTUBE (Nov. 20, 2016), <https://www.youtube.com/watch?v=MYsNkMw32Eg&t=5s> [<http://perma.cc/7Y32-HPG7>].

⁹⁸ *Id.*

⁹⁹ *Id.*; see also *id.* ("I don't think we'd see a lot of toleration for those aberrant complaints.").

¹⁰⁰ *Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct*, 46 PA. BULLETIN 7519 (Dec. 3, 2016), <http://www.pabulletin.com/secure/data/vol46/46-49/2062.html> [<http://perma.cc/X2ZC-79PH>].

¹⁰¹ *Id.*

Professor Rotunda illustrated the problem for bar regulatory authorities with a hypothetical:

If one lawyer tells another, at the water cooler or a bar association meeting on tax reform, “I abhor the idle rich. We should raise capital gains taxes,” he has just violated the ABA rule by manifesting bias based on socioeconomic status.

If the other lawyer responds, “You’re just saying that because you’re a short, fat, hillbilly, neo-Nazi,” he’s in the clear, because those epithets are not in the sacred litany. Of course, that cannot be what the ABA means, because it is always in good taste to attack the rich. Yet, that is what the rule says.¹⁰²

Conversely, a lawyer at the firm coffee pot might tell another, “low income individuals who receive public assistance should be subjected to mandatory drug testing.” As Josh Blackman explains, that statement, which might be seen by an observer as unfairly provocative, could result in discipline because the speaker “‘reasonably should know’ that someone at the event could find the remarks disparaging” toward those of lower socioeconomic status.¹⁰³

When, as noted above, the bar disciplinary authorities call for an explanation, the lawyer enters into an administrative process that lacks some of the constitutional protection one gets in court. The disciplinary boards “do[] not typically open [their] proceedings to the public, [they] follow[] relaxed rules of evidence, and there is no jury.”¹⁰⁴ As with the St. Thomas More Society and its membership, lawyers will prefer to hold their tongues and have their speech chilled than visit with the bar disciplinary authorities.

B. An Invitation to Viewpoint Discrimination

Both scenarios present bar regulatory authorities with a claim that presents a violation on its face. There is no principled way of dismissing those claims even though the comments are plainly protected by the First Amendment. They will have to ask for a response. That response will require the regulators to make finely honed discretionary judgments. That said, vesting disciplinary authorities with discretion is an invitation to engage in viewpoint discrimination. Two recent examples of the consideration shown by regulatory bodies, however, show both hostility to conservative messaging and the absence of viewpoint neutrality.

First, the Colorado Civil Rights Commission’s treatment of Jack Phillips displayed blatant hostility toward his views, as the Court found in *Masterpiece Cakeshop, Ltd. v. Colorado Civil*

¹⁰² Rotunda, *supra* note 10, at 4.

¹⁰³ Blackman, *supra* note 18, at 246.

¹⁰⁴ Rotunda, *supra* note 10, at 6.

*Rights Comm'n.*¹⁰⁵ As the Supreme Court noted, Jack Phillips was entitled to “neutral and respectful consideration of his claims in all the circumstances of the case,” but he didn’t get it from the Commission.¹⁰⁶ One commissioner asserted, “[f]reedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust”¹⁰⁷ The Court noted that such a comparison was “inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.”¹⁰⁸

The same commissioner also described Jack Phillips’ invocation of his religious beliefs as “one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.”¹⁰⁹ The Court explained, “[t]o describe a man’s faith as ‘one of the most despicable pieces of rhetoric that people can use’ is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere.”¹¹⁰

In addition, the Commission and the Colorado Court of Appeals treated Jack Phillips differently from other bakers who refused to prepare a cake bearing a message that disapproved of same-sex marriage.¹¹¹ Three other bakers were found to have acted within their rights by declining to create those cakes.¹¹² The Colorado Court of Appeals concluded that the other bakeries did not discriminate because their action was based on “the offensive nature of the requested message.”¹¹³

The Court found the distinction lacking. As it observed, a “principled rationale for the difference in treatment . . . cannot be based on the government’s own assessment of offensiveness.”¹¹⁴ The Court concluded, “[t]he Colorado court’s attempt to account for the difference in treatment elevates one view of what is

¹⁰⁵ See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729 (2018).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1720.

¹¹² *Id.*

¹¹³ *Id.* at 1731 (quoting *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 n.8 (Colo. App. 2015)).

¹¹⁴ *Id.*

offensive over another and itself sends a signal of official disapproval of Jack Phillips' religious beliefs."¹¹⁵

Put simply, although the Court did not put it this way, the Commission and the Colorado Court of Appeals were engaged in viewpoint discrimination. They were punishing a message they did not agree with and giving a contrary message, with which they did agree, a free pass.

Second, the Ohio Elections Commission found itself in the position of judging the truth of political advertisements regarding the Affordable Care Act statute. The Susan B. Anthony List (SBA List) criticized Steve Driehaus (D-OH), asserting that, by voting for the Act, he voted for a bill that included taxpayer-funded abortion.¹¹⁶ Driehaus disagreed, arguing that because the Act calls for insurers to collect a separate payment, segregate those funds, and use only those segregated funds to pay for abortions, the Act doesn't fund abortions.¹¹⁷ SBA List viewed the segregation rule as an accounting gimmick given the fungibility of money. Both parties essentially pointed to the same statutory provisions and drew contrary inferences from them.

Driehaus complained that the SBA List violated an Ohio law that makes it a criminal offense to make a knowingly or recklessly "false" statement about a candidate for office or a ballot initiative.¹¹⁸ By a 2-1 vote on partisan lines, the Ohio Elections Commission found probable cause to proceed.¹¹⁹

The Court unanimously held that SBA List did not have to wait for the conclusion of proceedings before the Ohio Elections Commission to challenge the constitutionality of the Ohio law.¹²⁰ On remand, the District Court found the Ohio law unconstitutional and permanently enjoined its enforcement.¹²¹ It observed, "the answer to false statements in politics is not to force silence, but to encourage truthful speech in response, and to let the voters, not the Government, decide what the political truth is."¹²²

In short, neither the Colorado Human Rights Commission nor the Ohio Elections Commission proved able to stay away

¹¹⁵ *Id.*

¹¹⁶ See Susan B. Anthony List v. Driehaus, 573 U.S. 149, 154 (2014).

¹¹⁷ See George F. Will, *George Will: Campaign speech case is regulatory overkill*, WASH. POST (Apr. 18, 2014), https://www.washingtonpost.com/opinions/george-will-campaign-speech-case-is-regulatory-overkill/2014/04/18/39413958-c652-11e3-bf7a-be01a9b69cf1_story.html?utm_term=.ac7d08a0551d [<http://perma.cc/GT3S-MAVJJ>].

¹¹⁸ *Susan B. Anthony List*, 573 U.S. at 153.

¹¹⁹ *Id.* at 154.

¹²⁰ *Id.* at 151–52.

¹²¹ See Susan B. Anthony List v. Ohio Elections Comm'n, 45 F. Supp. 3d 765, 770 (S.D. Ohio 2014).

¹²² *Id.*

from indulging their approval of one side and distaste for the other. Model Rule 8.4(g) presents bar disciplinary authorities with the opportunity to do precisely the same thing, and our hope must be that they will be otherwise too busy to do so.

V. CONCLUSION

Model Rule 8.4(g) has been rejected in eight of the nine states that have acted on a motion to adopt it.¹²³ Those rejections rest on sound legal and prudential grounds that should be persuasive to any other state considering its adoption.

As noted above, the ABA's membership is one-third or less than the total number of lawyers in the United States. If the ABA believes that Model Rule 8.4(g) is such a good idea, it should apply it to its members as a test before inflicting it on the rest of us.

¹²³ See Scott Flaherty, *More States Reject ABA Anti-Bias Ethics Rule*, AM. LAWYER (Sep. 25, 2018, 3:24 PM), <https://www.law.com/americanlawyer/2018/09/25/more-states-reject-aba-anti-bias-ethics-rule/?sreturn=20190220220613> [<http://perma.cc/QE79-MNXJ>].

The Tensions Between Regulation of the Legal Profession and Protection of the First Amendment Rights of Lawyers and Judges: A Tribute to Ronald Rotunda

Rodney A. Smolla*

I. INTRODUCTION

This Article is dedicated to the memory of my departed friend and colleague Ron Rotunda. When I later transition to substantive legal analysis, I will use the respectfully professional appellation “Professor Rotunda.” In this personal opening reflection, however, he will just be Ron.

Early on in my career as a law professor, I was on the faculty with Ron at the University of Illinois College of Law. Ron and his close friend and life-long co-author, John Nowak, were my friends and my mentors. Ron was a Renaissance Man, with wide-ranging intellectual and cultural interests. I will never forget dinners at his home, where I learned as much about fine wine and food, international travel, and outer-space as I did about legal ethics and constitutional law. I have seared in my mind’s eye viewing planets through the high-powered telescope Ron had mounted in his backyard, unveiling his passion as a dedicated astronomer. Ron taught me to see the stars and to reach for them.

In this Article, I reflect on the intersection of Ron’s two greatest scholarly passions: legal ethics and constitutional law. More specifically, I focus on the tensions that Ron explored between the regulation of the legal profession and the Free Speech Clause of the First Amendment. In 1995, Ron wrote an article entitled *Racist Speech and Lawyer Discipline*.¹ In the article, Ron argued against the adoption of a proposal to change Rule 8.4 of the American Bar Association (ABA) Model Rules of Professional Responsibility. The proposed change would “make a lawyer subject to discipline for engaging in speech that indicates racial, or sexual, or other bias.”² Ron argued passionately that the proposed change would be an affront to the free speech values

* Dean and Professor of Law, Widener University Delaware Law School.

¹ Ronald D. Rotunda, *Racist Speech and Lawyer Discipline*, 6 PROF. LAW. 1, 1 (1995).

² *Id.*

of the First Amendment.³

Twenty-one years later, in August of 2016, the ABA adopted a new section 8.4(g) to the Model Rules, which provides that it is professional misconduct for a lawyer to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”⁴

In the summer of 2018, the United States Supreme Court decided *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*).⁵ In *NIFLA*, the Court struck down provisions of a California law requiring that pro-life pregnancy centers counsel clients on the availability of abortion services.⁶ On the surface, the Supreme Court’s *NIFLA* pregnancy counseling decision and ABA Model Rule 8.4(g) might seem unrelated, but they are linked. California attempted to defend its abortion counseling law as a valid regulation of “professional speech.”⁷ To the extent that ABA Model Rule 8.4(g) applies to the *speech* of lawyers, its proponents might proffer the same defense. Rule 8.4(g), it may be claimed, regulates only professional conduct. To the extent that the regulation of the professional conduct of lawyers incidentally implicates a lawyer’s speech, the argument continues that regulation of “professional speech” should have little, if any, First Amendment protection.

My friend Ron—Professor Rotunda—would never have countenanced this argument. In this personal tribute to Ron, I offer my thoughts on why I think the great Professor Rotunda was right. By the same token, Rule 8.4(g), as it was finally passed, was by no means a brazen effort to restrict politically incorrect speech. On its face, it targets only conduct, and even then, only conduct that would constitute “harassment” or “discrimination” to boot.⁸ Professor Rotunda’s early attacks at more sweeping proposals may actually have accomplished their purpose by narrowing the compass of what the ABA finally enacted. In this Article, I explore these conundrums in honor of my friend and colleague’s memory, and his towering contributions to the legal profession and the ongoing interpretation of the Constitution of the United States.

³ *Id.*

⁴ MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016).

⁵ *See generally* 138 S. Ct. 2361 (2018).

⁶ *Id.* at 2370.

⁷ *Id.* at 2371.

⁸ *See* MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016).

II. ABA MODEL RULE 8.4(G)

The text of ABA Model Rule 8.4(g), as passed by the ABA House of Delegates in August of 2016, was the product of an evolutionary process that began in the mid-1990s when Professor Rotunda first voiced his opposition. The original proposals were advances on what was once Comment 3 to Model Rule 8.4(d). That former Comment 3 read:

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.⁹

This Comment plainly encompassed expression, as it openly referred to “words or conduct.”¹⁰ It was tempered, however, by the requirement that the actions be “prejudicial to the administration of justice.”¹¹

The provision that would become Rule 8.4(g), when adopted at the 2016 annual meeting in San Francisco, began to gain traction in 2014 through what was known as “Resolution 109.”¹² The resolution went through numerous revisions and iterations before the version ultimately enacted was passed. That version provides in its entirety that it is misconduct for a lawyer to:

engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.¹³

The intended scope of Rule 8.4(g) is slightly amplified by Comment 4, which provides some additional definition to the phrase “conduct related to the practice of law,” by reciting:

Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and

⁹ MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 1992).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Annual Meeting 2016: ABA amends Model Rules to add anti-discrimination, anti-harassment provision*, AM. BAR ASS'N (Aug. 8, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2016/08/annual_meeting_20161/ [http://perma.cc/YMU3-YYYT].

¹³ MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016).

others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.¹⁴

Taken in combination, the text of Rule 8.4(g) and the accompanying Comment 4 present some ambiguity as to whether the Rule regulates the speech of lawyers. Rule 8.4(g) is phrased as only engaging in “conduct” that is “related to the practice of law” which would constitute “harassment or discrimination.”¹⁵ The text of the Rule assiduously avoids reference to speech. Unlike old Comment 3, it avoids use of the phrase “manifests by words.”

Yet, the practice of law is almost entirely accomplished through the use of language. Doctors operate on the human body probing the organs, performing surgeries, and prescribing medications. Doctors also use speech to counsel and communicate to patients. The practice of medicine, however, is at least in equal parts physical and expressive. The practice of law, however, is almost entirely expressive. To regulate the “conduct” of lawyers is almost entirely to regulate what lawyers say. There are, of course, non-expressive aspects to the regulation of professional conduct. Rules relating to conflicts of interest, for example, concern transactions and relationships more than speech—though even those rules often implicate expression, as when they implicate obligations of disclosure or confidentiality.¹⁶

Even so, a large part of law practice is expressive, and a large part of the rules governing professional responsibility inevitably involve expression. Thus, “conduct” related to the practice of law that would amount to harassment or discrimination still *could* easily encompass expressive activity arguably falling within the protective ambit of the First Amendment. Comment 4 plainly suggests that this is so by describing the “conduct” prohibited as extending to “participating in bar association, business or social activities in connection with the practice of law.”¹⁷ Rule 8.4(g)’s potential tensions with the First Amendment are further intensified by the curious final sentence to Comment 4, which has troubling colorations of viewpoint discrimination. Lawyers are expressly allowed to “promote diversity and inclusion” by, for example, “implementing initiatives aimed at

¹⁴ *Id.* at cmt. 4.

¹⁵ *Id.*

¹⁶ *See, e.g.*, MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 1992).

¹⁷ MODEL RULES OF PROF’L CONDUCT r. 8.4 cmt. 4 (AM. BAR ASS’N 2016).

recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.”¹⁸ This safe-harbor for what lawyers *can* do plainly envisions expressive activity that promotes progressive pro-diversity provisions, suggesting that what lawyers *cannot* do is engage in similarly expressive activity promoting an anti-inclusive or anti-diversity end.

III. PROFESSOR ROTUNDA’S CRITIQUE

Professor Rotunda’s attack on the insipient emerging proposals to modify Rule 8.4 that surfaced in the 1990s *assumed* that the proposals were intended to curb the expression of lawyers *as lawyers* in a manner that would *not* be permitted under the First Amendment for non-lawyers. This led Professor Rotunda to frame his analysis by asking what additional purchase on the regulation of speech was gained by governmental authorities engaged in the conduct of regulating the legal profession.¹⁹ From this starting point, he divined a critical divide separating those rules of professional responsibility that are *functionally* related to the practice of law and those that are not:

The anti-speech proposals before the ABA are bad policy for another reason. For many years the ABA has fought to limit discipline of lawyers to matters that are functionally related to the practice of law. There are a lot of things that are bad (or that large segments of our population think are bad) but that do not preclude one from practicing law. Rule 8.4(b) does *not* provide that it is professional misconduct to engage in any “criminal act”; rather, it is only misconduct to engage in a criminal act “that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”

In the old days, many states were disciplining lawyers for adultery or fornication. While most people do not approve of adultery, that does not mean that one should discipline a lawyer for engaging in it. The official Comment to Rule 8.4 states that offenses “of personal morality, such as adultery and comparable offenses” do not relate to the fitness to practice law. “Although a lawyer is personally answerable to the entire criminal law, a lawyer should be *professionally answerable* only for offenses that indicate lack of those characteristics relevant to law practice.”²⁰

In a manner characteristic of his qualities as a Renaissance Man, Professor Rotunda concluded his attack on the nascent version of Rule 8.4(g) by invoking classical conceptions of freedom of speech.²¹ Professor Rotunda observed that “[i]n ancient Athens, the cradle of democracy, the Greeks widely believed that their

¹⁸ *Id.*

¹⁹ See Rotunda, *supra* note 1.

²⁰ *Id.* at 4 (emphasis in original) (internal citation omitted).

²¹ *Id.* at 6.

freedom of speech made their armies more brave.”²² Professor Rotunda invoked the history of Herodotus, who boasted that the Athenians could win victories over the more numerous Persians because the Athenians fought not as slaves but as free people respecting free speech.²³ So too, in his play *The Persian*, Aeschylus touted the victory of the Greeks because: “Of no man are they the slaves or subjects.”²⁴ Quoting I.F. Stone, Professor Rotunda concluded: “For Aeschylus, and for the Athenians, it was not just a victory of Greeks over Persians but of free men over ‘slaves.’ The victors at Salamis were men elevated and inspired by the freedom to speak their minds and govern themselves.”²⁵ Admonishing the ABA to not forget these ancient truths, Professor Rotunda urged the ABA to resist, even in a spirit of compromise, lending “any support to those who would discipline lawyers (or anyone else) for what they say or think, even when we know that what they say or think is abhorrent and offensive.”²⁶

IV. THE RISE AND FALL OF THE PROFESSIONAL SPEECH DOCTRINE

The “professional speech doctrine” developed momentum through a series of decisions by various federal circuits from 2013 through 2016. The courts posited that the regulation of the speech of professionals, incident to the regulation of a profession should be analyzed under some level of reduced First Amendment scrutiny.²⁷ In *Pickup v. Brown*, the Ninth Circuit invoked the professional speech doctrine to uphold a California law forbidding such sexual orientation change efforts for minors, applying simple rational basis review.²⁸ The same year, the Third Circuit invoked the professional speech doctrine to uphold a similar law in *King v. Governor of New Jersey*.²⁹ Moreover, the Fourth Circuit invoked the professional speech doctrine to sustain regulation of the speech of fortune tellers in *Moore-King v. County of Chesterfield*.³⁰

The incipient professional speech doctrine drew significant commentary and mixed reviews.³¹ I was an opponent of the

²² *Id.*

²³ *Id.*

²⁴ *Id.* (quoting 2 AESCHYLUS, PLAYS (H. Weir Smyth, trans., 1922)).

²⁵ *Id.* (quoting I.F. STONE, THE TRIAL OF SOCRATES 51 (1988)).

²⁶ *Id.*

²⁷ See generally David L. Hudson Jr., *The Professional Speech Doctrine*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1551/professional-speech-doctrine> [http://perma.cc/z82E-LNGR].

²⁸ See 740 F.3d 1208, 1222 (9th Cir. 2014).

²⁹ See 767 F.3d 216, 224 (3d Cir. 2014).

³⁰ 708 F.3d 560, 569–70 (4th Cir. 2013).

³¹ See generally Marc Jonathan Blitz, *Free Speech, Occupational Speech, and Psychotherapy*, 44 HOFSTRA L. REV. 681 (2016); Claudia E. Haupt, *Professional Speech*, 125

recognition of the professional speech doctrine. My critique of the doctrine sounded themes parallel to those invoked by Professor Rotunda in his early admonitions against the initial proposals to enact changes to Rule 8.4. Modern First Amendment doctrine is rooted in faith in the marketplace.³² Overreaching by government, not overreaching by lawyers, doctors, or fortune tellers, is the primary concern of the First Amendment.³³ Instead of inventing a special level of reduced scrutiny for the regulation of speech by professionals, I argued courts should engage in the rigorous strict scrutiny test in analyzing content-based regulation of professional speech.³⁴ Application of strict scrutiny will sort the chaff from the wheat, resulting in the striking down of paternalistic regulations that deserve to be struck down, and the upholding of regulations that deserve to be upheld.

Somewhat to my surprise, the Supreme Court of the United States effectively killed the professional speech doctrine earlier and more emphatically than I ever might have imagined. The professional speech doctrine crashed and burned in *NIFLA*.³⁵ *NIFLA* posed a challenge to the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the “FACT Act”).³⁶ The California law was enacted to regulate crisis pregnancy centers—pro-life centers that offer pregnancy-related services.³⁷ The FACT Act required licensed clinics that primarily serve pregnant women to advise those women that California provides free or low-cost services, including abortions, and give them a phone number to call.³⁸ The FACT Act’s stated purpose was to make sure that state residents know their rights and what healthcare services are available to them.³⁹ Unlicensed clinics must notify women that California had not licensed the clinics to provide medical services, to ensure that pregnant women know when they are receiving healthcare from licensed professionals.⁴⁰

In striking down the California provisions, the Court observed that the “Court has not recognized ‘professional speech’

YALE L.J. 1238, 1241 (2016); Jacob M. Victor, Note, *Regulating Sexual Orientation Change Efforts: The California Approach, Its Limitations, and Potential Alternatives*, 123 YALE L.J. 1532, 1537 (2014).

³² Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 112 (2016).

³³ *Id.*

³⁴ *See id.*

³⁵ *See generally* 138 S. Ct. 2361 (2018).

³⁶ *Id.* at 2368; *see also* CAL. HEALTH & SAFETY CODE § 123470 (West 2018).

³⁷ *NIFLA*, 138 S. Ct. at 2368.

³⁸ *Id.*

³⁹ *Id.* at 2369.

⁴⁰ *Id.* at 2370.

as a separate category of speech.”⁴¹ The Court distinguished two areas of existing First Amendment law in which it had previously recognized that standards lower than strict scrutiny applied to the speech of professionals was appropriate.⁴²

The intermediate scrutiny “commercial speech” standard applied to the commercial speech of professionals, such as advertising.⁴³ The commercial speech standard was limited, however, to requiring disclosure, at times, of factual *noncontroversial* information: “First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech.’”⁴⁴ But rules governing disclosure in commercial speech contexts, under the leading lawyer advertising commercial speech decision involving disclosures, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,⁴⁵ the Court held, were not applicable to the sort of disclosures California sought to impose on the clinics under the guise of the professional speech doctrine.⁴⁶ The speech California sought to force the clinics to speak had nothing to do with the clinics’ services or products, but were entirely the state-sponsored message of California.⁴⁷

The Court in *NIFLA* also rejected the argument that the California provisions could be upheld as regulation of professional conduct that “incidentally involves speech,” of the sort approved in *Planned Parenthood v. Casey*.⁴⁸ Professional ethical standards, or suits for professional malpractice, for example, have traditionally been regarded as regulating professional conduct, though that conduct may involve speaking.⁴⁹ “While drawing the line between speech and conduct can be difficult, this Court’s precedents have long drawn it.”⁵⁰

“Outside of the two contexts discussed above—disclosures

⁴¹ *Id.* at 2371.

⁴² *Id.* at 2372.

⁴³ *Id.*

⁴⁴ *Id.* (first citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); then citing *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); and then citing *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978)).

⁴⁵ *See Zauderer*, 471 U.S. at 651.

⁴⁶ *NIFLA*, 138 S. Ct. at 2372.

⁴⁷ *See id.* (“The *Zauderer* standard does not apply here. Most obviously, the licensed notice is not limited to ‘purely factual and uncontroversial information about the terms under which . . . services will be available.’ The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about *state-sponsored* services—including abortion, anything but an ‘uncontroversial’ topic. Accordingly, *Zauderer* has no application here.” (emphasis in original) (internal citations omitted)).

⁴⁸ *Id.*

⁴⁹ *See id.* at 2373.

⁵⁰ *Id.*

under *Zauderer* and professional conduct—this Court’s precedents have long protected the First Amendment rights of professionals,” the Court observed.⁵¹ For example, the Court “has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers, professional fundraisers, and organizations that provided specialized advice about international law.”⁵²

The Court had sound reasons for driving a stake through the heart of the professional speech doctrine. “The dangers associated with content-based regulations of speech are also present in the context of professional speech.”⁵³ As with other kinds of speech, the Court reasoned, regulating the content of professionals’ speech poses the inherent risk that the government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.⁵⁴ Indeed, throughout history, governments have manipulated the speech of professionals “to increase state power and suppress minorities.”⁵⁵ This skews the operation of the marketplace of ideas:

Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform.⁵⁶

The Court noted that, among other things, the reach of the professional speech doctrine was almost limitless, given the difficulty of defining what would or would not qualify as

⁵¹ *Id.* at 2374.

⁵² *Id.* (internal citations omitted).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* For example:

[D]uring the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet government expedited completion of a construction project on the Siberian railroad by ordering doctors to both reject requests for medical leave from work and conceal this government order from their patients. In Nazi Germany, the Third Reich systematically violated the separation between state ideology and medical discourse. German physicians were taught that they owed a higher duty to the “health of the Volk” than to the health of individual patients. Recently, Nicolae Ceausescu’s strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS.

Id. (quoting Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right To Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 201–02 (1994) (footnotes omitted)).

⁵⁶ *Id.* at 2374–75.

“professional.”⁵⁷ Indeed, the professional speech doctrine had the capacity to turn fundamental First Amendment assumptions upside down. For carried to its logical end, all the government would be required to do is create licensure rules for any particular occupation and then seek to reduce the freedom of members of that occupation to speak by treating the regulation as mere regulation of professional speech.⁵⁸ States do not get to choose the level of scrutiny a regulation will receive under the First Amendment; it is the First Amendment that chooses the level of scrutiny applied to a regulation by the States.⁵⁹

The Court in *NIFLA* did not foreclose the slim possibility that in some future scenario there might be a case for reduced scrutiny of the regulation of professionals:

In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists. We need not do so because the licensed notice cannot survive even intermediate scrutiny. California asserts a single interest to justify the licensed notice: providing low-income women with information about state-sponsored services. Assuming that this is a substantial state interest, the licensed notice is not sufficiently drawn to achieve it.⁶⁰

This modest hedge, however, was nothing more, in my view, than recognition that there undoubtedly *are* situations, as Professor Rotunda’s article acknowledged,⁶¹ when palpable government interests related to the functional health of the administration of justice and the conduct of lawyers will not run afoul of the First Amendment. In the closing section of this Article, I elaborate on what I believe Professor Rotunda had in mind, and what the Supreme Court in *NIFLA* had in mind, and how those minds are well-met, forming a coherent theory of what sorts of regulation of the speech of lawyers the Constitution does and does not permit.

⁵⁷ *Id.* (citing Smolla, *supra* note 32).

⁵⁸ *Id.* at 2375 (“All that is required to make something a ‘profession,’ according to these courts, is that it involves personalized services and requires a professional license from the State. But that gives the States unfettered power to reduce a group’s First Amendment rights by simply imposing a licensing requirement.”).

⁵⁹ *Id.* (“States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose ‘invidious discrimination of disfavored subjects.’” (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423–24, n.19 (1993))); *see also* *Riley v. Nat’l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (“[S]tate labels cannot be dispositive of [the] degree of First Amendment protection.” (citing *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975))).

⁶⁰ 138 S. Ct. at 2375.

⁶¹ *See, e.g.*, Rotunda, *supra* note 1, at 6.

V. EXPLORING THE CONSTITUTIONAL LIMITS

If the power of government to regulate the speech of lawyers and judges is considered on a spectrum, the government's power will surely be at its apex when the regulation is directly connected to the management of the administration of justice. Speech by lawyers and judges inside a courtroom is the quintessential example. In *Sacher v. United States*, the Supreme Court sustained the power of courts to use their contempt authority to sanction a lawyer for his expression within a courtroom.⁶² The Court invoked solid, functional rationales for its ruling, noting that “[t]he nature of the [lawyer’s] deportment was not such as merely to offend personal sensitivities of the judge, but it prejudiced the expeditious, orderly and dispassionate conduct of the trial.”⁶³

When a lawyer speaks outside a courtroom on a matter pending inside a courtroom, the constitutional protection for the speech remains high, though the government is permitted, under the rule of *Gentile v. State Bar of Nevada*,⁶⁴ to limit the extrajudicial speech of a lawyer participating in an ongoing proceeding when the lawyer knows or reasonably should know that the speech will “hav[e] a substantial likelihood of materially prejudicing that [adjudicative] proceeding.”⁶⁵

At the opposite end of the spectrum are efforts by the government to use the leverage of licensing attorneys to exact requirements that attorneys not take disfavored positions on public issues *not* directly germane to the practice law. The First Amendment would surely be violated by a sweeping regulation prohibiting an attorney from engaging in racist speech, or joining a racist organization, in situations in which the speech or the membership bear no connection to the practice of law.

As reprehensible as racist speech and membership in racist organizations were to Professor Rotunda—and are to

⁶² 343 U.S. 1, 4–5 (1952).

⁶³ *Id.* at 5.

⁶⁴ 501 U.S. 1030 (1991).

⁶⁵ *Id.* at 1076. (“The regulation of attorneys’ speech is limited—it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys’ comments until after the trial.”). While this rule comes from the *dissenting* opinion of Chief Justice Rehnquist, on this issue the Chief Justice spoke for the Court. *Id.* at 1032, 1076. Chief Justice Rehnquist delivered the opinion of the Court joined by Justices White, O’Connor, Scalia, and Souter, upholding the general “substantial likelihood of material prejudice” standard. *Id.* at 1032, 1063 (“We conclude that the ‘substantial likelihood of material prejudice’ standard applied by Nevada and most other States satisfies the First Amendment.”). The Court nonetheless struck down Nevada’s unusual interpretation and application of the rule, holding it was unconstitutionally vague, in an opinion written by Justice Kennedy, and joined by Justices Marshall, Blackmun, Stevens, and O’Connor. *Id.* at 1048.

me—Americans, including lawyers, have a right to be racist and associate with other racists. Professor Rotunda’s position was crystalline in its clarity:

First, let me make clear that I do not support lawyers who engage in racial or sexual discrimination. Nor do I think that lawyers should tell racist, ethnic, sexist, or other similar jokes. We should not laugh at such jokes, or otherwise indicate support of such speech. We can indicate, by our speech, that we do not approve of such discriminatory speech. The best weapon against the speech we do not like is more speech, not enforced silence.

It is one thing for us to disapprove of such speech, and it is another matter if we seek to use the authority of the state to punish such speech. The latter violates the First Amendment.⁶⁶

For my part, I served as lead counsel, writing the briefs and presenting argument in the Supreme Court in *Virginia v. Black*,⁶⁷ in which my clients included a leader of the Ku Klux Klan, a dedicated white supremacist, who had led a cross-burning ceremony as part of a traditional Klan ritual.⁶⁸ I was able to draw a distinction between my revulsion for his beliefs and my own belief in the First Amendment.

Where on the spectrum does the new ABA Model Rule 8.4(g) fall? Consider, as part of the mix, a somewhat parallel provision in Rule 2.3(B) of the American Bar Association Model Code of Judicial Conduct:

A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.⁶⁹

Rule 2.3(B) is in some respects ostensibly broader than Rule 8.4(g). Rule 2.3(B) prohibits “*words or conduct*,”⁷⁰ whereas Rule 8.4(g) requires that the lawyer “*engage in conduct*.”⁷¹ Rule 2.3(B) reaches “words” that “manifest bias or prejudice.”⁷² Thus, for a judge to express himself or herself in words that manifest prejudice is prohibited. In contrast, Rule 8.4(g) requires that the conduct prohibited “*is harassment or discrimination*.”⁷³ On the other hand,

⁶⁶ Rotunda, *supra* note 1, at 1.

⁶⁷ 538 U.S. 343 (2003).

⁶⁸ *Id.* at 347.

⁶⁹ MODEL CODE OF JUDICIAL CONDUCT r. 2.3(B) (AM. BAR ASS’N 2014).

⁷⁰ *See id.*

⁷¹ *See* MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016).

⁷² MODEL CODE OF JUDICIAL CONDUCT r. 2.3(B) (AM. BAR ASS’N 2014).

⁷³ MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016).

in one respect, Rule 2.3(B) is arguably more tightly confined than Rule 8.4(g). Rule 2.3(B) is limited to what a judge does “in the performance of judicial duties.”⁷⁴ Rule 8.4(g) refers to “conduct related to the practice of law,” a concept that might be deemed more expansive than actual *performance* of the practice of law. Comment 4, as previously noted, suggests the potentially expansive reach of the prohibition, describing it as reaching actions by lawyers “participating in bar association, business or social activities in connection with the practice of law.”⁷⁵

A narrow reading of Rule 8.4(g) would limit its reach to conduct in the practice of law constituting “harassment” or “discrimination” of the sort that would be illegal and unprotected by the Constitution, under federal, state, and local civil rights laws. If that is all that Rule 8.4(g) prohibits, then the hubbub over it is much ado about nothing. But it is not at all plain that Rule 8.4(g) is so limited. The scholarly commentary on the issue is divided.⁷⁶ A particularly thoughtful and balanced exploration of the issues by Professor Rebecca Aviel canvasses the history, text, and commentary of the Rule, yet concludes somewhat inconclusively, describing sensibilities about the Rule as a cultural work-in-progress.⁷⁷ Professor Aviel argues that “Rule 8.4(g) is a project to reshape the norms of the legal profession so that discrimination and harassment come to be seen as similarly grievous as misrepresentation and dishonesty.”⁷⁸ Professor Aviel admits this is an ambitious project, but ends with the optimistic exhortation that “with a bit more work we can make sure it is not an unconstitutional one.”⁷⁹

Individual states, of course, must make their own choices as to whether to adopt language suggested by ABA Model Rule

⁷⁴ MODEL CODE OF JUDICIAL CONDUCT r. 2.3(B) (AM. BAR ASS’N 2014).

⁷⁵ See MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 4 (AM. BAR ASS’N 2016).

⁷⁶ See Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 216 (2017) (“The claim that ‘harassment’ is unfairly vague, perhaps fatally so, ignores some powerful contrary arguments.”); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g) the First Amendment and “Conduct Related to the Practice of Law”*, 30 GEO. J. LEGAL ETHICS 241, 257 (2017) (“Because no jurisdiction has ever attempted to enforce a speech code over social activities merely ‘connected with the practice of law,’ there are no precedents to turn to in order to assess such a regime’s constitutionality. (Professor Gillers fails to acknowledge this gap in his otherwise thorough analysis.) While discrimination and sexual harassment do have established bodies of case law that can be referred to, longstanding ethics rules do not penalize harassment by itself in the context of private speech at various social functions. In such fora, the government’s interest is at its nadir, and tailoring must be extremely narrow to survive judicial scrutiny.” (footnote omitted)).

⁷⁷ See Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 55 (2018).

⁷⁸ *Id.* at 76.

⁷⁹ *Id.*

8.4(g), and if so, whether to modify the Rule to bring it more clearly into conformity with First Amendment norms. There are numerous steps that can be taken to tighten the scope of the Rule, and in so tightening, reduce tensions with the First Amendment.

One step is to include limiting language that would clarify that *only* conduct, including conduct effectuated through the use of language, that would constitute harassment or discrimination as defined under such civil rights laws as Title VII of the Civil Rights Act of 1964 are prohibited by the Rule. The leading Supreme Court case defining the contours of hostile work environment claims under Title VII should be understood as also establishing the permissible limitations on what constitutes “harassment” for the purpose of the regulation of the conduct of lawyers. In *Harris v. Forklift Systems, Inc.*,⁸⁰ the Court explained:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation. But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII’s broad rule of workplace equality.⁸¹

The Supreme Court has never taken a deep dive into an explanation of exactly why expression that would be protected by the First Amendment in the general marketplace might nonetheless be proscribable in the workplace. There are, however, cogent justifications.

First, speech that might be dismissed as constitutionally protected hate speech in the general marketplace takes on a different pallor within the workplace environment. An employee who sues under Title VII and recovers is clearly not engaged in an attempt to recover for mere distress caused by the content of a speaker’s message. The employee, instead, is invoking a legal remedy for abridgment of a legally vested interest: The interest Title VII grants all employees in freedom from discrimination in the

⁸⁰ 510 U.S. 17 (1993).

⁸¹ *Id.* at 21–22.

workplace. More than mere offense in reaction to the message is in play. There is a more palpable disruption of a legal relationship protected by law: The relationship of an employee to an employer that is guaranteed to be free from prohibited discrimination.

Second, there are captive audience and coercion elements implicated in the workplace. The classic response to exposure to offensive speech in the general marketplace is that the offended viewer should look the other way.⁸² “The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, ‘we are inescapably captive audiences for many purposes.’”⁸³ Now more than ever, we are constantly bombarded with speech that we deem false, coarse, and offensive. Would that it was not so, but this is the world we live in. “Much that we encounter offends our esthetic, if not our political and moral, sensibilities.”⁸⁴ It comes down largely to an issue of who “decide[s].”⁸⁵ Modern First Amendment orthodoxy, which Professor Rotunda deeply embraced, is that the “who” ought not be the government. In this deep belief, I believe he was right. He was surely right in the estimation of the Supreme Court, because the Court proclaimed, “the Constitution does not permit [the] government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.”⁸⁶ Yes, we are all subjected, all of the time, to messages that offend us. But the constitutional presumption is that, as adults, we avoid what bothers us by looking away, or dealing with it and responding.⁸⁷

A second step is to abandon efforts to regulate the conduct of lawyers with regard to biased speech in bar association, business, or social activities related to the practice of law. In these settings, there is great danger that bar authorities, wielding the force of the state, would be invited to investigate and potentially punish boorish, unsavory, and offensive comments that would turn off many, if not most, lawyers of goodwill and restrained judgment said in intemperate moments at a conference or a cocktail party. Our profession has plenty of informal social, cultural, and peer-pressure levers to exert as a counter to such expression. To render such expression grounds for professional discipline, however, comes dangerously close to imposing a culture of

82 *Erznoznik v. Jacksonville*, 422 U.S. 205, 211 (1975).

83 *Id.* at 210 (quoting *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 736 (1970)).

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.* at 210–11 (“Rather, . . . the burden normally falls upon the viewer to ‘avoid further bombardment of [his] sensibilities simply by averting [his] eyes.’” (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971))).

orthodoxy and decorum that may align with the highest aspirations of the profession, but cannot be squared with the values of free speech in an open society. As I have argued elsewhere, much of modern First Amendment law is most easily understood as an exercise in boundary disputes. In the general marketplace, we extend robust protection to even the most offensive opinions. Unless the speech meets the rigorous First Amendment standards defining incitement to violence, a true threat, or defamation, to use common examples, the Constitution protects it. In certain “carve outs” from the general marketplace, such as the workplace, speech that would be protected in the general marketplace may become proscribable. The standard in *Harris* defining hostile work environments, for example, would render actionable under Title VII language that which could not be penalized off-duty in a public park.⁸⁸ The looseness of current ABA Model Rule 8.4(g), particularly as expanded by Comment 4, seems to disregard this fundamental constitutional divide.

VI. CONCLUSION

My friend Ron Rotunda was a scholar, teacher, and advocate driven by deep conviction and powerful passions. Perhaps that is why he was so solicitous of freedom of speech, and so cautious about equating attitudes and sentiments he deemed unsavory as punishable violations of legally binding ethical rules. I am thankful to the *Chapman Law Review* for the opportunity to offer this brief reflection on the personality and principles of Ron Rotunda, whose passions and thoughts made this world a better place.

⁸⁸ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

The Significance of “Domicile” in *Wong Kim Ark*

John C. Eastman*

Candidate Trump’s pledge during his 2015–2016 campaign for President to “End Birthright Citizenship,”¹ and *President* Trump’s October 2018 assertion in an interview with Axios on HBO that he could end birthright citizenship by executive order,² has brought the dispute over the meaning of the Fourteenth Amendment’s Citizenship Clause³ back to the forefront of our national discourse. The current perception among many (perhaps most) Americans, whether they agree with it or think it foolish, is that mere birth on U.S. soil results in automatic citizenship for the child, no matter the circumstances of the child’s parents’ presence in the United States—whether temporary or permanent, lawful, or unlawful. This common perception is bolstered by majority academic opinion, which contends that the question was settled by the Supreme Court

* Henry Salvatori Professor of Law & Community Service, and former Dean, Chapman University Dale E. Fowler School of Law; Senior Fellow at The Claremont Institute and Founding Director of the Institute’s Center for Constitutional Jurisprudence. This Article was prepared for the *Chapman Law Review* symposium honoring the life and work of the late Ron Rotunda, whom I had the privilege of recruiting to Chapman while I was serving as Dean. One of the things that distinguished Ron in the legal academy was his willingness to consider new arguments, and the topic here was no exception. In earlier editions of Ron’s constitutional law treatise, the section on the Fourteenth Amendment’s Citizenship Clause merely conveyed the modern understanding that mere birth on U.S. soil provided automatic citizenship to the newborn child, but after I informed him of the significant scholarship indicating that the modern understanding was contrary to the original understanding of the clause, Ron modified the section, indicating in a footnote that there were competing scholarly views on the subject. Compare 3 ROTUNDA, NOWAK & YOUNG, TREATISE ON CONSTITUTIONAL LAW § 22.3 (1986); 4 ROTUNDA, NOWAK & YOUNG, TREATISE ON CONSTITUTIONAL LAW § 22.3 (2d ed. 1992); and 5 ROTUNDA, NOWAK & YOUNG, TREATISE ON CONSTITUTIONAL LAW § 22.3 (3d ed. 1999), with 6 ROTUNDA, NOWAK & YOUNG, TREATISE ON CONSTITUTIONAL LAW § 22.3 (4th ed. 2009). Honest scholarship and debate were Ron’s hallmark, and I am delighted to present this Article in his memory.

¹ *Immigration Reform That Will Make America Great Again*, TRUMP: MAKE AMERICA GREAT AGAIN! 1, 4 (2015), <https://web.archive.org/web/20151231034321/https://www.donaldjtrump.com/images/uploads/Immigration-Reform-Trump.pdf> [<http://perma.cc/D6T4-D7m9>].

² Jonathan Swan & Stef W. Kight, *Exclusive: Trump targeting birthright citizenship with executive order*, AXIOS (Oct. 30, 2018), <https://www.axios.com/trump-birthright-citizenship-executive-order-0cf4285a-16c6-48f2-a933-bd71fd72ea82.html> [<http://perma.cc/TT3C-6R46>].

³ U.S. CONST. amend. XIV, § 1, cl. 1.

over a century ago in the 1898 *Wong Kim Ark* case,⁴ in which the Court held that a child born on U.S. soil to Chinese parents who were not citizens (and because of a treaty between the U.S. and China could not become citizens) was nevertheless a citizen by virtue of the Fourteenth Amendment.⁵

I have argued extensively elsewhere—in briefing before the Supreme Court,⁶ in legislative testimony,⁷ in articles both scholarly⁸ and popular,⁹ and in numerous media appearances¹⁰—why I believe

⁴ *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

⁵ See, e.g., Garrett Epps, *The Citizenship Clause: A Legislative History*, 60 AM. U. L. REV. 331, 332–33 (2010).

⁶ See generally Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence In Support of Respondents, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

⁷ *Birthright Citizenship: Is it the Right Policy for America?*, Hearing Before the Subcomm. on Immigration and Border Security of the Comm. on the Judiciary of the H.R., 114th Cong. 13 (2015) (statement of John C. Eastman), <https://docs.house.gov/meetings/JU/JU01/20150429/103384/HHRG-114-JU01-Transcript-20150429.pdf> [<http://perma.cc/B2EV-3LLK>]; *Birthright Citizenship State Compact Bill: Hearing Before S. Appropriations Comm.*, 50th Sess. (Ariz. Feb. 22, 2011) (statement of John C. Eastman), <https://www.azleg.gov/archivedmeetings/?Year=2011> [<http://perma.cc/R7CC-ARJX>]; *Birthright Citizenship State Compact Bill: Hearing Before S. Judiciary Comm.*, 50th Sess. (Ariz. Feb. 7, 2011) (statement of John C. Eastman), <https://www.azleg.gov/archivedmeetings/?Year=2011> [<http://perma.cc/R7CC-ARJX>]; *Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the Comm. on the Judiciary of the H.R.*, 109th Cong. 57–59 (Sept. 29, 2005) (statement of John C. Eastman), <https://www.govinfo.gov/content/pkg/CHRG-109hrg23690/html/CHRG-109hrg23690.htm> [<http://perma.cc/6SYZ-U6ED>].

⁸ See generally John C. Eastman, *From Plyler to Arizona: Have the Courts Forgotten About Corfield v. Coryell?*, 80 U. CHI. L. REV. 165 (2013); John C. Eastman & Ediberto Roman, *Debate on Birthright Citizenship*, 6 FLA. INT'L U. L. REV. 293 (2011); John C. Eastman, *Born in the U.S.A.? Re-assessing Birthright Citizenship in the Wake of 9/11*, 12 TEX. REV. L. & POL. 167 (2007) (reprinting congressional testimony); John C. Eastman, *From Feudalism to Consent: Rethinking Birthright Citizenship*, HERITAGE FOUND. (Mar. 30, 2006), <https://www.heritage.org/the-constitution/report/feudalism-consent-rethinking-birthright-citizenship> [<http://perma.cc/Q4U9-ZVF5>].

⁹ See generally John C. Eastman, *Trump is Right on Birthright Citizenship*, DAILY CALLER (Nov. 2, 2018, 8:00 AM), <https://dailycaller.com/2018/11/02/trump-right-birthright-citizenship/> [<http://perma.cc/34LK-2RZ3>]; John C. Eastman, *Revoking birthright citizenship would enforce the Constitution*, N.Y. POST (Oct. 30, 2018, 6:55 PM), <https://nypost.com/2018/10/30/revoking-birthright-citizenship-would-enforce-the-constitution/> [<http://perma.cc/LF3K-XFMK>]; John C. Eastman & Linda Chavez, *Birthright Citizenship: Debate*, CRB DIGITAL (Feb. 10, 2016), <http://www.claremont.org/crb/basicpage/birthright-citizenship/> [<http://perma.cc/P5EG-VZRB>]; John C. Eastman, *We Can Apply the 14th Amendment While Also Reforming Birthright Citizenship*, NAT'L REV. (Aug. 24, 2015, 8:00 AM), <https://www.nationalreview.com/2015/08/birthright-citizenship-reform-it-without-repealing-14th-amendment/> [<http://perma.cc/NF85-QHD9>].

¹⁰ See, e.g., *The California Report: Trump Considers Executive Order to End Birthright Citizenship* (KQED radio broadcast Oct. 30, 2018), <https://www.kqed.org/news/11702317/calexico-mayor-calls-trumps-response-to-migrant-caravan-alarmist> [<http://perma.cc/XC7E-BTNP>]; Steve Harman, *Bye-Bye Baby: Trump Aims to End Birthright Citizenship*, VOICE OF AM. (Oct. 30, 2018, 9:43 AM), <https://www.voanews.com/a/trump-aims-to-end-birthright-citizenship/4634978.html> [<http://perma.cc/E56D-QESS>]; *AirTalk Hosted by Larry Mantle: Can Trump end birthright citizenship – and should it end?* (KPCC radio broadcast Oct. 30, 2018), <https://www.scpr.org/programs/airtalk/2018/10/30/63847/can-trump-end-birthright-citizenship-and-should-he/> [<http://perma.cc/4H82-WKN5>]; *All Things Considered: Trump Claims He Will*

the predominate modern understanding of the Citizenship Clause is incorrect. The short version? The Citizenship Clause actually contains two components for automatic citizenship: 1) birth on U.S. soil; and 2) being “subject to the jurisdiction” of the United States.¹¹ Contrary to the modern understanding, the phrase “subject to the jurisdiction” is not synonymous with “subject to the laws,” which for those who drafted and ratified the Fourteenth Amendment was merely a partial or territorial jurisdiction. Rather, for them, “subject to the jurisdiction” meant subject to the “complete” jurisdiction, “[n]ot owing allegiance to anybody else.”¹² In other words, as the Supreme Court noted when it first addressed the clause in 1872, just four years after the Amendment’s adoption: “The phrase, ‘subject to its jurisdiction’ was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.”¹³

Admittedly, that language in the Supreme Court’s 1872 *Slaughter-House* decision was not necessary to the case’s holding and is therefore *dicta*. But it became a holding a decade later in a case involving John Elk, a Native American born in the United States who later renounced his tribal allegiance and claimed citizenship by virtue of the Citizenship Clause.¹⁴ The Supreme Court rejected his claim, holding that Elk was not at the time of his birth “subject to the jurisdiction” of the United States, which required that he be “not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction,

End Birthright Citizenship Through Executive Order (NPR radio broadcast Oct. 30, 2018, 4:30 PM), <https://www.npr.org/2018/10/30/662253537/trump-claims-he-will-end-birthright-citizenship-through-executive-order> [http://perma.cc/GC4H-NMS7]; *The Larry Elder Show* (KRLA-Salem Radio Network radio broadcast Oct. 30, 2018), <https://www.larryelder.com/show-archive/page/6/> [http://perma.cc/P575-DX3R]; *The Ingraham Angle* (Fox News Channel television broadcast Oct. 30, 2018), <https://video.foxnews.com/v/5855619416001/?#sp=show-clips> [http://perma.cc/EGV2-5Y3A]; *The Dennis Prager Show: Truth vs. Leftism* (KRLA-Los Angeles radio broadcast Nov. 1, 2018), <https://pragertopia.com/2018/11/01/prager-20181101-1-truth-vs-leftism/> [http://perma.cc/2LLE-W2RX]; James Ho & John C. Eastman, *Birthright Citizenship and the 14th Amendment* (C-SPAN television broadcast Oct. 16, 2015), <https://www.c-span.org/video/?328772-1/discussion-birthright-citizenship> [http://perma.cc/C3Y6-AL8U]; *Doug McIntyre Show* (WCBS-New York radio broadcast Aug. 20, 2015); *McIntyre in the Morning* (KABC-Los Angeles radio broadcast Aug. 20, 2015); *On Point*, (NPR radio broadcast Aug. 9, 2010); Interview with Ji-Eun Lee (Munhwa Broadcasting Corp. broadcast Feb. 12, 2009); *Special Report with Brit Hume* (Fox News Channel television broadcast Dec. 14, 2007); *The Paula Zahn Show* (CNN television broadcast Dec. 31, 2005). See also Press Conference at the National Press Club (Aug. 10, 2010) (participating media outlets included Politico, Federal News Service, Congressional Quarterly, Amnesty International, Fox News, Talk Radio News, Congressional Quarterly, Center for American Progress, Dallas Morning News, Human Events, GAO, World Journal, Think Progress, Eagle Forum, and Voice of America).

¹¹ U.S. CONST. amend. XIV, § 1, cl. 1.

¹² CONG. GLOBE, 39th Cong., 1st Sess., 2893 (1866) (statement of Sen. Lyman Trumbull).

¹³ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872) (emphasis added).

¹⁴ *Elk v. Wilkins*, 112 U.S. 94 (1884).

and owing them direct and immediate allegiance”—a test he could not meet because, at his birth, Elk “owed immediate allegiance” to this tribe and not to the United States.¹⁵

The Citizenship Clause therefore bestowed automatic citizenship on those born in the United States who were subject not merely to the partial, territorial jurisdiction applicable to anyone physically present within our borders (save for diplomats and invading armies), but who were subject to the complete, political jurisdiction, in the sense of owing allegiance to the United States. As Thomas Cooley, the leading treatise writer of the era, described it, “subject to the jurisdiction” of the United States “meant full and complete jurisdiction to which citizens are generally subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government.”¹⁶ That would seem to have settled the matter.

But fourteen years after the decision in *Elk*, and thirty years after adoption of the Fourteenth Amendment, the Supreme Court ruled that Wong Kim Ark, who had been born in 1873 to parents of Chinese origin who were still subjects of the Emperor of China and not U.S. citizens, was a citizen because he had been born on U.S. soil.¹⁷ My goal here is not to revisit the correctness of that decision, or to review the extensive evidence that I believe demonstrates that Chief Justice Fuller had the better of the argument in his dissent, but rather to focus on one critically important aspect of the case that rather dramatically limits the scope of the case’s *holding* (as opposed to its more expansive *dicta*) in a way that is directly relevant to the current dispute about whether the Fourteenth Amendment mandates automatic citizenship for the children of parents unlawfully present in the United States.

That critical aspect of the case is the word “domicile,” which appears twenty-four times in the majority opinion and introductory statement of facts, and another four times in the dissent.¹⁸ The “question presented,” as stated by Justice Gray,

[I]s whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, *but have a permanent domicile and residence in the United States*, and are there carrying on business, and are not employed in

¹⁵ *Id.* at 94, 99, 102.

¹⁶ THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 243 (The Lawbook Exch., Ltd. 2001) (1880).

¹⁷ *United States v. Wong Kim Ark*, 169 U.S. 649, 653, 704 (1898).

¹⁸ The words “resident” or “residence” appear an additional thirty-two times in the majority opinion, and twelve times in the dissent. *See generally id.*

any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment of the constitution: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”¹⁹

The fact that Wong Kim Ark’s parents were “*domiciled residents* of the United States” at the time of Wong Kim Ark’s birth in 1873, “and had established and enjoyed a *permanent domicile* and residence therein at said city and county of San Francisco,” California, was explicitly part of the agreed-upon facts on which the case had been submitted to the U.S. District Court for the Northern District of California for decision.²⁰ Justice Gray repeated that factual stipulation at the outset of his opinion: “They [Wong Kim Ark’s parents] were at the time of his birth *domiciled residents* of the United States, having previously established and are still *enjoying a permanent domicile* and residence therein at San Francisco.”²¹ He also noted, per the factual stipulation, that Wong Kim Ark, himself,

ever since his birth, has had but one residence, to wit, in California, within the United States and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States.²²

Although Justice Gray used the word “residence” rather than “domicile” when describing Wong Kim Ark’s circumstances, it was (and is) well established, as Justice Joseph Story noted in his *Commentaries on the Conflict of Laws*, that “the place of birth of a person is considered as his domicil[e], if it is at the time of his birth the domicil[e] of his parents.”²³

“Domicile” is, of course, a legal term of art. According to *Black’s Law Dictionary*, it is “[t]hat place in which a man has voluntarily fixed the habitation of himself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home, until some unexpected event shall occur to induce him to adopt some other permanent

¹⁹ *Id.* at 653 (emphasis added).

²⁰ *Id.* at 650–51 (emphasis added).

²¹ *Id.* at 652 (emphasis added).

²² *Id.*

²³ JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS § 46, at 44 (Boston, Hilliard, Gray, & Co. 1834) (emphasis added).

home.”²⁴ “It is his *legal residence*, as distinguished from his temporary place of abode.”²⁵ “Legal residence” is in turn defined as “the term applied to the place a person spends most of his time and is *the home that is recognised by law*.”²⁶ Or, as the Seventh Circuit put it in *In re Garneau*, it is the place where a person “exercises his political rights.”²⁷

Thus, by repeatedly describing Wong Kim Ark’s parents as “domiciled” in the United States, the actual holding in the case addressed only children born in the United States to parents who are *domiciled* in the United States, which is to say, have their “legal residence” in the United States.²⁸

Chief Justice Fuller, joined by Justice Harlan, contested even this in his dissent.²⁹ Though “domiciled” in the United States, Wong Kim Ark’s parents (and hence Wong Kim Ark himself) could not be “subject to the jurisdiction” of the United States in the complete, political sense intended by the Fourteenth Amendment, he argued, because by treaty they were not allowed to become citizens but remained “subjects” of the Emperor of China, to whom they therefore continued to owe allegiance.³⁰ Whether or not Chief Justice Fuller was correct on that score (and I contend that he was), the majority opinion could not extend further than the facts of the case warranted, namely, that children born to parents who are *domiciled* in the United States are sufficiently “subject to the jurisdiction” of the United States that the Fourteenth Amendment bestows on them automatic citizenship upon birth.³¹ As Justice Gray himself noted when discounting the contrary language in the *Slaughter-House Cases* cited above:

[I]t is well to bear in mind the often-quoted words of Chief Justice Marshall: ‘It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the

²⁴ *Domicile*, BLACK’S LAW DICTIONARY (2d ed. 1910) (citing *In re Garneau*, 127 F. 677 (7th Cir. 1904)).

²⁵ *Id.* (emphasis added) (citing *Town of Salem v. Town of Lyme*, 29 Conn. 74 (1860)).

²⁶ *Legal Residence*, THE LAW DICTIONARY, <https://thelawdictionary.org/legal-residence/> [<http://perma.cc/5MLZ-FWP7>] (emphasis added).

²⁷ *In re Garneau*, 127 F. at 678.

²⁸ Had Justice Gray considered the full scope of the requirements for “domicile,” including that it is the place where one exercises “political rights,” he might have realized that the treaty prohibition on Chinese immigrants exercising political rights would have prevented them from being deemed “domiciled” in the United States. Nevertheless, the actual holding of the case is limited to those who are so “domiciled.”

²⁹ See *United States v. Wong Kim Ark*, 169 U.S. 649, 706–10 (1898) (Fuller, C.J., dissenting).

³⁰ *Id.* at 725–26.

³¹ One could even argue that the actual holding is narrower still, limited to those domiciled in the United States who were barred by treaty from ever becoming citizens.

case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.³²

Chief Justice Marshall’s long-standing distinction between *holding* and *dicta*³³ is particularly germane in assessing the scope of *Wong Kim Ark*’s holding, because language in Justice Gray’s opinion that appears to apply more broadly than to those domiciled in the United States is, at times, patently wrong—errors that likely would have not been made had the precise issue been before the Court. In one glaring example, Justice Gray quoted Justice Joseph Story for the proposition that “[p]ersons who are born in a country are generally deemed citizens and subjects of that country,”³⁴ but he omitted the very next sentence in Justice Story’s treatise, namely, that a “reasonable qualification of the rule would seem to be, that it should not apply to the children of parents, who were *in itinere* [traveling] in the country, or who were abiding there for temporary purposes, as for health, or curiosity, or occasional business.”³⁵ Although Justice Story acknowledged that “[i]t would be difficult . . . to assert, that in the present state of public law such a qualification is universally established,”³⁶ Justice Gray’s omission of the qualification altogether erroneously implies that the opposite was universally established.

Justice Story’s caveat directly addresses several of the modern issues that might well be, but have not previously been, presented to the Court. Does “subject to the jurisdiction” cover children born to those who are in the United States lawfully but only temporarily, such as those on tourist, student, or work visas (temporary sojourners, to use the language of the day)? Does it also extend to children born to those who have overstayed their visas and become unlawfully present in the United States? And can it possibly also extend to children born to those who were never lawfully admitted into the United States in the first place? Honest scholars who argue for such a broad interpretation of the Citizenship Clause

³² *Wong Kim Ark*, 169 U.S. at 679 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)).

³³ See, e.g., Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994) (discussing accuracy as being the “primary virtue” for Chief Justice Marshall’s dicta-holding distinction).

³⁴ *Wong Kim Ark*, 169 U.S. at 661 (quoting STORY, *supra* note 23, § 48).

³⁵ STORY, *supra* note 23, § 48.

³⁶ *Id.* Great Britain, for example, did not recognize the qualification that Story recognized was otherwise nearly universally accepted.

concede that the Supreme Court has never *held* that such individuals are citizens.³⁷

Another example: Justice Gray claimed that the English common law rule of *jus soli* “was in force” not only “in all the English colonies upon this continent down to the time of the Declaration of Independence,” as it clearly was, but also “in the United States afterwards, and continued to prevail under the constitution as originally established.”³⁸ The latter point is patently erroneous. The English common law rule, accurately described by Justice Gray, is that:

[E]very person born within the dominions of the crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning, in the country, was an English subject, save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England.³⁹

Being an “English subject” also meant under the law of *jus soli*, owing “*permanent* allegiance to the crown.”⁴⁰ The Declaration of Independence is not just a thorough repudiation of that old feudal idea of “permanent allegiance,” but perhaps the most eloquent repudiation of it ever written.

³⁷ See, e.g., Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499, 500 n.5 (2008) (noting that the principle that any child born on U.S. soil (save to diplomats) “does not rest on any judicial holding. It is based instead on dictum from the *Wong Kim Ark* case and longstanding practice”); Ronald Rizzo, *Born in the USA but Not A Citizen? How the Birth Visa Can Solve Today’s Immigration Challenges*, 27 J. CIV. RTS. & ECON. DEV. 393, 403 (2014) (“*Wong Kim Ark* made absolutely no holding regarding children born to illegal aliens and temporary visitors on U.S. soil.”); David A. Martin, *Membership and Consent: Abstract or Organic?*, 11 YALE J. INT’L L. 278, 280-81 (1985) (likewise noting that language in *Wong Kim Ark* extending beyond children of lawfully domiciled parents is “dictum”); Katherine Nesler, *Resurgence of the Birthright Citizenship Debate*, 55 WASH. U. J.L. & POL’Y 215, 235 (2017) (“[T]he Supreme Court has not addressed a case directly on whether children born to undocumented immigrants on United States soil are automatically granted citizenship by virtue of birth within United States.”); Katherine Pettit, *Addressing the Call for the Elimination of Birthright Citizenship in the United States: Constitutional and Pragmatic Reasons to Keep Birthright Citizenship Intact*, 15 TUL. J. INT’L & COMP. L. 265, 268 (2006) (“The Supreme Court has yet to decide specifically whether this principle applies to a person whose parents are in the United States illegally.”); Alberto R. Gonzales, *An Immigration Crisis in A Nation of Immigrants: Why Amending the Fourteenth Amendment Won’t Solve Our Problems*, 96 MINN. L. REV. 1859, 1868 (2012) (“[T]he Supreme Court has yet to rule on birthright citizenship or the interpretation of ‘subject to the jurisdiction’ in the context of a child born in the United States to unauthorized immigrants.”).

³⁸ *Wong Kim Ark*, 169 U.S. at 659.

³⁹ *Id.* at 657 (quoting LORD CHIEF JUSTICE COCKBURN, COCKBURN ON NATIONALITY 7).

⁴⁰ *Id.* (quoting A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 173–77, 741 (n.p., Sweet & Maxwell 1896)).

The Declaration begins with a statement that it had become necessary for the American people “to dissolve the political bands which ha[d] connected them” to the English people.⁴¹ It then asserts as a “self-evident” truth:

That whenever any Form of Government becomes destructive of [the end of securing the unalienable rights with which the people are endowed by their Creator], it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.⁴²

And if it were not clear enough from those two statements that the Americans were repudiating the notion that they owed perpetual allegiance to the English crown, the language of the closing paragraph is unmistakable, declaring that “these United Colonies are, and of Right ought to be Free and Independent States; *that they are Absolved from all Allegiance to the British Crown*, and that all political connection between them and the State of Great Britain is, and ought to be totally dissolved”⁴³ The notion that the English common law of *jus soli* therefore continued unabated after the Declaration of Independence could not be more mistaken.

Much of the evidence Justice Gray marshalled in support of his conclusion likewise suffers from a lack of care that might not have been the case had the broader question actually been at issue. By way of example, Justice Gray cited several cases for the unobjectionable proposition that “[t]he interpretation of the [C]onstitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in light of its history.”⁴⁴ What he failed to mention is that the general rule about using the common law as a rule of interpretation only applies to the extent that the common law was compatible with the principles of the American Revolution. As Justice Story noted in his 1829 opinion in *Van Ness v. Pacard*, “The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted

⁴¹ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

⁴² *Id.* at para. 2.

⁴³ *Id.* at para. 32 (emphasis added).

⁴⁴ *Wong Kim Ark*, 169 U.S. at 655 (quoting *Smith v. Alabama*, 124 U.S. 465, 478 (1888)); see also *id.* at 654–55 (citing *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874); *Ex parte Wilson*, 114 U.S. 417, 422 (1885); *Boyd v. United States*, 116 U.S. 616, 624–25 (1886); *Smith v. Alabama*, 124 U.S. 465, 478 (1888); and *Moore v. United States*, 91 U.S. 270, 274 (1875)).

only that portion which was applicable to their situation.”⁴⁵ Indeed, long before Justice Gray treated the common law as an obligatory and indisputable governing principle in the United States, the California Supreme Court had much more accurately described that the rule was just the opposite.⁴⁶ There was, that court claimed:

[N]o doctrine better settled, than that such portions of the law of England as are not adapted to our condition, form no part of the law of this State. This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such as are framed with special reference to the physical condition of a country differing widely from our own. It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason, to a case where that reason utterly fails. *Cesante ratione legis cessat ipsa lex.* [The reason for a law ceasing, the law itself ceases].⁴⁷

In short, “[t]he principles of the common law have been adopted in this country only so far as applicable to the habits and condition of our society, and in harmony with the genius, spirit, and objects of our institutions.”⁴⁸ They are not applicable

⁴⁵ Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 144 (1829); *see also* Shively v. Bowlby, 152 U.S. 1, 52 (1894); Webster v. Reid, 52 U.S. (11 How.) 437, 455 (1850); Murray v. Chi. & N.W. Ry. Co., 62 F. 24, 27 (1894) (“[W]hen the [C]onstitution of the United States was adopted, the general rules of the common law, *in so far as they were applicable to the conditions then existing in the colonies, and subject to the modifications necessary to adapt them to the uses and needs of the people*, were recognized and were in force in the colonies” (emphasis added)); United States v. Reid, 53 U.S. (12 How.) 361, 363 (1851) (“The colonists who established the English colonies in this country, undoubtedly brought with them the common and statute laws of England, as they stood at the time of their emigration, *so far as they were applicable to the situation and local circumstances of the colony.*” (emphasis added)); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 31–32 (The Lawbook Exch., Ltd. 1999) (1883); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 537 (Fred B. Rothman Publ’ns 1999) (1873) (“[T]he common law, *so far as it is applicable to our situation and government*, has been recognized and adopted, as one entire system, by the constitutions of Massachusetts, New York, New Jersey, and Maryland. It has been assumed by the courts of justice, or declared by statute, with the like modifications, as the law of the land in every state. It was imported by our colonial ancestors, *as far as it was applicable*” (emphasis added)).

⁴⁶ *See* Crandall v. Woods, 8 Cal. 136 (1857).

⁴⁷ *Id.* at 142–43 (quoting Starr v. Child, 20 Wend. 149 (N.Y. 1838) (Bronson, J., dissenting)).

⁴⁸ Pierson v. Lane, 14 N.W. 90, 92 (Iowa 1882); *see also, e.g.,* *Ex parte Holman*, 28 Iowa 88, 126 (1869) (“The courts of this country unite in holding that the common law, *so far as it is suited to the condition of our people and accords with our institutions*, is the law of the land.” (emphasis added)); Wagner v. Bissell, 3 Iowa 396, 403 (1856) (“[W]here [the common law] has been varied by custom, not founded in reason, or not consonant to the genius and manners of the people, it ceases to have force.”); Brief for Respondents at 316, *People v. Van Rensselaer*, 9 N.Y. 291 (1853) (“There is this necessary limitation implied [upon adoption of the common law by British subjects in new territories], that they carry with them all the laws applicable to their situation, and not repugnant to the local and political circumstances in which they are placed.”); Brief for Plaintiff at 117, *Whitney v. Powell*, 2 Pin. 115, 117 (Wis. 1849), 1849 WL 3235, at *2 (“The common law of England is not to be taken in all respects to be that of America.”); *Ex parte Hickey*, 12 Miss. (4 S. & M.) 751, 776–77 (1845) (“The United States have not taken, in all respects,

otherwise, and the common law *jus soli* principle of perpetual and irrevocable allegiance is simply incompatible with the doctrine of consent explicated in the Declaration of Independence.

Chief Justice Fuller correctly noted in his dissent this significant caveat about the general applicability of the common law in the United States when he stated,

Manifestly, when the sovereignty of the crown was thrown off, and an independent government established, every rule of the common law, and every statute of England obtaining in the colonies, in derogation of the principles on which the new government was founded, was abrogated.⁴⁹

But Justice Gray chose not to engage him on the point, simply asserting, without any of the necessary nuance that the subject deserved (and directly contrary to the express language of the Declaration of Independence), that the English common law rule of *jus soli* was “in force” *after* the Declaration “and continued to prevail under the Constitution as originally established.”⁵⁰ Such manifest errors on matters collateral to the holding of a case is precisely why John Marshall’s old maxim about *dicta* is so important. As Justice Gray himself noted:

The reason of [John Marshall’s] maxim [regarding *dicta*] is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.⁵¹

Viewed through that lens, much of the case authority relied on by Justice Gray is irrelevant to the issues that remain to be addressed. That “citizenship by birth was the law of the English colonies in America” and during the time that New York City was under British occupation during the war—the issue confronted by the Court in *Inglis v. Sailors’ Snug Harbor*⁵²—tells us nothing about whether, or the extent to which, the principles of the Declaration repudiated the common law of *jus soli*. Indeed, another aspect of that case, built on the uncertainty about the

the common law of England. So much only of its general principles are claimed and adopted which is applicable to our situation, institutions and form of government.”); *Lynch v. Clarke*, 1 Sand. Ch. 583, 646 (N.Y. Ch. 1844) (noting that the colonists “brought with them as a birth-right and inheritance, so much of the common law as was applicable to their local situation and change of circumstances”); Brief for Executor at 205, *Gilbert v. Heirs of Richards*, 7 Vt. 203 (1835) (“Such part only of the common law of England, is adopted here ‘as is applicable to the local situation and circumstances’ of this state.”).

⁴⁹ *Wong Kim Ark*, 169 U.S. at 709 (1898) (Fuller, C.J., dissenting).

⁵⁰ *Id.* at 658 (majority opinion).

⁵¹ *Id.* at 679 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821)).

⁵² *Id.* at 659 (citing *Inglis v. Trustees of Sailor’s Snug Harbor*, 28 U.S. (3 Pet.) 99 (1830)).

timing of the John Inglis's birth,⁵³ demonstrates that the rule set down in the majority opinion in *Inglis* is just the opposite of that which was attributed to it by Justice Gray's *dicta*. Addressing the period of time between the Declaration of Independence in July 1776, and the occupation of New York by the British army in September 1776 (i.e., when the City was "in the United States" and not under occupation by a foreign army), the Court held:

If born after the 4th of July 1776, and before the 15th of September of the same year, when the British took possession of New York, his infancy incapacitated him from making any election for himself, and *his election and character followed that of his father*, subject to the right of disaffirmance in a reasonable time after the termination of his minority; which never having been done, he remains a British subject, and disabled from inheriting the land in question.⁵⁴

The italicized language is inaccurate under the pure form of *jus soli* claimed by Justice Gray, for the status of the father is irrelevant if the child is born on the soil of the sovereign. To repeat the prior language of Lord Chief Justice Cockburn, quoted by Justice Gray earlier in the opinion:

By the common law of England, every person born within the dominions of the crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning, in the country, was an English subject, save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England.⁵⁵

Justice Gray similarly ignored a key component of Justice Swayne's decision in *U.S. v. Rhodes*⁵⁶ while riding circuit. The issue in that case was the constitutionality of the 1866 Civil Rights Act, which, as Justice Swayne noted, provided that anyone "born in the United States, *and not subject to any foreign*

⁵³ *Inglis*, 28 U.S. (3 Pet.) at 120–21 (noting that whether John Inglis was born before or after July 4, 1776 was essential to the Court's decision).

⁵⁴ *Id.* at 126 (emphasis added). Language to the contrary in the concurring opinion of Justice Johnson was based on the fact that the State of New York had expressly adopted the common law (including the rule of *jus soli*), not that the rule applied after the Declaration of Independence absent any such adoption by the positive law. *See id.* at 135–36 (Johnson, J., concurring) ("By the twenty-fifth article of the constitution of New York of 1777, the common law of England is adopted into the jurisprudence of the state. By the principles of that law, the demandant owed allegiance to the king of Great Britain, as of his province of New York. By the revolution that allegiance was transferred to the state, and the common law declares that the individual cannot put off his allegiance by any act of his own.")

⁵⁵ *Wong Kim Ark*, 169 U.S. at 657 (quoting LORD CHIEF JUSTICE COCKBURN, COCKBURN ON NATIONALITY 7).

⁵⁶ 27 F. Cas. 785, 786 (C.C.D. Ky. 1866).

power,” was a citizen and therefore able to testify in court.⁵⁷ Nancy Talbot was, Justice Swayne held, “a citizen of the United States of the African race, having been born in the United States, and not subject to any foreign power.”⁵⁸ His later description of the common law of *jus soli* is therefore pure *dicta*.

Most egregious, though, was Justice Gray’s reliance on the New Jersey Supreme Court’s decision in *Benny v. O’Brien*⁵⁹ as support for his broad claim that “[t]he [F]ourteenth [A]mendment affirms the ancient and fundamental rule of citizenship by birth within the territory” for all children here born of resident aliens except diplomats and occupying armies.⁶⁰ *Benny*, like *Wong Kim Ark* itself, involved parents who were “domiciled” in the United States,⁶¹ and so its holding is likewise limited to that context. But the New Jersey Supreme Court was also quite explicit in noting that the Fourteenth Amendment did not provide automatic citizenship beyond that. “Two facts must concur” for there to be automatic citizenship, it held.⁶² “[T]he person must be born here, and he must be subject to the jurisdiction of the United States according to the [F]ourteenth [A]mendment, which means, according to the [C]ivil [R]ights [A]ct, that the person born here is not subject to any foreign power.”⁶³ The two provisions—that is, the Civil Rights Act and the Citizenship Clause of the Fourteenth Amendment—“by implication concede that there may be instances in which the right to citizenship does not attach by reason of birth in this country,” the court stated.⁶⁴ And contrary to Justice Gray’s claim, those exceptions involved not just the children of diplomats or invading armies: “Persons intended to be excepted are only those born in this country of *foreign parents who are temporarily traveling here*, and children born of persons resident here in the diplomatic service of foreign governments.”⁶⁵

The New Jersey Supreme Court’s acknowledgement that the phrases “subject to the jurisdiction” and “not subject to any foreign power” were both intended to exclude temporary visitors confirms that the phrases meant complete, political jurisdiction, not a partial, territorial jurisdiction. And it comports with a key

⁵⁷ *Id.* at 786 (emphasis added) (quoting An act to protect all persons in the United States in their civil rights, and to furnish the means for their vindication, ch. 31, 14 Stat. 27 (1866)).

⁵⁸ *Id.* at 785.

⁵⁹ 32 A. 696 (N.J. 1895).

⁶⁰ *Wong Kim Ark*, 169 U.S. at 693.

⁶¹ *Benny*, 32 A. at 696.

⁶² *Id.* at 697.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 698 (emphasis added).

discussion during the debates over the Fourteenth Amendment in the Senate. Shortly after Senator Howard introduced the language that was to become the Citizenship Clause, Senator Cowan asked: “Is the child of the Chinese immigrant in California a citizen [under the language of the proposed amendment]? Is the child of a Gypsy born in Pennsylvania a citizen? If so, what rights have they? *Have they any more rights than a sojourner in the United States?*”⁶⁶ Senator Conness responded that the amendment would grant citizenship to the children of Chinese living in California and Gypsies living in Pennsylvania,⁶⁷ but his response must be read in light of the distinction that Senator Cowan himself had made between the Chinese and Gypsies to whom he was referring and “sojourners.” In other words, by asking whether children of the Chinese and Gypsies were to be given “more rights than a sojourner,” Senator Cowan was necessarily referring to Chinese and Gypsies who were *not* mere sojourners (temporary visitors), but who were instead permanently domiciled in the United States and not owing allegiance to any foreign power. Far from establishing that the Citizenship Clause guarantees citizenship to everyone born on U.S. soil no matter the circumstances of their parents, as several scholars have claimed,⁶⁸ this important colloquy therefore demonstrates just the opposite. Citizenship would not be limited to white Europeans, as prior naturalization acts had done, but neither would it be extended to the children born on U.S. soil to parents who were merely temporary visitors—sojourners—to the United States.⁶⁹

This is precisely the interpretation of the Fourteenth Amendment given by the New Jersey Supreme Court, Justice Gray’s claims notwithstanding: “The [F]ourteenth [A]mendment, by the language, ‘all persons born in the United States and subject to the jurisdiction thereof,’ was intended to bring all races, without distinction of color, within the rule, which, prior to that time, pertained to the white race,” stated the court.⁷⁰ It therefore extended to a child “of alien parents, who at the time of his birth were *domiciled* in this country.”⁷¹ But it did not extend

⁶⁶ CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (emphasis added) (remarks of Sen. Edgar Cowan).

⁶⁷ *Id.* at 2892 (remarks of Sen. John Conness).

⁶⁸ See, e.g., Epps, *supra* note 5, at 356; James C. Ho, *Defining “American”: Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 367, 368 (2d ed. 2006).

⁶⁹ In any event, if Senator Conness’s comments can be read to suggest that anyone born on U.S. soil were to become citizens no matter the circumstances of their parents, it is significant that none of the other supporters of the Citizenship Clause embraced that position.

⁷⁰ *Benny*, 32 A. at 698.

⁷¹ *Id.*

to “those born in this country of foreign parents who are temporarily traveling here.”⁷²

The Executive Branch of the federal government likewise recognized—both before and for two-thirds of a century after the decision in *Wong Kim Ark*—that more than mere birth on U.S. soil was required for the grant of automatic citizenship. With the exception of wartime, when passports could be issued to non-citizen members of the military who took an oath of allegiance,⁷³ only American citizens have been eligible for passports since 1856, so proof of citizenship has been required when applying for a passport.⁷⁴ But shortly after the Court’s decision in *Elk v. Wilkins*, the passport office adopted a form for use by any “native citizen” applying for a passport that required, *inter alia*, the following information: 1) city, state, and date of birth in the United States; 2) whether the father was a native or naturalized citizen; 3) confirmation that the individual was domiciled in the United States, including the city and state of permanent residence; and 4) an oath of allegiance to the United States.⁷⁵ Information about the father’s status continued until it was inexplicably dropped as a requirement in 1967.⁷⁶ If birth on United States soil alone was sufficient for citizenship, the information about the father’s citizenship status would not have been necessary.

Similarly, as Chief Justice Fuller noted in his *Wong Kim Ark* dissenting opinion, Secretary of State Frederick Frelinghuysen rendered an opinion in 1885 that a child born on U.S. soil to Saxon parents who were “temporarily in the United States” was not a citizen because, through his parents, he was subject to a foreign power.⁷⁷ Moreover, Frederick Frelinghuysen’s successor as Secretary of State, Thomas Bayard, rendered the same opinion in

⁷² *Id.*

⁷³ An Act For enrolling and calling out the national Forces, and for other Purposes, ch. 75, § 1, 12 Stat. 731, 731 (1863) (exempting from the citizen requirement foreign-born males between the ages of twenty and forty-five “who shall have declared on oath their intention to become citizens” and who were therefore obligated to military service by An Act for enrolling and calling out the national Forces, and for other Purposes).

⁷⁴ An Act To regulate the Diplomatic and Consider Systems of the United States, ch. 127, § 23, 11 Stat. 52, 60–61 (1856).

⁷⁵ GAILLARD HUNT, THE STATE DEP’T, THE AMERICAN PASSPORT: ITS HISTORY AND A DIGEST OF LAWS, RULINGS, AND REGULATIONS GOVERNING ITS ISSUANCE BY THE DEPARTMENT OF STATE 64 (Wash., Gov’t Printing Office 1898).

⁷⁶ See 22 C.F.R. § 33.23 (1938) (requiring for “native citizen” applications, *inter alia*, “the name, date and place of birth, and place of residence of the applicant’s father”); *but see* 22 C.F.R. § 51.43 (1967) (requiring only proof of birth in the United States).

⁷⁷ Frederick Frelinghuysen, *Hausding’s Case: Frelinghuysen, Sec’y of State, to Kasson, 1885*, 2 Wharton’s Digest 399 (1885) in CASES AND OPINIONS ON INTERNATIONAL LAW 222–23 (Boston, The Bos. Book Co. 1893).

Richard Greisser's case. Greisser was born in Ohio in 1867 to a father who was a German subject and domiciled in Germany.⁷⁸ Greisser was therefore not a citizen, according to Secretary of State Bayard, because he was "subject to a foreign power,' and 'not subject to the jurisdiction of the United States.'"⁷⁹

In sum, the distinction between sojourners and those permanently domiciled in the United States was made during the debates over the Fourteenth Amendment, in state court judicial opinions, and by the actual practice of the passport office. These distinctions indicate that the mandate of automatic citizenship was not understood to apply to children of temporary visitors to the United States. Of course, if the Citizenship Clause does not mandate automatic citizenship for children born to parents who are temporarily, but lawfully, visiting the United States, it necessarily does not extend citizenship to the children of those who are unlawfully visiting the United States. In both cases, the parents are subject only to the partial, territorial jurisdiction of the United States in the sense that they must comport with the laws while physically present within the borders of the United States. But they are not subject to the jurisdiction of the United States in the broader sense intended by the Fourteenth Amendment because they are not subject to the complete, political jurisdiction. For their temporary sojourn to the territory of the United States brings with it only a temporary obligation to obey her laws, not a full allegiance to her sovereignty.

One might well argue that even children whose parents are "domiciled" in the United States, but who remain subjects or citizens of a foreign power, do not meet the test of the Citizenship Clause as it was originally understood, and that even the more limited *holding* of *Wong Kim Ark* was therefore incorrect. But it should be acknowledged that the treaty between the United States and the Emperor of China that gave rise to the *Wong Kim Ark* case was ignoble because it refused to afford to Chinese subjects the same inalienable right to reject their prior allegiance that Americans had claimed as an unalienable, natural right in 1776.⁸⁰ Perhaps Justice Gray was doing no more than counter-balancing the pernicious effects of that treaty, acknowledging that because Chinese parents who had become lawfully and permanently domiciled in the United States had demonstrated their allegiance to their adopted country as much as the treaty allowed them to do,

⁷⁸ *United States v. Wong Kim Ark*, 169 U.S. 649, 719 (1898) (Fuller, C.J., dissenting) (internal citation omitted).

⁷⁹ *Id.* (Fuller, C.J., dissenting) (internal citation omitted).

⁸⁰ *See id.* at 701–02.

any children born to them on U.S. soil should enjoy the benefits of citizenship. But that concern no longer exists—“*Cessante Ratione Legis, Cessat Ipsa Lex*” (the reason for a law ceasing, the law itself ceases).⁸¹ Thus, to extend the mandate of automatic citizenship to the entirely different context of temporary visitors, and even further to the context of those who have entered this country illegally, pushes well beyond any such sentiment, and certainly beyond the actual *holding* of *Wong Kim Ark*.

⁸¹ *Crandall v. Woods*, 8 Cal. 136 (1857).

The Right to Shout Fire in a Crowded Theatre: Hateful Speech and the First Amendment

Ronald D. Rotunda*

I. INTRODUCTION

Oliver Wendell Holmes’s dictum that the First Amendment “would not protect a man in falsely shouting fire in a theatre,”¹ summarizes free speech law for many people. They think it allows Congress to make *some* laws restricting, if the laws are necessary, even though the First Amendment says, “Congress shall make *no* law . . . abridging freedom of speech or of the press.”² Plug “falsely shouting fire in a crowded theater” into Google and you will find over 3.3 million results.³ Remove the adjective, “crowded” (Justice Holmes did not use it), and the references climb to about 9 million.⁴ Limit the phrase to case citations in Westlaw, and you find over 200 cases and another 200 court documents. These references are often approving if not fawning.

Yet, if we look closely at what the law as it is now—rather than as Justice Holmes imagined it, or as Justice Holmes thought it should be—we will see that Justice Holmes was wrong. It would be a very rare circumstance that the government could constitutionally prohibit one from shouting “fire” in a crowded theatre.

The United States Supreme Court has travelled on a long and twisting path to reach that destination. We owe our thanks

* Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University Dale E. Fowler School of Law. This Article is being published as part of *Chapman Law Review* symposium honoring the life and work of Professor Ronald Rotunda (1945-2018).

¹ The full quotation is:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.) (internal citations omitted).

² U.S. CONST. amend. I (emphasis added).

³ Note, the number of results is as of April 10, 2019.

⁴ Note, the number of results is as of April 10, 2019.

to the Greek philosophers and playwrights who first blazed that trail, nearly two and one-half millennia ago.

As discussed below, the Supreme Court now protects hateful speech, such as a burning cross.⁵ It protects threats against the life of the President, except for the narrow category of “true ‘threat[s].’”⁶ In general, speech alone (in contrast to speech *plus* an action or an activity) is protected,⁷ which is why there is a constitutional right to *lie* about receiving the Congressional Medal of Honor,⁸ although not a right to commit fraud (e.g., by using deceptive speech to take money under false pretenses). Those who receive government grants even have a free speech right to receive these subsidies while rejecting a government requirement that they affirm in their award documents that they are “opposed to prostitution”⁹

⁵ See, e.g., *Virginia v. Black*, 538 U.S. 343, 366–67 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393 (1992); *Brandenburg v. Ohio*, 395 U.S. 444, 445, 449 (1969) (per curiam).

⁶ *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam). The Court did not invalidate, on its face, the statute (8 U.S.C. § 871(a)) which prohibits threats against the President. It did overturn the conviction, directed an acquittal, and explained that the government must prove more than that the defendant said the forbidden words. See *id.* at 707. “[A] statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.” *Id.* at 707–08.

“Hundreds of celebrity howlers threaten the President of the United States every year, sometimes because they disagree with his policies, but more often just because he is the President”—yet there is no prosecution. STALKING, THREATENING, AND ATTACKING PUBLIC FIGURES: A PSYCHOLOGICAL AND BEHAVIORAL ANALYSIS 111 (J. Reid Meloy, Lorraine Sheridan & Jens Hoffmann eds., 2008).

⁷ There are a few categories of speech that the Court historically has not protected, such as “obscenity” and “defamation,” both terms of art that are narrowly defined. *New York Times v. Sullivan*, 376 U.S. 254, 269, 271–74 (1964) (analyzing “defamation” and “knowing falsehood” about public officials); *Miller v. California*, 413 U.S. 15, 24–26 (1973) (defining obscenity as “patently offensive representations . . . of ultimate sexual acts” that lack “serious literary, artistic, political, or scientific value”). Such decisions, however, do nothing to undercut the protection the First Amendment gives to hateful speech.

⁸ See *United States v. Alvarez*, 567 U.S. 709, 729–30 (2012). This case made clear that there are very few constitutional content-based restrictions on free speech:

[C]ontent-based restrictions on speech have been permitted . . . only when confined to the few “historic and traditional categories [of expression] Among these categories are advocacy intended, and likely, to incite lawless action, obscenity, defamation, speech integral to criminal conduct, so-called “fighting words,” child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent

Id. at 717 (internal citations omitted).

⁹ *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 210, 221 (2013) (internal quotation marks omitted). Chief Justice Roberts, for the Court, held that the Agency for International Development’s (AID) requirement violated the First Amendment because it compels, as a condition of federal funding, recipients to affirm a belief that, by its nature, cannot be confined within the scope of the government program. *Id.* There is a constitutional distinction between (1) conditions that define the limits of the government spending program (that is, they specify the activities Congress wants to subsidize) and (2) conditions that try to leverage funding “to regulate speech outside the contours of the program itself.” *Id.* at 214–15.

The law may require that the grantee may not use federal funds to promote or advocate the legalization or practice of prostitution. *Id.* at 218. However, the government’s

When the Court allows prohibitions of some speech, such as perjury, it makes clear that it is speech *plus* something else.¹⁰ If I hold a gun to your head and say, “give me your money or your life,” I’m engaging in conduct (robbery) accompanied by words. If I say, “I wish I had Bill Gates’ money,” or, “I hate the idle rich,” I am just engaging in speech.

Another example is speech that proposes an illegal commercial transaction. If it is illegal to hire an assassin, the law can make it illegal to publish an advertisement that says, “Wanted: A hitman; no questions asked.”¹¹

Similarly, a law that prohibits aiding and abetting a “foreign terrorist organization,” can apply to a group that uses speech to support the lawful and nonviolent purposes of the terrorist organization because the law does not ban “pure political speech. . . .”¹² It bans speech plus, that is, speech used in connection with an activity in order to help the terrorist group under the direction of that group.

An organization or individual can say or advocate whatever they want. They can argue, if they wish, that Hamas is a good organization and its methods are justified. That is independent advocacy. However, the Court upheld a statute limiting speech that aided foreign terrorists because it did not limit pure speech. It “reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent advocacy that might be viewed as promoting the

second requirement is invalid, because it improperly *leverages* funding. *Id.* at 215–16. It requires a funding recipient to “espouse a specific belief as its own.” *Id.* at 219. This Policy Requirement, “by its very nature” affects speech outside the scope of the federally funded program. *Id.* at 218. It “goes beyond preventing” grantees from using private funds in a way that would undermine the federal program. *Id.* at 220. “It requires them to pledge allegiance to the [g]overnment’s policy of eradicating prostitution.” *Id.* This “Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the [g]overnment program.” *Id.*

¹⁰ “It is not simply because perjured statements are false that they lack First Amendment protection.” *Alvarez*, 567 U.S. at 720. When the Court allows civil or criminal penalties for “defamation, fraud, or some other legally cognizable harm associated with a false statement” there is speech plus something else, “such as an invasion of privacy or the costs of vexatious litigation.” *Id.* at 719. Perjury, that is, intentionally introducing false evidence, interferes with a trial in the same way that an action, such as introducing a forged document, interferes with a fair trial. *Id.* at 720. As the Court said in *United States v. Dunnigan*, “[t]o uphold the integrity of our trial system . . . the constitutionality of perjury statutes is unquestioned.” 507 U.S. 87, 97 (1993).

¹¹ It is not “an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)) (internal quotation marks omitted); see also *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

¹² *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28–29 (2010).

group's legitimacy is not covered."¹³ Congress may enact this statute to prevent terrorist organizations like Hamas from using "its overt political and charitable organizations as a financial and logistical support network for its terrorist operations."¹⁴

The government cannot limit the speaker simply because the audience is upset with the words spoken. There is no longer any heckler's veto, even when the speaker spews forth hate. Thus, the Nazis have a constitutional right to march through Skokie, Illinois, a town that the American Nazis chose specifically because a large number of Holocaust survivors lived there.¹⁵ The point of the Nazi march was to impose psychic harm—yet the First Amendment still protected it.¹⁶

In order to understand modern speech doctrine, where people have a right to lie, to march celebrating Nazi hate, to advocate anarchy, to accept federal money while rejecting some of the conditions attached to it—to know how we arrived here, with substantially more free speech rights than Justice Holmes would ever have imagined—we have to understand free speech's ancient roots.

It is more important than ever to understand the intellectual rationale of modern free expression, and learn why Justice Holmes was wrong, because today, free speech is under renewed attack from those who used to be its supporters.

The usual suspects who reject free speech would include terrorists, like those who, in 2015, attacked *Charlie Hebdo*, the satirical French newspaper, and claimed twelve lives.¹⁷ To that group there is another, more surprising addition—those who intimated that *Charlie Hebdo* had it coming to them. These people argued that those who parody should exercise self-censorship if the objects of their satire are prone to violence.¹⁸ In other words, blame the victim.

¹³ *Id.* at 31–32.

¹⁴ *Id.* at 31 (quoting MATTHEW LEVITT, *HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD 2* (2006)).

¹⁵ See *Collin v. Smith*, 578 F.2d 1197, 1198–200 (7th Cir. 1978). The members of the National Socialist Party of America, clothed with the swastika and other symbols of the Nazis, planned to march in front of the Village Hall in Skokie, a Chicago suburb with a large Jewish population, including several thousand survivors of the Holocaust. *Id.* The court invalidated various attempts to forbid the march, including ordinance No. "995," prohibiting the dissemination of any materials promoting and inciting racial hatred. *Id.* at 1207.

¹⁶ *Id.*

¹⁷ Ronald D. Rotunda, *Je Suis Charlie Hebdo*, VERDICT (Feb. 16, 2015), https://verdict.justia.com/2015/02/16/je-suis-charlie-hebdo?utm_source=twitter&utm_campaign=wordtwit&utm_medium=web [http://perma.cc/N2TL-UUDM].

¹⁸ See, e.g., Erik Wemple, *On CNN, Jay Carney Sticks to Position that Charlie Hebdo Should Have Pulled Back*, WASH. POST (Jan. 8, 2015), https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/01/08/on-cnn-jay-carney-sticks-to-position-that-charlie-hebdo-should-have-pulled-back/?utm_term=.28144e322e05 [http://perma.cc/JA74-JJ5B]; Charles Lane,

What is even more troubling is that to the list of usual suspects, we must add some *unusual* suspects—those who think of themselves as liberal and supportive of free speech yet justify restriction to prohibit what they regard as hateful or hurtful speech. That group is more worrisome, because its members used to be the champions of free speech.

Our universities are educating the leaders of tomorrow. These future leaders do not believe in free speech. We know from news reports that when university students do not agree with a viewpoint of a speaker, the students protest, sometimes violently.¹⁹ Recent surveys show that the protestors are not merely a small but vocal minority. Instead, they are a majority.²⁰

If we survey Democrats, Republicans, or Independents, fewer than half think the First Amendment protects speech the students regard as “hate speech.”²¹ A significant number of students, regardless of political affiliation, believe it is completely appropriate for students to disrupt a speaker so that no one in the audience can hear him or her.²² One-fifth of all college students believe that *violence* is appropriate to prevent the speaker from being able to speak at all.²³ In 1984, twenty percent of college students thought that universities should ban speakers they considered extreme.²⁴ By 2015, that percentage more than doubled to forty-three percent.²⁵

Charlie Hebdo's Editors Took Big Risks to Defend Freedom of Expression, WASH. POST (Jan. 7, 2015), https://www.washingtonpost.com/opinions/charles-lane-charlie-hebdos-editors-took-risks-to-defend-the-freedom-of-expression/2015/01/07/8b4a3782-9694-11e4-927a-4fa2638cd1b0_story.html?utm_term=.819dfad16d51 [http://perma.cc/3Y4S-6K57].

¹⁹ See Lisa Rathke, *US colleges confront a new era of sometimes-violent protest*, AP NEWS (Apr. 26, 2017), <https://www.apnews.com/116336dc947e4e8faba1d5ccd1805398/US-colleges-confront-a-new-era-of-sometimes-violent-protest> [http://perma.cc/G9RL-AZ27].

²⁰ See John Villasenor, *Views among college students regarding the First Amendment: Results from a new survey*, BROOKINGS INST. (Sept. 18, 2017), <https://www.brookings.edu/blog/fixgov/2017/09/18/views-among-college-students-regarding-the-first-amendment-results-from-a-new-survey/> [http://perma.cc/NQK7-5NH2].

²¹ *Id.* (finding only thirty-nine percent of students surveyed believe hate speech is protected).

²² *Id.* (finding fifty-one percent of students surveyed agreed with the statement “A student group opposed to the speaker disrupts the speech by loudly and repeatedly shouting so that the audience cannot hear the speaker. Do you agree or disagree that the student group’s actions are acceptable?”).

²³ *Id.* (finding nineteen percent of students agreed with the statement “A student group opposed to the speaker uses violence to prevent the speaker from speaking. Do you agree or disagree that the student group’s actions are acceptable?”).

²⁴ See Jean M. Twenge, *The Smartphone Generation vs. Free Speech*, WALL ST. J. (Sept. 1, 2017, 10:08 AM), <https://www.wsj.com/articles/the-smartphone-generation-vs-free-speech-1504274890>.

²⁵ See *id.*; see also Jean M. Twenge, Review --- *The Smartphone Generation vs. Free Speech --- Risk-Averse and Unaccustomed to Independence, they Flee From the ‘Hurt’ of Words*, WALL ST. J., Sept. 2, 2017, at C.3; JEAN M. TWENGE, iGEN: WHY TODAY’S SUPER-CONNECTED KIDS ARE GROWING UP LESS REBELLIOUS, MORE TOLERANT, LESS HAPPY—AND COMPLETELY UNPREPARED FOR ADULTHOOD 252 (2017).

Instead of being bastions of free discourse, many universities are now politically correct. Take Iowa State University for example. Last year, it required its students to waive their free speech rights. It explicitly told its students that they must agree, in order to graduate, that the University can punish speech it regards as “harassment” even though the student is “[e]ngaging in First Amendment protected speech activities.”²⁶ The inevitable lawsuit followed, and the university settled and agreed to change its ways.²⁷ As the verified complaint explained—quoting the Iowa State University’s “Student Disciplinary Regulations”—the University’s “Discriminatory Harassment” policy prohibits students from engaging in “unwelcome behavior” on the basis of specific classifications, including religion, and confirms that “[e]ngaging in First Amendment protected speech activities” may be deemed harassment “depending upon the circumstances.”²⁸

In law schools nowadays, it is common for constitutional law professors to teach that there are many limits to the First Amendment. Often, they begin a course on free speech by quoting Justice Holmes, explaining that protection for free speech requires “balance,” and then justifying whatever restrictions they would like to impose. Although the First Amendment provides that Congress “shall make no law . . . abridging the freedom of speech, or of the press,”²⁹ it does not really mean “no law”—that is how the argument goes and its proponents use it to justify banning hate speech, politically incorrect speech, and hurtful speech.³⁰

Others to add to the list of those who reject First Amendment values are some lower courts.³¹ They do not acknowledge the modern vigorous protections for unpopular speech perhaps because they do

²⁶ Verified Compl. for Declaratory and Injunctive Relief ¶¶ 124, 133, *Dunn v. Leath*, No. 4:16-CV-00553-JAJ-CFB (S.D. Iowa Oct. 17, 2016).

²⁷ The University settled and changed its policies in 2017. See Settlement Agreement & Release at 2, *Dunn v. Leath*, No. 4:16-CV-00553-JAJ-CFB (S.D. Iowa Oct. 17, 2016).

²⁸ Verified Compl. for Declaratory and Injunctive Relief, *supra* note 26, ¶ 133.

²⁹ U.S. CONST. amend. I.

³⁰ Professor and Judge Richard Posner frankly adopts a balancing test in First Amendment cases. See, e.g., RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 67 (2001) (“[S]peech should be allowed if but only if its benefits equal or exceed its costs discounted by their probability and by their futurity, and reduced by the costs of administering a ban.”). See also *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1097 (7th Cir. 1990) (Posner, J., concurring) (“I insist that bullfighting is an expressive activity,” but the state can still forbid it “because in American society its harmful consequences are thought to outweigh its expressive value”), *rev’d sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

³¹ See, e.g., *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 767, 770 (9th Cir. 2014) (holding that a public school could prohibit students from wearing a symbol of the American Flag on their clothing because doing so might upset some Mexican American students); *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 233 (6th Cir. 2015) (en banc) (overruling the panel which had upheld a heckler’s veto).

not understand the modern rationale for free speech—a rationale that traces its ancestry to ancient roots.

Typically, these people—university administrators, university students, law school professors, lower courts, modern pundits—go on to agree that the restrictions on free speech that occurred in an earlier time were wrong and were not justified at the time, *but*—there is always a “but”—today is different.

Justice Frankfurter is a typical example of this phenomenon, and the vehicle he used to justify his position is his concurring opinion in *Dennis v. United States*, in which the Court upheld the conviction of the defendants for violating the Smith Act.³² *Dennis* came down in 1951, in the midst of the second Red Scare, which lasted from about 1947 to mid-1950s.³³ It was the heyday of McCarthyism.

Justice Frankfurter agreed that the government overreacted to the first Red Scare, in the 1920s, but the government, he said, is not overreacting to the second Red Scare, which he was living through.³⁴

Justice Frankfurter took “judicial notice” of the ascendancy of the Communist doctrine in the 1950s because it was, to him, a matter of “common knowledge,” and that knowledge “would amply justify a legislature in concluding that recruitment of additional members for the [Communist] Party would create a substantial danger to national security.”³⁵ What the Court is doing now, said Justice Frankfurter, is not like what the Court did in *Gitlow v. New York*, when it upheld a state conviction for “criminal anarchy.”³⁶ Justice Frankfurter would require:

[E]xcessive tolerance of the legislative judgment to suppose that the *Gitlow* publication in the circumstances could justify serious concern. In contrast, there is ample justification for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security.³⁷

In contemporary America, many of those who ridicule both the first and the second Red Scare of yesteryear have no problem attacking unpopular speech today, banning it, or limiting it to certain “zones” with trigger warnings to protect the sensitive.

³² 341 U.S. 494, 541–42 (1951) (Frankfurter, J., concurring).

³³ See RICHARD M. FRIED, NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE 3 (1991); see also MICHAEL J. HEALE, MCCARTHY’S AMERICANS: RED SCARE POLITICS IN STATE AND NATION, 1935–1965, at 2 (1998); LANDON R. Y. STORRS, THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT 1 (2012).

³⁴ See generally David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 1, 22 (2003).

³⁵ *Dennis*, 341 U.S. at 547 (Frankfurter, J., concurring).

³⁶ *Gitlow v. New York*, 268 U.S. 652, 654, 670 (1925).

³⁷ *Dennis*, 341 U.S. at 541–42 (Frankfurter, J., concurring).

Like Justice Frankfurter, they say, “This time it’s different. The prior generation overreacted, but what we are doing now is justified.” That is the way the argument goes, and each generation that justifies restrictions uses it.

The universities, which used to be the citadels of free speech—think of the University of California, Berkeley, famous for its “free speech movement” in the 1960s³⁸—are now famous for limiting free speech.³⁹ Courts now justify banning students from wearing t-shirts with the American Flag because showing it might upset those who see it.⁴⁰ In this new legal regime, we have a right to burn the flag⁴¹ but not to display it.

Justice Frankfurter’s false distinction between the first Red Scare and the second one, as well as Berkeley’s free speech turnaround, should teach us that each generation must re-learn the importance of free speech, even rebellious speech in time of war, even speech that promotes hate, or advocates anarchy. And to re-learn that lesson, we must start with the ancient Greeks.

II. PERICLES AND THE BIRTH OF FREE SPEECH

Over 2400 years ago, in the cradle of democracy, the people of Athens believed that freedom of speech made their armies more courageous, and that free speech made them stronger, not weaker. Their philosophers, historians, and playwrights crafted the first arguments favoring free speech and opposing government regulation, even in time of war. The primary ancient Greek figures, along with Pericles, were Herodotus, Thucydides, and Aeschylus.

Herodotus wrote the *Histories*, his History of the Persian Wars (499–479 BC), in nine books. We sometimes refer to Herodotus as the father of history.⁴² Before Herodotus, people wrote history in the sense of chronicling events, writing lists (there was a battle; a king lost; another king sealed his victory by a propitious marriage, and so forth). Herodotus was different: He was interested in *why* things happened; what caused nations or

³⁸ See ROBERT COHEN, FREEDOM’S ORATOR: MARIO SAVIO AND THE RADICAL LEGACY OF THE 1960s 82 (2009).

³⁹ John Woodrow Cox, *Berkeley Gave Birth to the Free Speech Movement in the 1960s. Now, Conservatives are Demanding it Include Them*, WASH. POST (Apr. 20, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/04/20/berkeley-gave-birth-to-the-free-speech-movement-in-the-1960s-now-conservatives-are-demanding-it-include-them/?utm_term=.2e7f010e6538 [http://perma.cc/5TQH-S5H3].

⁴⁰ See *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 774–75 (9th Cir. 2014). Discussed *infra*.

⁴¹ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 399 (1989); *United States v. Eichman*, 496 U.S. 310, 312 (1990).

⁴² J. A. S. Evans, *Father of History or Father of Lies: The Reputation of Herodotus*, 64 CLASSICAL J. 11 (1968).

leaders to do one thing or another.⁴³ Our word, “history” comes from the Greek wording meaning “inquiry” or “investigation.”⁴⁴ Admittedly, he relied on oral recollections, rumors, and legends, which is why others call him the father of lies.⁴⁵

Herodotus sought to understand and explain why Athenians could win victories over the more numerous Persians in the first part of the fifth century BC⁴⁶ His answer was that Athenians fought as free people, not as slaves.⁴⁷ It is not that the Athenians were braver than the Persians were, or that their archers were more accurate, or their weapons more advanced. Instead, Herodotus argued, when the Athenians were under despotic rulers, they “were no better in war than any of their neighbors, yet once they got quit of despots they were far and away the first of all,” because “when they were freed each man was zealous to achieve for himself.”⁴⁸ Freedom made the Athenians braver.

In contrast to Herodotus, Thucydides wrote about the history of events that occurred during his lifetime.⁴⁹ He sought to confirm facts through eyewitness accounts and written records. Yet his histories were no transcript of what people said. In his *History of the Peloponnesian War*, Thucydides included long speeches that historical figures *might* have delivered.⁵⁰ Thucydides tells us that a custom of the times was for a prominent figure to give a funeral oration.

In Book 2 of his *History*, he gives us the famous Funeral Oration of Pericles. Although one might think that Thucydides presents this speech as if it were a verbatim transcript of Pericles’ discourse, Thucydides does not pretend that it is so. Instead, he said the words represent what Pericles intended, what he could have said, what was “called for in the situation.”⁵¹

The Funeral Oration indicates free speech was not merely a theory of a few academicians. Democratically elected political leaders were also embracing it. Pericles delivered his speech as a

⁴³ *See id.* at 12.

⁴⁴ *Id.*

⁴⁵ *See id.* at 11; *see also* DONALD LATEINER, THE HISTORICAL METHOD OF HERODOTUS 8–9 (1989); DAVID SACKS, ENCYCLOPEDIA OF THE ANCIENT GREEK WORLD 155 (Lisa R. Brody ed., 2005).

⁴⁶ LATEINER, *supra* note 45, at 182.

⁴⁷ *Id.*

⁴⁸ I.F. STONE, THE TRIAL OF SOCRATES 50 (1988) (footnote omitted).

⁴⁹ *See* Julia Kindt, *Guide to the Classics: Thucydides’s History of the Peloponnesian War*, CONVERSATION (June 12, 2017, 3:56 PM), <http://theconversation.com/guide-to-the-classics-thucydides-history-of-the-peloponnesian-war-71550> [<http://perma.cc/ZZZ6-HGUL>].

⁵⁰ *See id.*

⁵¹ ALAN RYAN, ON POLITICS: A HISTORY OF POLITICAL THOUGHT: FROM HERODOTUS TO THE PRESENT 23 (2012).

tribute to those who died in the war that year.⁵² When he spoke, the first year of Peloponnesian War was just ending.⁵³

Thucydides tells us that Pericles argued that the Athenians were stronger because they were free. Athens was not a formidable city-state *in spite of* free speech but *because of* free speech. Pericles' famous funeral oration argued:

Our city is thrown open to the world, and we never expel a foreigner or prevent him from seeing or learning anything of which the secret if revealed to an enemy might profit him. We rely not upon management or trickery, but upon our own hearts and hands. False The great impediment to action is, in our opinion, not discussion, but the want of knowledge that is gained by discussion preparatory to action.⁵⁴

Pericles does not focus on the achievements of Athens' military. Instead, he praises the Athenian form of government and its protection of free speech.⁵⁵

The final ancient figure justifying free speech as essential to democracy is the playwright, Aeschylus. His play, *The Persians*, echoed Herodotus and Thucydides.⁵⁶ He wrote it in 472 BC. That same year, this play won first prize at the dramatic competitions in the City Dionysia festival of Athens.⁵⁷ Remember that at this time, in contrast to little city-state of Athens, dictators and kings ruled the rest of the world.

Aeschylus explained that the Athenians were victorious because, “[o]f no man are they the slaves or subjects.”⁵⁸ Art reflects life, and Aeschylus, in his play, reflected what many Athenians believed: Athenians should celebrate their victory not as a victory of Greeks over Persians, but as a victory of free men over slaves. “The victors at Salamis were men elevated and inspired by the freedom to speak their minds and govern themselves.”⁵⁹ The Persians outnumbered the Greeks, but the Greeks won a decisive victory led by Themistocles, a non-aristocratic Athenian politician and general.

Herodotus, Thucydides, Aeschylus, along with political leaders like Pericles, all embraced this ancient truth: People who are free are people who work more intensely because they work

⁵² See Kindt, *supra* note 49.

⁵³ *Id.*

⁵⁴ Pericles, *Funeral Oration*, in BENJAMIN JOWETT, THUCYDIDES 116, 118–19 (Clarendon Press, 1881).

⁵⁵ *See id.*

⁵⁶ See Tim Rood, *Thucydides' Persian Wars*, in OXFORD READINGS IN THUCYDIDES 168–69 (Jeffrey S. Rusten ed., 2009).

⁵⁷ See AMNON KABATCHNIK, BLOOD ON THE STAGE: 480 B.C. TO 1600 A.D. 4 (2014). *The Persians* is the first play in recorded history that contains a ghost scene. *Id.*

⁵⁸ STONE, *supra* note 48, at 51 (quoting 2 AESCHYLUS, *PLAYS*).

⁵⁹ *Id.*

for themselves, not for a master.⁶⁰ It is for the same reason that it takes many hunting dogs to catch one fox: The fox works harder because he is self-employed.

The countries of the world were slow to learn this lesson. When the United States began its experiment with democracy, it was also slow to learn. It took nearly two centuries before we broadly embraced the principle that free speech and the right to dissent are essential for a free people, even in wartime. The road to the modern legal protections was not straight and narrow.

Justice Oliver Wendell Holmes, whom the liberals of his day idolized, did free speech no favor with his advocacy of the “clear and present danger” test. In fact, the Supreme Court has typically used the “clear and present danger” test to uphold a criminal prosecution of speech.⁶¹ In contrast, the modern Court now follows the path that Pericles and the Greek philosophers first walked.

While there will always be those who call for prosecutions of those who spew hate, history has taught us that the best response for the speech we do not like is more speech, not less. How we moved from the “clear and present danger” test to the modern, more robust protection for hate speech and political dissent offers an important historical lesson. This lesson is important, not only because it tells us how we reached the contemporary view, but also reveals why our journey was so slow. When we understand the rationale to protect hateful speech, we will be less likely to repeat the mistakes of the past.

III. THE ORIGIN OF THE BILL OF RIGHTS AND THE FIRST AMENDMENT

The Framers were conversant with the Greek philosophers as well as the classical Roman and European philosophers.⁶² Reflecting the political theories of the ancients, the Framers created the “separation of powers” by dividing power between the states and the federal government (vertical separation), and among three branches of the federal government (horizontal separation).⁶³

The original Constitution created the various branches of the central government and divided power between the central

⁶⁰ *Id.*

⁶¹ As Justice Douglas’s concurrence explained in *Brandenburg v. Ohio*, “My own view is quite different. I see no place in the regime of the First Amendment for any ‘clear and present danger’ test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it.” 395 U.S. 444, 454 (1969) (Douglas, J., concurring).

⁶² See generally CARL J. RICHARD, *GREEKS & ROMANS BEARING GIFTS: HOW THE ANCIENTS INSPIRED THE FOUNDING FATHERS* (2008).

⁶³ See Ronald D. Rotunda, *Vertical Federalism, the New States’ Rights, and the Wisdom of Crowds*, 11 FLA. INT’L U. L. REV. 307, 307–08 (2016).

government and the states—those were the structural protections. Other than these structural safeguards, the Framers imposed few direct limitations on the government. The original Constitution guarantees only a few important rights. It prohibits any religious test for any office—state or federal⁶⁴—a restriction that was very progressive for its time. The original Constitution also guarantees the right to a jury trial in criminal cases.⁶⁵ It prohibits Congress from suspending the right of habeas corpus, or from enacting any *ex post facto* law or bill of attainder.⁶⁶ It also forbids states from enacting any bill of attainder or *ex post facto* law.⁶⁷ To protect reasonable expectations, the original Constitution forbids states from impairing the obligation of contracts.⁶⁸ Yet, it had no bill of rights.

When the Framers lobbied the people urging them to approve the new Constitution, many were concerned that the structural protections of federalism and the few direct limits in the Constitution were not enough. They feared that the government could use its powers to restrict freedoms that the people assumed to exist but to which the Constitution did not refer.⁶⁹

For example, the body of the Constitution does not give the central government any power to regulate the press or speech. However, Congress does have the power to declare war,⁷⁰ and the President has the power of the Commander-in-Chief of the Armed Forces.⁷¹ Congress, when the nation is at war, has the power to wage war effectively. The Necessary and Proper Clause augments these express powers with implied powers—the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁷² Could Congress use the war power to limit free speech in time of war? Prohibiting criticism of a war by people within the United States may make it easier to conduct a more effective war against foreign enemies.

Because the proposed Constitution had few limits, some people who favored it were worried that it did not explicitly grant

⁶⁴ See U.S. CONST. art. VI, cl. 3.

⁶⁵ See *id.* at art. III, § 2, cl. 3.

⁶⁶ See *id.*; *id.* at art. I, § 9, cl. 2–3.

⁶⁷ See *id.* at art. I, § 9, cl. 2–3; *id.* at art. III, § 2, cl. 3; *id.* at art. I, § 10, cl. 1.

⁶⁸ *Id.* at art. I, § 10, cl. 1. See also *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 427–28 (1934) (explaining that the Contract Clause was adopted to give predictability to the business of society).

⁶⁹ See *infra*.

⁷⁰ See U.S. CONST. art. I, § 8, cl. 11.

⁷¹ *Id.* at art. II, § 2, cl. 1.

⁷² *Id.* at art. I, § 8, cl. 18. This clause greatly increases federal power by authorizing implied powers. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418–20 (1819).

more protections. The Framers responded to these pressures by promising that once the Constitution went into effect, the first Congress would propose a Bill of Rights.⁷³ The politicians actually kept their promise: The first Congress under the new Constitution promptly proposed, on September 25, 1789, what we now call the Bill of Rights.⁷⁴ It granted more individual freedoms, though these rights did not limit the states until after the enactment of the Fourteenth Amendment.⁷⁵

The Bill of Rights gave us the First Amendment, protecting freedom of speech and press.⁷⁶ Some modern constitutions have provisions that suspend constitutional rights in times of public danger. For example, the South African Constitution, which Justice Ruth Bader Ginsburg has praised,⁷⁷ devotes 970 words to an article dedicated to suspending rights, including free speech.⁷⁸ There is a table of “non-derogable rights,” but free speech is not one of them.⁷⁹ In contrast, the First Amendment speaks in broader terms: “Congress shall make no law . . . abridging the freedom of speech, or of the press”⁸⁰ There is no provision for suspending any rights.

IV. THE EARLY FIRST AMENDMENT—FROM THE EIGHTEENTH CENTURY TO WORLD WAR I

The first test of the Free Speech Clause was the ill-fated Alien and Sedition Acts of 1798. Congress enacted those laws in

⁷³ See CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 768–69 (1928).

⁷⁴ See ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS: 1776–1791*, at 214–15 (1955).

⁷⁵ See *Barron v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243, 250–51 (1833) (holding that the Bill of Rights only applies to the United States government); see also 2 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 14.2 (5th ed. 2012) (explaining that the Bill of Rights did not apply to state governments until the passage of the Fourteenth Amendment).

⁷⁶ U.S. CONST. amend. I.

⁷⁷ See Ronald D. Rotunda, *Egypt’s Constitutional Do-Over: This Time Around, Take a Closer Look at America’s Bill of Rights*, WALL ST. J. (July 17, 2013), <https://www.wsj.com/articles/SB10001424127887323740804578601383340547860>.

⁷⁸ S. AFR. CONST., 1996 art. 37.

⁷⁹ See Ronald D. Rotunda, *Model, Resource, or Outlier? What Effect has the U.S. Constitution had on the Recently Adopted Constitutions of Other Nations?*, Panel Discussion hosted by the Heritage Foundation (Oct. 11, 2012), in THE HERITAGE FOUNDATION, May 17, 2013, at 12, 15, <http://www.heritage.org/research/lecture/2013/05/model-resource-or-outlier-what-effect-has-the-us-constitution-had-on-the-recently-adopted-constitutions-of-other-nations> [<http://perma.cc/5F2R-MNAT>]. “Consider the South African constitution. The title of Article 37 is ‘States of Emergency.’ This one article, *dedicated to suspending rights* under various circumstances, is 970 words long. This one article is more than [twenty] percent of the length of the entire U.S. Constitution of 1787. Article 37 has a table of ‘non-derogable rights.’ Free speech is not one of those.” *Id.* (emphasis in original).

⁸⁰ U.S. CONST. amend. I.

an effort to squelch criticism of President Adams.⁸¹ No cases reached the Supreme Court, but there were lower court prosecutions involving the Sedition Act. At this early time in American history, the restrictions that the language of the First Amendment imposed (“Congress shall make no law”), appeared to be as effective as chains made of parchment.

Under the Alien Act, the President could order all aliens “as he shall judge dangerous to the peace and safety of the United States” to leave the country.⁸² The President never formally invoked this law, and it expired after two years, but its existence did result in some aliens leaving the country or going into hiding.⁸³

Its companion law, the Sedition Act, prohibited “publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of Congress . . . or the President . . . with intent to defame . . . or to bring them . . . into contempt or disrepute”⁸⁴ In spite of these prohibitions, the law was relatively tolerant for its time: It allowed the defendant to use truth as a defense to a prosecution; and it gave the defendant a jury trial; and it authorized the jury to determine the law and facts under the direction of the court.⁸⁵

In contrast, England did not establish a defense of truth until 1843.⁸⁶ Before that, supporters of sedition laws argued, “[t]he greater the truth, the greater the libel.”⁸⁷ The fact that the criticism was true made it *more dangerous*, because people are more likely to believe the truth. Truthful criticism is more likely to undermine government authority.⁸⁸ Moreover, if you say something is true, you cannot retract it without lying. Our sedition law, measured against the English prohibitions, was moderately enlightened for its time.

President Adams used the Sedition Act against members of Thomas Jefferson’s Democratic-Republican Party for their

⁸¹ See *Alien and Sedition Acts*, HISTORY (last updated Aug. 21, 2018), <https://www.history.com/topics/early-us/alien-and-sedition-acts> [<http://perma.cc/TEV4-BKAR>].

⁸² Alien Act, ch. 58, § 1, 1 Stat. 570–71 (1798).

⁸³ 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.5 (5th ed. 2012).

⁸⁴ Sedition Act, ch. 74, § 2, 1 Stat. 596 (1798).

⁸⁵ *Id.* § 3.

⁸⁶ See Libel Act 1843, 6 & 7 Vict. c. 96 (Eng.); see also 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 383 (London, MacMillan and Co. 1883). England did allow the jury to return a general verdict during this period. See Fox’s Libel Act 1792, 32 Geo. 3, c. 60.

⁸⁷ 2 HENRY SCHOFIELD, ESSAYS ON CONSTITUTIONAL LAW AND EQUITY AND OTHER SUBJECTS 516 (Fac. of L. Nw. Univ. ed., 1921). This maxim is typically attributed to Lord Mansfield, William Murray, first Earl of Mansfield. See THE OXFORD DICTIONARY OF PROVERBS 136 (Jennifer Speake ed., 2003).

⁸⁸ See *id.*

criticism of his administration.⁸⁹ Jefferson objected to the Sedition Act, but his actions were hardly a paean to free speech.⁹⁰ When he assumed the presidency, he urged his supporters to use *state* laws, rather than federal law, to keep the press in line.⁹¹ Thus, he pressed the Governor of Pennsylvania to institute a “few [selected] prosecutions” of those newspapers who attacked the Jeffersonians.⁹²

The First Amendment’s protections, initially, were chains made of parchment because the federal government enforced the Sedition Act, although no case involving the Sedition Act ever worked its way to the Supreme Court. Historians today agree that this law would not survive constitutional scrutiny.

The Sedition Act “crystallized a national awareness of the central meaning of the First Amendment.”⁹³ After the Sedition Act expired,⁹⁴ a different Congress enacted a law to repay the fines that the government had levied against violators of the Sedition Act, because it considered the law unconstitutional.⁹⁵ When Thomas Jefferson became President, he pardoned those whom courts had convicted and sentenced under the Act. He said, “I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image”⁹⁶

Decades later, on February 4, 1836, Senator Calhoun, speaking to the U.S. Senate, said that the unconstitutionality of the Sedition Act was a matter “which no one now doubts.”⁹⁷ Over the years, various Justices, in case law⁹⁸ or their other writings,⁹⁹ have

⁸⁹ LEONARD W. LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* 58–59 (Ivan R. Dee, Inc. ed., Elephant Paperbacks 1989) (1963).

⁹⁰ *See id.*

⁹¹ *See e.g.*, Ryan Mattimore, *Presidential Feuds With the Media Are Nothing New*, *History* (Jan. 26, 2018), <https://www.history.com/news/presidents-relationship-with-press>.

⁹² LEVY, *supra* note 89.

⁹³ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

⁹⁴ The Act, by its own terms, expired in 1801. Sedition Act, ch. 74, §4, 1 Stat. 597 (1798).

⁹⁵ *See* Act of July 4, 1840, ch. 45, 6 Stat. 802; H.R. REP. NO. 26-86, at 2 (1840).

⁹⁶ Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), in 4 *THE WRITINGS OF THOMAS JEFFERSON: BEING HIS BIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE* 555–56 (H. A. Washington ed., 1854).

⁹⁷ *Sullivan*, 376 U.S. at 276 (quoting S. REP. NO. 24-122, at 3 (1836)).

⁹⁸ *See, e.g.*, *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting); *see also* *Beauharnais v. Illinois*, 343 U.S. 250, 288–89 (1953) (Jackson, J., dissenting); *Sullivan*, 376 U.S. at 276.

⁹⁹ *See* WILLIAM O. DOUGLAS, *THE RIGHT OF THE PEOPLE* 47 (Doubleday and Co. 1958).

volunteered that this law violated the First Amendment. Classical constitutional law commentators came to a similar conclusion.¹⁰⁰

After the sad experience of the enforcement of the Sedition Law, there was little activity raising free speech issues until World War I. The federal government, particularly during the Civil War,¹⁰¹ occasionally tried to punish critical speech, but the Supreme Court had no important role to play.¹⁰² That all changed with America's entry into World War I. The Supreme Court came out of hibernation.

V. THE BIRTH OF SHOUTING "FIRE" IN A CROWDED THEATRE: WORLD WAR I AND ITS AFTERMATH

The politicians of the early twentieth century forgot our experience with the Alien and Sedition Acts of the early eighteenth century. Congress, in response to the domestic political unrest that greeted America's entrance into World War I, passed the Espionage Act of 1917¹⁰³ and the Sedition Act of 1918.¹⁰⁴ These laws did not respect the right to dissent in time of war. Cases that the government brought under this legislation reached the Supreme Court for the first time.¹⁰⁵ The Court then developed standards for approaching First Amendment rights at a time when the nation was at war. The climate was not conducive to any expansive reading of the free speech guarantee. The Court, like the politicians, forgot the Greek philosophers and the historical lessons of the Alien and Sedition Acts.

¹⁰⁰ See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION 899–900 (8th ed., Carrington, 1927); see also ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 17–28 (Harv. Univ. Press, 1954) (1941).

¹⁰¹ See Michael Kent Curtis, *Lincoln, Vallandigham, and the Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105 (1998) (discussing the arrest by Union soldiers of Clement L. Vallandigham, a former Democratic congressman, because of his anti-war speech of May 1, 1863). Vallandigham said the purpose of the war was not to save the Union but to free the slaves and sacrifice liberty to "King Lincoln." *Id.* at 123. That arrest started a debate about the role of free speech in time of war. Vallandigham sued for release under habeas corpus, but the Supreme Court said it had no jurisdiction to issue the writ to a military commission. See *Ex Parte Vallandigham*, 68 U.S. (1 Wall.) 243, 253 (1863).

¹⁰² See Alexis Anderson, *The Formative Period of First Amendment Theory, 1870–1915*, 24 AM. J. LEGAL HIST. 56, 64 (1980); see also David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 516, 581–82 (1981); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1227–29 (1983); Howard Owen Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court from 1791–1930*, 35 EMORY L.J. 59, 72–73 (1986); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 1 (1999).

¹⁰³ Espionage Act of 1917, ch. 30, 40 Stat. 217.

¹⁰⁴ Sedition Act of 1918, ch. 75, 40 Stat. 553 (repealed 1920).

¹⁰⁵ See generally Marcie K. Cowley, *Red Scare*, FIRST AMEND. ENCYCLOPEDIA, <http://www.mtsu.edu/first-amendment/article/1063/red-scare> [<http://perma.cc/7K7B-T36F>].

In 1919, the Supreme Court handed down two important decisions involving free speech issues, *Schenck v. United States*¹⁰⁶ and *Abrams v. United States*.¹⁰⁷ In the first case, the Court introduces the “clear and present danger” test.¹⁰⁸ In both, the Court denied any protection for speech.¹⁰⁹

A. *Schenck v. United States*: Shouting Fire in a Theatre

In *Schenck*, the Court affirmed the defendants’ conviction for conspiracy to violate the Espionage Act of 1917.¹¹⁰ The year was 1919. The great Red Scare (later called the first Red Scare) had begun, reacting to Communist successes in Russia and Eastern Europe.¹¹¹ Feeding this fear were bomb-throwing anarchists, plus the growing popularity of the Industrial Workers of the World¹¹² (an international radical industrial labor organization). In January 1919, Attorney General A. Mitchell Palmer launched a gigantic two-year Red witch-hunt, complete with mass arrests without benefit of habeas corpus, hasty prosecutions, and mass deportation of Communists and other radicals.¹¹³

However, the *Schenck* defendants harangued no crowd, threw no bombs, and made no threats.¹¹⁴ Instead, they merely *mailed* leaflets to men eligible for military service, and argued that the draft violated the Thirteenth Amendment, which prohibits involuntary servitude (slavery).¹¹⁵ These leaflets, the government argued, violated the Espionage Act, which prohibited obstruction of military recruiting.¹¹⁶

Nowadays, we think of Justice Holmes’s opinions as a hymn to free speech. He was the darling of the liberals of his day, and the perception that he believed in free speech was a major reason for his popularity.¹¹⁷ Ironically, Justice Holmes was a Social

¹⁰⁶ 249 U.S. 47 (1919).

¹⁰⁷ 250 U.S. 616 (1919).

¹⁰⁸ *Schenck*, 249 U.S. at 52.

¹⁰⁹ *Id.* at 52–53; *Abrams*, 250 U.S. 623–24.

¹¹⁰ *Schenck*, 249 U.S. at 53.

¹¹¹ See Cowley, *supra* note 105.

¹¹² See *Industrial Workers of the World*, ENCYCLOPAEDIA BRITANNICA (last updated June 15, 2015), <https://www.britannica.com/topic/Industrial-Workers-of-the-World> [<http://perma.cc/B5HW-4RQZ>].

¹¹³ See, e.g., 2 ALFRED H. KELLY & WINFRED A. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 690 (4th ed. 1970).

¹¹⁴ *Schenck*, 249 U.S. at 48–51.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Elizabeth R. Purdy, *Oliver Wendell Holmes Jr.*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1337/oliver-wendell-holmes-jr> [<http://perma.cc/A66L-GAU2>] (“[Justice Holmes] was viewed as a civil libertarian who protected the First Amendment from encroachments, particularly during World War I and the period of hostility to dissent that followed the war.”).

Darwinist—a cynical believer in the survival of the fittest.¹¹⁸ He did not believe in progressive taxation, or social reform, or in antitrust enforcement. Although he fought in the Civil War and had an abolitionist background, the plight of black people did not move him.¹¹⁹ Justice Holmes was “an atheist, a materialist, a behaviorist and a resolute enemy of natural law.”¹²⁰

Only seven months before the parties argued the *Schenck* case before the Supreme Court, Justice Holmes shared an interesting train ride with Judge Learned Hand, which resulted in them exchanging correspondence.¹²¹ In his letter of June 24, 1918, Justice Holmes actually declared to Judge Learned Hand:

[F]ree speech stands no differently than freedom of vaccination. The occasions would be rarer when you cared enough to stop it but if for any reason you did care enough you wouldn't care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong.¹²²

The following year, Justice Holmes, writing for the *Schenck* Court, *upheld* the convictions and the restraint on freedom of expression.¹²³ He claimed that the convictions were necessary to prevent grave and immediate threats to national security.¹²⁴ Ordinarily, Justice Holmes believed, leaflets should be constitutionally protected, but—

the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.¹²⁵

¹¹⁸ See generally Seth Vannatta, *Justice Holmes the Social Darwinist*, 4 PLURALIST 78 (2019).

¹¹⁹ See *id.* at 81, 89.

¹²⁰ See Richard A. Posner, *Bookshelf: Star of the Legal Stage*, WALL ST. J., Aug. 9, 1989, at A9.

¹²¹ See Frederic R. Kellogg, *Learned Hand and the Great Train Ride*, 56 AM. SCHOLAR 471, 480–81 (1987).

¹²² *Id.*; see also DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS 1870–1920*, at 293 (Arthur McEvoy & Christopher Tomlins eds., 1997).

¹²³ See *Schenck v. United States*, 249 U.S. 47, 52–53 (1919).

¹²⁴ *Id.* at 52.

¹²⁵ *Id.* (internal citations omitted).

Justice Holmes concluded that First Amendment protection should *not* protect speech that hindered the war effort.¹²⁶ That presents a “clear and present danger.”¹²⁷

Justice Holmes’s conclusion does not flow from his hypothetical, which we should examine in detail. He said:

The most stringent protection of free speech would not protect a man in *falsely* shouting fire in a theater and causing a panic.¹²⁸

We should ask, why not? Notice that Justice Holmes limits the prosecution to the speaker who is speaking falsely. That is his only limitation, and it certainly makes sense. If there really is a fire in a theatre, should we not tell others about it? Or, do we quietly head for the exits and let others burn? There surely is nothing wrong in *truthfully* warning the theatre audience that there is a fire, even if many people injure themselves while trying to escape.

The alternative would be to forbid people from warning others about fire. If that were the law, fire alarms would be illegal. Hence, the speaker can truthfully shout fire in a crowded theater. Justice Holmes seems to assume that, even though shouting of fire will cause the same panic. That is the only restriction he imposes on his famous hypothetical—that the speaker is speaking falsely.

Let us consider his facile hypothetical a bit further. What if the speaker is speaking falsely but he does not know that it is false? The speaker, reasonably believing that there is a fire, will

¹²⁶ *Id.* One week after Justice Holmes wrote the *Schenck* opinion, he wrote two other opinions for the Court affirming convictions in similar cases. In *Frohwerk v. United States*, he stated:

[T]he First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language . . . Whatever might be thought of the other counts on the evidence, if it were before us, we have decided in *Schenck v. United States*, that a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion.

249 U.S. 204, 206 (1919) (emphasis removed).

In *Debs v. United States*, Justice Holmes also affirmed the conviction of Eugene Debs, a prominent Socialist of the time, for allegedly encouraging listeners to obstruct the recruiting service. 249 U.S. 211, 216 (1919). Justice Holmes in this case spoke more in common law speech terms, which the Court (but not Justice Holmes) later adopted in *Abrams* and *Gitlow*, discussed below. Justice Holmes said in the *Debs* case:

We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as *their natural tendency and reasonably probable effect* to obstruct the recruiting service, & c., and unless the defendant had the specific intent to do so in his mind.

Id. (emphasis added). See generally Paul Freund, *The Debs Case and Freedom of Speech*, 19 NEW REPUBLIC 13 (1919) (reprinted in 40 U. CHI. L. REV. 235, 239 (1973)); Harry Kalven, Jr., *Ernst Freund and the First Amendment Tradition: Professor Ernst Freund and Debs v. United States*, 40 U. CHI. L. REV. 235, 236–38, 240 (1973).

¹²⁷ *Schenck*, 249 U.S. at 52.

¹²⁸ *Id.*

therefore shout a warning. The speaker shouting falsely (but reasonably) is not lying—not acting with scienter. Even if there is a panic, the government will not punish the person who acts reasonably in warning his fellow theatregoers.

Let us turn to the portion of Justice Holmes's hypothetical where there is a panic. Justice Holmes does not say that the speaker knows that he will be causing a panic. Yet, even if Justice Holmes meant to impose that limitation—that the speaker is knowingly causing a panic—that knowledge should not cause liability if the person acts quite reasonably in warning fellow theatregoers even though the particular warning happens to be incorrect. We install fire alarms so that people can warn others without the need to shout, and we do not punish them if they act reasonably in triggering the alarm.

Justice Holmes's hypothetical does not provide, but must assume, that the theatre audience believes the speaker is speaking the truth, even if the speaker is speaking falsely. Assume, for example, that the ushers were removing a member of the audience because he was unruly and talking too loudly. The rest of the audience might cheer the miscreant as he is escorted to the exits. If this troublemaker starts shouting, "invasion," "fire," "flood," the audience would laugh as the ushers escort him to the exits. The miscreant was knowingly and falsely shouting fire in a crowded theater, but he would not be prosecuted for starting a riot because there would be no panic.

Now assume the speaker knowingly and falsely shouts fire in the crowded theatre, but there is no panic because of the circumstances. For example, if the audience was watching a play or movie, and an actor shouted "fire," there would be no panic because the audience would not believe the speaker even if he had the acting ability of Meryl Streep.

If several members of the audience—perhaps they were inattentive because it was a boring play—misunderstood and thought that the voice shouting fire was someone in the audience, and subsequently panicked, we still would not prosecute the actor who was simply playing his part. Think of the "War of the Worlds" radio broadcast of Orson Welles. Many of the people who tuned in after the show began to think that the Martians were really invading New Jersey.¹²⁹ There were no prosecutions of Orson Welles although many people were upset with him.¹³⁰

¹²⁹ See A. BRAD SCHWARTZ, BROADCAST HYSTERIA: ORSON WELLES'S WAR OF THE WORLDS AND THE ART OF FAKE NEWS 3–7 (2015).

¹³⁰ See *id.* at 131–35.

Justice Holmes's "fire in the theatre" hypothetical has another important (and unarticulated) qualifier that is not present in his conclusion about speech hindering the war effort. The hypothetical assumes that there is no time for others to respond to someone who falsely shouts "fire." We cannot normally debate the issue as to whether there is a fire because there is no time for debate. The circumstances are not conducive to the give and take of normal conversation. A fire alarm is not a call to debate. Yet, there was plenty of time to debate the assertion of the *Schenck* defendants that the draft violated the Thirteenth Amendment.

It is not difficult to imagine a situation where there was time to debate, even in the "shout fire" hypothetical. A member of the audience shouts "fire," while pointing to smoke in a corner of the stage. An actor on the stage responds, "No need to worry; that's just smoke from dry ice, which the magician will use in the next act." The audience, already rising from their chairs, sits down, waits for the next act, and wonders how the magician will use a solid form of carbon dioxide in a magic trick.

The "shouting fire" hypothetical necessarily assumes that there is no time for responsive speech. Yet, often there is time. Modern courts often say that the best remedy for speech that we do not like is more speech, not enforced silence.¹³¹ In the free marketplace of ideas, we can use speech to persuade others to reject the false speech. Justice Holmes's hypothetical unavoidably assumes that there is no time for the marketplace of ideas to work. In the right circumstances, shouting the knowingly false words will cause a panic, and there will be no time to debate the shouter. In that factual situation, falsely pulling the fire alarm is not a call to discuss the nature of fire.

The state may punish someone who knowingly triggers a false fire alarm with the intent of causing a panic, thereby causing a panic, but there will be no punishment or a substantially less severe one if no one hears the alarm because there will be no panic. That is also true in the Justice Holmes's "shouting fire" hypothetical. If the audience were composed of deaf people watching a movie with closed captions, and our hypothetical malefactor sneaks into the theatre and shouts "fire," there will be no panic. Whatever one might prosecute this reprobate for, causing a riot will not be one of the counts because there will be no riot. Justice Holmes's hypothetical should be assuming that the audience is ripe to hear the words and act on them before anyone can counteract the speech. We are talking about the language of incitement. Merely knowingly shouting falsely is not enough.

¹³¹ See, e.g., *Whitney v. California*, 274 U.S. 357, 377 (1927).

Now, let us think of the speech involved in *Schenck*—where Justice Holmes wrote the opinion upholding the criminal prosecution.¹³² The defendants opposed the war, but speeches that oppose war do not fit the hypothetical. Those speeches are not like falsely shouting “fire” in a crowded theatre knowing that the audience will panic instinctively, because there is no time to reason with them.

The speech in *Schenck*—or more precisely, the *leaflets* that the defendants *mailed* to men eligible for military service—could not cause a panic, yet Justice Holmes upheld the convictions. Those who object to the war protestors can engage them and dispute them in the marketplace of ideas. There was plenty of time for proponents of the draft to respond to the claims of those opposed to the war. There was not even a claim that the defendants were lying about anything. They believed what they were saying and thus did not have the scienter to lie knowingly. They were also not inciting anyone in the sense that the rabble-rouser harangues the lynch mob, goading, provoking, or prodding the willing crowd to storm the jail immediately.

In addition, Justice Holmes’s hypothetical does not require that the speech be inherently connected with an act that is independently criminal. For example, Justice Holmes was not talking about a spy who informs the enemy how to break a top-secret code. That is speech tied in with an illegal action (aiding the enemy in time of war), and one could not rely on the marketplace of ideas to counteract the secret actions of a spy. Similarly, when someone takes an oath to tell the truth and then perjures himself on a material matter, he is not merely talking but he is using his words to engage in the act of obstructing justice.¹³³ Or, if the bank robber passes a note to the teller saying, “This is a stick-up,” the writing is connected to an act, an attempted theft.

B. *Abrams v. United States*

In his dissenting opinion in *Abrams v. United States*, Justice Holmes again embraced his “clear and present danger” test and tried to explain its application.¹³⁴ This time, Justice Holmes

¹³² See generally *Schenck*, 249 U.S. at 48.

¹³³ *United States v. Alvarez*, 567 U.S. 709, 720–21 (2012) (Kennedy, J.) (plurality opinion). As Justice Kennedy explained:

It is not simply because perjured statements are false that they lack *First Amendment* protection. Perjured testimony “is at war with justice” because it can cause a court to render a “judgment not resting on truth.” Perjury undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system.

Id. (internal citations omitted). See also *id.* at 734–38 (Breyer, J., joined by Kagan, J., concurring).

¹³⁴ *Abrams v. United States*, 250 U.S. 616, 627–28 (1919) (Holmes, J., dissenting).

finally supported free speech but he could not persuade the majority to overturn the guilty verdicts.¹³⁵ The government convicted the defendants of conspiracy to violate the Espionage Acts amendments,¹³⁶ which prohibited speech that encouraged resistance to the war effort and curtailment of production “with intent by such curtailment to cripple or hinder the United States in the prosecution of the war”¹³⁷ At the time, we were at war against Germany, but these war protestors were not objecting to the war against Germany. Instead, they distributed pamphlets criticizing the United States’ involvement in the effort to crush Russia’s new communist government.¹³⁸

The government was creative in explaining how the efforts of the United States in involving itself in Russia’s civil war had anything to do with the war against Germany.¹³⁹ The prosecutors used a chain of inferences that reminds us of the nursery rhyme, “This is the house that Jack built.” The actual statute involved forbade conspiracies to interfere with production of “things necessary to the prosecution of war” with the intent to hinder the prosecution of the war.¹⁴⁰ The theory of the trial court and the Supreme Court majority was that to reduce arms production for the Russian fight might aid Germany (with whom the United States was at war) because the United States would have fewer total arms.¹⁴¹ The Court did not require any specific intent by the defendants.¹⁴²

The majority in *Abrams* rejected the free speech defense and was unimpressed with Justice Holmes’s clear and present danger test.¹⁴³ Because of the “bad tendency” of the defendants’ speech, the Court upheld the convictions, even though the lower court had sentenced the defendants to lengthy prison terms of twenty years.¹⁴⁴ Under the majority’s use of the bad tendency test, the government could prohibit speech if it could tend to bring about harmful results.

Justice Holmes argued that it was ridiculous to assume these pamphlets would actually hinder the government’s war

¹³⁵ *See id.* at 631 (Holmes, J., dissenting).

¹³⁶ *Id.* at 623–24.

¹³⁷ Espionage Act of 1917, ch. 30, sec. 3, 40 Stat. 21 (as amended May 16, 1918 at ch. 75, §3, 40 Stat. 553) (repealed 1948).

¹³⁸ *See Abrams*, 250 U.S. at 624–25 (Holmes, J., dissenting).

¹³⁹ *Id.* at 624–26 (Holmes, J., dissenting).

¹⁴⁰ *Id.* at 626 (Holmes, J., dissenting).

¹⁴¹ *Id.* at 622.

¹⁴² *Id.* at 629 (Holmes, J., dissenting).

¹⁴³ *See id.* at 621 (“Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce.”). The free speech defense was very briefly dismissed as “sufficiently discussed and is definitely negated in *Schenck . . .*” and other cases. *Id.* at 619.

¹⁴⁴ *Id.* at 629 (Holmes, J., dissenting).

efforts in Germany, which is what the statute required.¹⁴⁵ He then quickly moved beyond the language of the statute to consider the constitutional issues. Holmes contended that the government could only restrict freedom of expression when there was “present danger of immediate evil or an intent to bring it about . . . Congress certainly cannot forbid all effort to change the mind of the country.”¹⁴⁶

Laws regulating free speech, Justice Holmes conceded, would be an effective way for the government to stifle opposition, but he maintained hope that people would realize that:

[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market That . . . is the theory of our Constitution.¹⁴⁷

Justice Holmes warned against overzealous repression of unpopular ideas:

[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.¹⁴⁸

Still, he hardly embraced any robust restriction on government power over speech:

[N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet if published for the purposes alleged in the fourth count might be punishable.¹⁴⁹

Under Justice Holmes’s utilitarian theory, we are left to wonder why the government must wait until the dangers of the plan are immediate. If one can punish such speech if it is successful, would it not be better to nip the problem in the bud? Justice Holmes himself concedes, “Publishing those opinions for the very purpose of obstructing however, might indicate a greater danger and at any rate would have the quality of an attempt.”¹⁵⁰

¹⁴⁵ *Id.* at 626–27 (Holmes, J., dissenting).

¹⁴⁶ *Id.* at 626–28 (Holmes, J., dissenting).

¹⁴⁷ *Id.* at 630 (Holmes, J., dissenting).

¹⁴⁸ *Id.* (Holmes, J., dissenting).

¹⁴⁹ *Id.* at 628 (Holmes, J., dissenting).

¹⁵⁰ *Id.* (Holmes, J., dissenting).

If the government can prosecute if the danger becomes greater, why wait until it is a greater danger? Justice Holmes's rationale does not explain (to turn to the fire analogy, once again) why the firefighters should wait until the little blaze becomes a big fire before trying to squelch it. If the danger is very great, such as the danger of a forcible overthrow of the government, should we not nip it in the bud? Why wait until the revolutionaries have advanced from pistols to Howitzers? If a speaker is haranguing a crowd, and the crowd seems uninterested, is that not the best time to take down the speaker, before the crowd gets bigger and when it is not absorbed with radical ideas?

C. The *Gitlow* Decision

Six years after *Abrams*, the Court continued to use the “bad tendency test” to uphold restrictions on free speech. State prosecutors convicted defendants in *Gitlow v. New York*, of violating New York’s “criminal anarchy statute.”¹⁵¹ This law prohibited advocating for a violent overthrow of the government.¹⁵² Defendants had printed and circulated a radical manifesto encouraging political strikes.¹⁵³ There was no evidence that the manifesto had any effect on the individuals who received copies.¹⁵⁴ The manifesto was unpersuasive.¹⁵⁵

The majority of the *Gitlow* Court once again upheld the conviction and the statute, finding the “clear and present danger” test inapplicable. The Court reasoned that the clear and present danger test applies when a statute prohibiting particular acts does not include any restrictions on the use of language.¹⁵⁶ Only then, the majority argued, should a court use the “clear and present danger” test to determine if the particular speech is constitutionally protected.¹⁵⁷ In such a case, where the statute does not ban speech directly, the government must prove the defendants’ language brought about the statutorily prohibited result.¹⁵⁸ However, *Gitlow* noted that the legislature had already determined what utterances would violate the statute.¹⁵⁹ The government’s decision that certain words are likely to cause the substantive evil “is not open for consideration.”¹⁶⁰ The government must then show only that there is a reasonable basis for the

¹⁵¹ See *Gitlow v. New York*, 268 U.S. 652, 654–55 (1925).

¹⁵² *Id.* at 654.

¹⁵³ *Id.* at 655–56.

¹⁵⁴ *Id.* at 656.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 671.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 670–71.

¹⁵⁹ *Id.* at 670.

¹⁶⁰ *Id.*

statute. It is irrelevant that the particular words do or do not create a “clear and present danger.”¹⁶¹

Justice Holmes dissented. He argued that if the “clear and present danger” test were properly applied, it would be obvious there was no real danger that the defendants’ pamphlets would instigate political revolution.¹⁶² If the manifesto presented an immediate threat to the stability of the government, then there would be a need for suppression.¹⁶³ In the absence of immediate danger, Justice Holmes concluded, the defendants were entitled to exercise their First Amendment rights.

Yet, Justice Holmes once again appeared to concede that the government could limit speech if the speaker is convincing. He would protect the defendants in this case because their “redundant discourse . . . had no chance of starting a present conflagration.”¹⁶⁴ The Constitution, it would seem, only protects boring speakers. Persuasive speakers are fair game for criminal prosecution under Justice Holmes’s rationale.

If the government may limit speech when it becomes persuasive, why wait? The government should be able to stop the problem at its source. Justice Holmes’s rationale for the “clear and present danger” test suggests that the state can crush dissent when people start to believe in it (a “present” danger). If that is true, one might think that the state should not have to wait—just like firefighters should not wait to act until the brushfire becomes a barnburner.

D. *Whitney*, Justice Brandeis, and the Influence of Pericles

In the Court’s 1927 decision, *Whitney v. California*,¹⁶⁵ the “clear and present danger” test made its appearance yet again, and this time at least it was in a concurrence, rather than a dissent. Still, it did not protect the defendant. In fact, when Justice Holmes was on the Court, it never used the “clear and present danger” test to overturn any conviction.

The government convicted Ms. Whitney of violating the California Criminal Syndicalism Act by assisting in the organization of the Communist Labor Party of California.¹⁶⁶ The statute defined criminal syndicalism as any doctrine “advocating, teaching or aiding

¹⁶¹ *See id.*

¹⁶² *Id.* at 672–73 (Holmes, J., joined by Brandeis, J., dissenting).

¹⁶³ *Id.* at 673 (Holmes, J., joined by Brandeis, J., dissenting).

¹⁶⁴ *Id.* (Holmes, J., joined by Brandeis, J., dissenting).

¹⁶⁵ 274 U.S. 357 (1927).

¹⁶⁶ *Id.* at 360–64.

and abetting . . . crime, sabotage . . . or unlawful acts of force and violence” to effect political or economic change.¹⁶⁷

Ms. Whitney said that she attended the organizing convention to advocate for political reform through the democratic process.¹⁶⁸ The majority of the Court, however, disagreed with her and found that she supported change through violence and terrorism.¹⁶⁹ She maintained that she had not assisted the Communist Party with knowledge of its illegal purpose. The state based her conviction on her mere presence at the convention.¹⁷⁰

The Court held that the jury had resolved adversely to Ms. Whitney important factual questions, concluding that (1) she had participated at the convention, (2) the united action of the Communist Party threatened the welfare of the state, and (3) she was a part of that organization.¹⁷¹ That was enough for the majority, and they affirmed her conviction.¹⁷²

What is significant about *Whitney* is Justice Brandeis’s concurring opinion. Justice Brandeis labeled his opinion “concurring,” but it reads like a dissent. His technical reason for affirming the conviction (Ms. Whitney did not specifically raise the “clear and present danger” test), was probably a ploy or stratagem. The Justices can call their opinions whatever they want. He likely wanted his opinion to carry more authority for future Justices, and an opinion called “concurring” should carry more weight than a dissent, which is, by definition, not precedent. Justice Brandeis understood that the Supreme Court had not yet used Justice Holmes’s clear and present danger test to overturn a free speech conviction. If the Court used it at all, it only did so to affirm a conviction. (Justice Brandeis did not know it yet, but the Supreme Court would never use the clear and present danger test to overturn a state or federal conviction based on criminal syndicalism.)

Justice Brandeis’s opinion, which Justice Holmes joined, upheld the conviction only on a narrow procedural ground.¹⁷³ More importantly, he offered a rationale for free speech that was much more principled than Justice Holmes’s rationale. It did not adopt Justice Holmes’s concession that the government could not ban boring speech but could ban persuasive speech. One fatal flaw in Justice Holmes’s reasoning is that, by conceding that the government can punish persuasive speech, he allowed the

¹⁶⁷ *Id.* at 359.

¹⁶⁸ *See id.* at 367.

¹⁶⁹ *Id.* at 367–68.

¹⁷⁰ *Id.*

¹⁷¹ *See id.* at 367–72.

¹⁷² *Id.* at 372.

¹⁷³ *See id.* at 372–74 (Brandeis, J., joined by Holmes, J., concurring).

government to respond that it should be able to thwart the problem early, by banning the same speech before it becomes persuasive. The First Amendment does not protect much if it only protects the speaker engaged in a “redundant discourse,” who has “no chance of starting a present conflagration.”¹⁷⁴

Justice Brandeis, first, specifically objected to any notion, first presented in *Gitlow*, that the enactment of a statute foreclosed the application of the clear and present danger test by the Court.¹⁷⁵ Then he proceeded to justify the right of free speech even for those who protest a war or advocate communism or similar doctrines. To do that, he adopted the rationale of Herodotus, Thucydides, Pericles, and Aeschylus, nearly two and one-half millennia earlier. Justice Brandeis focused on “incitement.”¹⁷⁶

Justice Brandeis argued that the state does not ordinarily have “the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.”¹⁷⁷ That is because the Framers “valued liberty both as an end and as a means.”¹⁷⁸ Those who drafted the First Amendment “believed liberty to be the secret of happiness and courage to be the secret of liberty.”¹⁷⁹ His words mirrored similar sentiments in the funeral oration of Pericles, who said that we should regard “courage to be freedom and freedom to be happiness”¹⁸⁰

Justice Brandeis also argued that free speech does not undermine, but rather secures public order: “[R]epression breeds hate; . . . hate menaces stable government; . . . the path of safety lies in the opportunity to *discuss freely* supposed grievances and proposed remedies”¹⁸¹ That argument channeled Pericles who said, “The *great impediment to action is, in our opinion, not discussion, but the want of that knowledge which is gained by discussion preparatory to action.*”¹⁸²

174 See *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

175 *Whitney*, 274 U.S. at 374 (Brandeis, J., joined by Holmes, J., concurring) (“[T]he enactment of the statute cannot alone establish the facts which are essential to its validity.”); see also SIX JUSTICES ON CIVIL RIGHTS 161–71 (Ronald D. Rotunda ed., 1983).

176 See *Whitney*, 274 U.S. at 376 (Brandeis, J., joined by Holmes, J., concurring).

177 *Id.* at 374 (Brandeis, J., joined by Holmes, J., concurring).

178 *Id.* (Brandeis, J., joined by Holmes, J., concurring).

179 *Id.* at 375 (Brandeis, J., joined by Holmes, J., concurring).

180 1 PERICLES, THUCYDIDES 116, 122 (B. Jowett trans., Clarendon Press, 1881).

181 *Whitney*, 274 U.S. at 375 (Brandeis, J., joined by Holmes, J., concurring) (emphasis added).

182 1 PERICLES, *supra* note 180, at 119 (emphasis added).

Justice Brandeis's concurrence emphasized that the government must prove *incitement*—an unthinking, Pavlovian response from the audience:

[E]ven advocacy of [law] violation, however, reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on . . . [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.¹⁸³

The government cannot ban speech that “falls short of incitement.”¹⁸⁴ Only when speech is in a context that it causes unthinking, immediate action is the rationale for the protection of the First Amendment withdrawn. That is because when the speaker *incites* the crowd—for example, the leader incites a lynch mob, or the man knowingly and falsely shouts fire in a crowded theater knowing that the crowd will listen to him and believe him—there is no opportunity for full discussion. There is no way to counter the speech we do not like by presenting more speech.

Justice Brandeis concluded that in situations where the rights of free speech and assembly were infringed, the defendant might contest this suppression alleging a violation of free speech. Instead, Ms. Whitney had challenged her conviction on the basis of a denial of due process; therefore, Justice Brandeis said that he was unable to pass on the free speech issue.¹⁸⁵ This technicality meant that Justice Brandeis was able to call his opinion a concurrence, thus lending it more authority for future citations.

Justice Brandeis's plea for toleration fell on deaf ears. Recall that during the second Red Scare, in the 1950s, the federal government once again prosecuted those who advocated anarchy, communism, and social unrest.¹⁸⁶ Recall also that Justice Frankfurter, concurring in *Dennis v. United States*,¹⁸⁷ thought that—unlike in Justice Brandeis's day—there is now “ample justification for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security.”¹⁸⁸

183 *Whitney*, 274 U.S. at 376–77 (Brandeis, J., joined by Holmes, J., concurring).

184 *Id.* (Brandeis, J., joined by Holmes, J., concurring).

185 *Id.* at 379 (Brandeis, J., joined by Holmes, J., concurring).

186 See Landon R. Y. Storrs, *McCarthyism and the Second Red Scare*, OXFORD RES. ENCYCLOPEDIA: AM. HISTORY (2015), <http://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-6> [http://perma.cc/XA7A-YLFH].

187 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring).

188 *Id.* at 541–42 (Frankfurter, J., concurring).

Justice Frankfurter was not alone. His factual assertions were also “obvious” to the *Dennis* plurality, which upheld the conviction. Chief Justice Vinson spoke for the plurality:

Obviously, the words [clear and present danger] cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members . . . action by the Government is required Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent.¹⁸⁹

Chief Justice Vinson said the Court must look at “the gravity of the ‘evil,’ discounted by its improbability.”¹⁹⁰ The evil in this case is the overthrow of the government. That evil is so grave that the government may punish speech that is unlikely to be persuasive and is far divorced from any action.

Justice Holmes used his clear and present danger test to uphold the conviction of Mr. Schenck and his colleagues for mailing leaflets arguing that the draft violated the Thirteenth Amendment.¹⁹¹ This test became an even weaker protection for unpopular speech when Chief Justice Vinson turned the test on its head. As the potential evil becomes greater, the need for the government to move earlier is greater, so the less clear and present the danger may be.

There was a long and winding road from Justice Brandeis’s concurrence in *Whitney* to the modern free speech doctrine. Rather than retrace each step, a journey that one can take elsewhere,¹⁹² let us move to the modern right to advance unpopular speech, to propagate hate, and to advocate (but not engage in) violence and other illegal conduct. The modern view rejects “clear and present danger” and adopts a stricter test that incorporates and extends Justice Brandeis’s rationale.

VI. THE MODERN TEST

During the late 1960s, the Court focused on protecting the advocacy of unpopular ideas. Thus, this modern test is much more protective of the right to dissent. It grew out of four cases decided by the Court in the late 1960s: *Bond v. Floyd*,¹⁹³ *Watts v. United*

¹⁸⁹ *Id.* at 509 (Vinson, C.J., speaking for a plurality). Only Justices Black and Douglas dissented. *See id.* at 579 (Black, J., dissenting); *id.* at 581 (Douglas, J., dissenting).

¹⁹⁰ *Id.* at 510 (Vinson, C.J. speaking for a plurality) (quoting *United States v. Dennis*, 183 F.2d 201, 210 (Hand, C.J.)).

¹⁹¹ *See supra* Part V.A.

¹⁹² *See generally* 5 ROTUNDA & NOWAK, *supra* note 83, §§ 20.1–20.17.

¹⁹³ 385 U.S. 116 (1966).

States,¹⁹⁴ *Brandenburg v. Ohio*,¹⁹⁵ and *Hess v. Indiana*.¹⁹⁶ The last two cases, in particular, create the modern incitement test, which requires the government to prove that the speaker both subjectively and objectively intended to incite immediate and unthinking lawless violence in a situation that makes this purpose likely to be successful.¹⁹⁷

A. The *Julian Bond* Case

Mr. Julian Bond was a duly elected member of the Georgia House of Representative.¹⁹⁸ The other Members of the Georgia House refused to seat him. The problem was that Mr. Bond had publicly expressed his support of a statement issued by the Student Nonviolent Coordinating Committee (SNCC) criticizing the “United States’ involvement in Viet Nam” and the operation of the draft laws.¹⁹⁹ The Georgia legislature conducted a special hearing to determine if Mr. Bond, in good faith, could take the mandatory oath to support the Constitution.²⁰⁰ At the legislative hearing, Mr. Bond said that he was willing and able to take his oath of office.²⁰¹ He testified that he supported individuals who burned their draft cards but, he added, he did not burn his own nor had he counseled anyone to burn their card.²⁰² Nonetheless, the Georgia House voted not to administer the oath or seat Mr. Bond. He sued and that led to *Bond v. Floyd*.²⁰³

The U.S. Supreme Court held that the Georgia House violated Mr. Bond’s right of free expression.²⁰⁴ Although the oath of office was constitutionally valid, Chief Justice Warren wrote, this requirement did not empower the state representatives to challenge a duly elected legislator’s sincerity in swearing allegiance to the Constitution.²⁰⁵ Such authority could be used to stifle dissents of legislators who disagreed with majority views.²⁰⁶

The Court also ruled that it would be unconstitutional for the federal government to convict Mr. Bond under the Selective Service Act for counseling or aiding persons to evade or refuse

¹⁹⁴ 394 U.S. 705 (1969) (per curiam).

¹⁹⁵ 395 U.S. 444 (1969) (per curiam).

¹⁹⁶ 414 U.S. 105 (1973) (per curiam).

¹⁹⁷ See 5 ROTUNDA & NOWAK, *supra* note 83, § 20.15(d).

¹⁹⁸ See *Bond*, 385 U.S. at 118.

¹⁹⁹ *Id.* at 118–21.

²⁰⁰ *Id.* at 123.

²⁰¹ *Id.* at 125.

²⁰² *Id.* at 123–24. The Supreme Court later upheld the constitutionality of federal laws punishing draft card burning in *United States v. O’Brien*, 391 U.S. 367, 381–82 (1968).

²⁰³ *Bond*, 385 U.S. at 123, 125–26.

²⁰⁴ *Id.* at 137.

²⁰⁵ *Id.* at 132.

²⁰⁶ See *id.*

registration.²⁰⁷ The Court said that one could not reasonably interpret Mr. Bond's statements "as a call to unlawful refusal to be drafted."²⁰⁸ Mr. Bond actually appeared to be advocating legal alternatives to the draft, not inciting people to violate the law. The Court concluded that Mr. Bond's punishment for these statements violated the First Amendment.²⁰⁹

B. The *Watts* Decision

A harbinger of the later cases is *Watts v. United States*.²¹⁰ In a brief, per curiam opinion, the Supreme Court reversed Mr. Watts's conviction for violating a statute prohibiting persons from "knowingly and willfully . . . threat[ening] to take the life of or to inflict bodily harm upon the President"²¹¹ Mr. Watts, during a public rally in Washington, D.C., stated he would not report for his scheduled draft physical. Then, he referred to President Johnson (L.B.J.) and added:

If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers.²¹²

The Court said that the statute was "constitutional on its face," because the nation certainly has a valid interest in protecting the President.²¹³ However, the Court must interpret this statute narrowly, so that it does not criminalize pure speech, protected by the First Amendment.²¹⁴ "What is a threat must be distinguished from what is constitutionally protected speech."²¹⁵ Mr. Watts's statement was only "political hyperbole" and not a "true threat."²¹⁶

²⁰⁷ *Id.* at 132–33.

²⁰⁸ *Id.* at 133.

²⁰⁹ *Id.* at 134 (citing *Wood v. Georgia*, 370 U.S. 375 (1962); *Yates v. United States*, 354 U.S. 298 (1957); and *Terminiello v. Chicago*, 377 U.S. 1 (1949)).

²¹⁰ 394 U.S. 705, 706, 708 (1969) (per curiam).

²¹¹ *Id.* at 705.

²¹² *Id.* at 706 (internal quotation marks omitted).

²¹³ *Id.* at 707.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 708 (concluding that the government must "prove a true 'threat'"); see also *Virginia v. Black*, 538 U.S. 343, 359 (2003) (plurality opinion) ("True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."). The plurality ruled that a provision of the Virginia cross burning statute, which stated that burning a cross in public view "shall be prima facie evidence of an intent to intimidate," was facially unconstitutional under the First Amendment because it was not limited to "true threats." *Id.* at 347–48. It is a "true threat" if "a speaker directs a threat to a person . . . with the intent of placing the victim in fear of bodily harm or death." *Id.* at 359–60. A "true threat" is one "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359 (emphasis added). "[S]ome cross burnings fit within this meaning of intimidating speech and rightly so." *Id.* at 360 (emphasis added).

The language of the political arena . . . is often vituperative, abusive, and inexact. [The defendant's] only offense here was "a kind of very crude offensive method of stating a political opposition to the President."²¹⁷

One must consider Mr. Watts's statement in context: His "threat" was conditional, and his listeners responded by laughing. His words should only be interpreted as an expression of political belief. Moreover, the circumstances of Mr. Watts's speech did not amount to a literal *incitement* of violence. If it had, the Court's reasoning and analysis would have been different.

The influence of the "incitement" prong of Justice Brandeis's concurrence in *Whitney*²¹⁸ is evident in both *Bond* and *Watts*. The pivotal determination in *Bond* was the fact that the defendant was merely expressing his grievances with the government, not inciting a lynch mob to unlawful action. Furthermore, the Court reversed the defendant's conviction in *Watts* because his statement did not clearly present any imminent threat to the President.

Later, the Court clarified that a "true threat" requires not only that the recipient of the threat believe it to be a real and serious threat, but also that the defendant *intended* to issue a true threat, had *scienter*, and specifically knew that the communications would be viewed as threats.²¹⁹

This leads to the two decisions that incorporate the learning and mistakes of the past to give us the modern test—*Brandenburg v. Ohio*,²²⁰ and *Hess v. Indiana*.²²¹ The origins of this modern test lie 2500 years ago.

C. The *Brandenburg* Test

The culmination of the modern test is found in *Brandenburg v. Ohio*.²²² It signaled a major shift in the Court. Many commentators at the time did not appreciate its significance because the Court issued its ruling in a brief per curiam opinion,²²³ a designation often given to less significance opinions. The Warren Court rejected the limited protection of the "clear and present danger" test as Justice Holmes had advanced it, and instead

²¹⁷ *Watts*, 394 U.S. at 708.

²¹⁸ *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

²¹⁹ See *Elonis v. United States*, 135 S. Ct. 2001, 2011–12 (2015) (holding that, in order for the government to convict the defendant of issuing threats on Facebook, it must prove that the defendant, with scienter, *intended* to issue a true threat or knew that communications would be viewed as threats). Defendant said such things as, "if worse comes to worse I've got enough explosives," and, "hell hath no fury like a crazy man in a Kindergarten class." *Id.* at 2006.

²²⁰ 395 U.S. 444 (1969) (per curiam).

²²¹ 414 U.S. 105 (1973) (per curiam).

²²² *Brandenburg*, 395 U.S. at 447.

²²³ *Id.* at 444.

adopted crucial differences in phrasing and emphasis to assure that its free speech protections would not be diluted.²²⁴

Instead, *Brandenburg* created a new test. First, it explicitly overruled the *Whitney* decision.²²⁵ It did not adopt the clear and present danger test, and never explicitly referred to it. However, Justices Black and Douglas did: In their separate concurrences they made clear that, “the ‘clear and present danger’ doctrine should have no place in the interpretation of the First Amendment.”²²⁶ *Brandenburg* also added new vigor to the reasoning of Justice Brandeis’s concurrence in *Whitney*, and eliminated the open-ended use of the test that had prevailed in the “bad tendency” and “balancing” years.

The *Brandenburg* Court’s per curiam opinion reversed the conviction of a Ku Klux Klan leader for violating Ohio’s criminal syndicalism statute.²²⁷ Ohio charged Brandenburg with advocating political reform through violence and assembling with a group formed to teach criminal syndicalism.²²⁸ The facts showed that a man identified as Brandenburg arranged for a television news crew to attend a Ku Klux Klan rally.²²⁹ During the news film made at the rally, Klan members, including Brandenburg, discussed the group’s plan to march on Congress.²³⁰

The Court acknowledged that it had upheld a similar criminal syndicalism statute in *Whitney*, but the Court said, later decisions discredited *Whitney*.²³¹ The Court then held that the right of free speech protects advocacy of violence as long as the advocacy did not incite people to *imminent* action.²³² The key is “incitement.”

When a speaker uses speech to cause unthinking, immediate lawless action, one cannot rely on more speech in the market place of ideas to correct the errors of the original speech; there simply is not enough time, because there is an incitement. In these rare cases, the state has a significant interest in, and no other means of preventing, the resulting lawless conduct. The situation is comparable to someone urging the lynch mob to string up the prisoner. Or, to apply this test to Justice Holmes’s analogy, it is akin

²²⁴ *Id.* at 450.

²²⁵ *See id.* at 449 (overturning *Whitney v. California*, 274 U.S. 357, 376 (1927)).

²²⁶ *Id.* at 449–50 (Black, J., concurring); *see also id.* at 454 (Douglas, J., concurring) (“I see no place in the regime of the First Amendment for any ‘clear and present danger’ test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it.”).

²²⁷ *Id.* at 444–45.

²²⁸ *See id.* at 445.

²²⁹ *Id.*

²³⁰ *See id.* at 446.

²³¹ *Id.* at 447.

²³² *Id.*

to someone (a) knowingly and *falsely* shouting “fire” in a crowded theater (b) with the intent to cause a riot, in such circumstances, (c) where there is no time for reasoned debate, because both the *intent* of the speaker, his *objective* words, his scienter (he is knowingly and falsely shouting), and the circumstances in which he harangues the crowd amount to incitement.

Thus, *Brandenburg* developed a new, four-part test that emphasizes the need for the state to prove incitement. For the state conviction to be valid, the state must prove: (1) the speaker *subjectively intended* incitement; (2) in context, the words used are “likely to incite or produce” “*imminent, lawless action*,”²³³ and (3) the words used by the speaker *objectively encouraged*, urged, and (4) provoked imminent action. The Court made clear this third part of the test, with its focus on the objective words used by the speaker, in a later decision, *Hess v. Indiana*,²³⁴ discussed below.

The *Brandenburg* Court then summarized the new test for speech that advocates unlawful conduct: The state may not “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²³⁵ Merely teaching abstract doctrines, the Court noted, was not like leading a group in a violent action. Moreover, the statute must be narrowly drawn to reflect these limitations. If the statute failed to distinguish between advocacy of a theory and advocacy of action, it abridges First Amendment freedoms.

Criminal syndicalism, as defined in the Ohio statute, did not pass the *Brandenburg* test.²³⁶ The statute forbade teaching of violent political revolution with the intent of spreading such doctrine or assembling with a group advocating this doctrine.²³⁷ At the defendant’s trial, the prosecution made no attempt to distinguish between incitement and advocacy. Thus, the Ohio statute abridged the First and Fourteenth Amendments.²³⁸ Any law punishing mere

²³³ *Id.* at 447 (emphasis added) (footnote omitted) (“[A]dvocacy is *directed to inciting* or producing *imminent* lawless action *and* is likely to incite or produce such action.” (emphasis added)).

²³⁴ 414 U.S. 105, 109 (1973) (per curiam); see also Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1179, 1193–94 (2005).

²³⁵ *Brandenburg*, 395 U.S. at 447 (footnote omitted). Justice Douglas concurred separately entering the caveat that there was no place for the clear and present danger test in any cases involving First Amendment rights. *Id.* at 452 (Douglas, J., concurring). He was distrustful of the test, which he believed could be easily manipulated to deny constitutional protection to any speech critical of existing government. *Id.* at 451–52 (Douglas, J., concurring). Justice Black also concurred separately, and similarly objected to the clear and present danger test as insufficiently protective of free speech. *Id.* at 449–50 (Black, J., concurring).

²³⁶ *Id.* at 449.

²³⁷ See *id.*

²³⁸ *Id.* at 448–49.

advocacy of Ku Klux Klan doctrine and the assembling of Klan members to advocate their beliefs was unconstitutional.

Brandenburg's new formulation offers broad, new protection for strong advocacy. Its major focus is on the inciting language of the speaker—that is, on the *objective* words. In addition, it stresses the need to show that the speech is directed to produce immediate, unthinking lawless action and that, in fact, the situation makes this purpose likely to be successful.

D. *Hess v. Indiana* and its Vindication of *Brandenburg*

A post-Warren Court decision, *Hess v. Indiana*,²³⁹ is significant because it demonstrates that the Court is serious and literal in its application of the test proposed in *Brandenburg*. The police arrested Mr. Hess (who was subsequently convicted) for disorderly conduct when he shouted “we’ll take the fucking street later (or again)” during an antiwar demonstration.²⁴⁰ Two witnesses testified Mr. Hess did not appear to exhort demonstrators to go into the street that the police had just cleared, that he was facing the crowd, and that his tone of voice (although loud) was no louder than any of the other demonstrators.²⁴¹ The Indiana Supreme Court upheld the trial court’s finding that Mr. Hess intended his remarks to incite further riotous behavior and were likely to produce such a result.²⁴²

However, the Supreme Court reversed, and in its brief per curiam opinion the Court stated:

At best, . . . the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess’[s] speech. Under our decisions, “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action.”²⁴³

Because Mr. Hess’s speech was “not directed to any person or group of persons,” he had not advocated action that would produce imminent disorder.²⁴⁴ Mr. Hess’s statements, therefore, did not violate the disorderly conduct statutes.²⁴⁵

²³⁹ See *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (per curiam).

²⁴⁰ *Id.* at 106–07.

²⁴¹ *Id.* at 107.

²⁴² *Id.*

²⁴³ *Id.* at 108 (emphasis in original) (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

²⁴⁴ *Id.* at 108–09.

²⁴⁵ *Id.*

Justice Rehnquist, joined by Chief Justice Burger and Justice Blackmun, strongly dissented to the per curiam opinion's "somewhat antiseptic description of this massing" of people and preferred to rely on the decision of the trial court, which was free to reject some testimony and accept other testimony.²⁴⁶ The majority, Justice Rehnquist claimed, was merely interpreting the evidence differently, and thus exceeding the proper scope of review.²⁴⁷ The majority was unmoved. There was some evidence that Mr. Hess's "statement could be taken as counsel for present moderation" and hence his "objective words" did not meet the requirements of *Brandenburg*.²⁴⁸

The new *Brandenburg* test—a test more vigorously phrased and strictly applied than the older clear and present danger test—now is the proper formula for determining when speech that advocates criminal conduct may constitutionally be punished. With its emphasis on incitement, imminent lawless action, and the objective words of the speaker, the *Brandenburg* test should provide a strong measure of First Amendment protection.

When a speaker advocates violence using speech that does not literally incite,²⁴⁹ the Court should protect the speaker. The government might urge the Court to look for proximity to violence rather than to the literal words of incitement. However, *Brandenburg* rejects that theory.²⁵⁰

²⁴⁶ See *id.* at 110–11 (Rehnquist, J., dissenting).

²⁴⁷ *Id.* at 109, 111–12 (Rehnquist, J., dissenting).

²⁴⁸ See *id.* at 108.

²⁴⁹ Consider the application of this principle to those who sue the media because of what they broadcast. A woman sued a television network and publisher for injuries inflicted by persons whom, she alleged, were stimulated by watching a scene of brutality broadcast in a television drama. *Nat'l Broad. Co., Inc. v. Niemi*, 434 U.S. 1354 (1978), *cert. denied*, 435 U.S. 1000 (1978), *appeal after remand* 126 Cal. App. 3d 488 (1981). The petitioners sought a stay of the state court order remanding for a trial. *Id.* Circuit Justice Rehnquist denied the stay for procedural reasons, and he noted that the trial judge rendered judgment for petitioners because he found that the film "did not advocate or encourage violent and depraved acts and thus did not constitute an incitement." *Id.* at 1356. The *Brandenburg* test should be applicable to determine the free speech defense to plaintiff's tort claim.

See also *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1021 (5th Cir. 1987) *cert. denied*, 485 U.S. 959 (1988), which overturned a jury verdict against *Hustler Magazine* arising out of the death of an adolescent who attempted sexual practice described in a magazine article. *Id.* "[W]e hold that liability cannot be imposed on Hustler on the basis that the article was an incitement to attempt a potentially fatal act without impermissibly infringing upon freedom of speech." *Id.*

²⁵⁰ See, for example, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982), which declared:

The emotionally charged rhetoric of Charles Evers'[s] speeches did not transcend the bounds of protected speech set forth in *Brandenburg*. The lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language

E. *Brandenburg*, Marc Antony, and Shouting Fire

Brandenburg's new formulation offers broad, new protection for strong advocacy. Its major focus is on the inciting language of the speaker, that is, on the *objective* words, in addition to the need to show that the speaker subjectively *intends* the speech to produce immediate, unthinking lawless action in a situation that makes this purpose likely to be successful.

Let us apply this test to another funeral oration, not the oration of Pericles, but Marc Antony's funeral oration in Shakespeare's *Julius Caesar*. Here are a few of Antony's words:

I come to bury Caesar, not to praise him.
 The evil that men do lives after them,
 The good is oft interrèd with their bones;
 So let it be with Caesar. The noble Brutus
 Hath told you Caesar was ambitious;
 If it were so, it was a grievous fault, . . .
 [Caesar] was my friend, faithful and just to me,
 But Brutus says he was ambitious,
 And Brutus is an honourable man. . .
 I thrice presented him a kingly crown,
 Which he did thrice refuse. Was this ambition?
 Yet Brutus says he was ambitious,
 And sure he is an honourable man.
 I speak not to disprove what Brutus spoke, . . .
 My heart is in the coffin there with Caesar,
 And I must pause till it come back to me.²⁵¹

First, we can safely assume that Antony *subjectively intended* incitement. Second, in context, the words used were *likely to produce* imminent, lawless action. We all know what

was used. *If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct.* In this case, however--with the possible exception of the Cox incident--the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966 speech; the chancellor made no finding of any violence after the challenged 1969 speech. Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech.

Id. (emphasis added).

²⁵¹ WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 3, sc. 2, at 66–71, 77–79, 88–92, 98–99 (Marvin Spevack ed., Cambridge Univ. Press 2004) (1599).

happened next: Civil War. Antony's side won, although it was a short-lived victory for Antony. His ally, Octavius Caesar, soon turned against him and forced him to commit suicide.²⁵²

Still, Antony's speech does not meet the third part of the test—the words used by the speaker must *objectively encourage*, urge, and provoke imminent action. This third part of the test, with its focus on the speaker's objective words, protects Antony. He did not literally advocate violence. Indeed, he said his opponents were “honourable” men. He did not advocate war: He said he only spoke to bury Caesar. Thus, the ruling in *Brandenburg* would protect him. And in so doing the First Amendment protects all of us.

VII. APPLYING THE MODERN TEST TO UNDERSTAND THE MODERN LAW

A. Fighting Words

In the era before *Brandenburg*, the Court created a category of unpopular speech that the First Amendment did not protect, so-called “fighting words.” The first case was *Chaplinsky v. New Hampshire*, decided in 1942, during World War II.²⁵³ The defendant, Walter Chaplinsky, encountered the city fire marshal, addressed him as a “God damned racketeer and a damned fascist.”²⁵⁴ The Court upheld his conviction under a state statute banning face-to-face words having “a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.”²⁵⁵ “The test,” said the Court, “is what men of common intelligence would understand would be words likely to cause an average addressee to fight.”²⁵⁶

We can think of the speech in *Brandenburg* or in *Hess*, as a call for mayhem on a wholesale level. Recall that neither speech in those cases met the strict three-part requirements of incitement that would allow the government to intervene. The call to fight in *Chaplinsky* we might compare to a call for mayhem on a retail level, face-to-face. However, that speech hardly met the test laid out in *Brandenburg* and *Hess*, yet the Court affirmed the conviction.

The Court indicated some discomfort with the *Chaplinsky* “fighting words” test in *Terminiello v. Chicago*.²⁵⁷ In *Terminiello*, the Court invalidated the defendant's breach of the peace

²⁵² See generally *id.*

²⁵³ 315 U.S. 568 (1942).

²⁵⁴ *Id.* at 569.

²⁵⁵ *Id.* at 573.

²⁵⁶ *Id.*

²⁵⁷ 337 U.S. 1, 26 (1949).

conviction for denouncing Jews and others.²⁵⁸ However, the Court reversed the conviction without reaching the question of whether the speech constituted “fighting words.” Instead, the Court found the jury instruction was in error.²⁵⁹ The trial judge had instructed the jury to convict if the speech “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm.”²⁶⁰ Denouncing the instruction, the Court stated that “a function of free speech under our system of government is to invite dispute,” and do the other things explicitly forbidden by the jury instruction.²⁶¹ A conviction “resting on any of those grounds [relied on in the jury instruction] may not stand.”²⁶²

The last Supreme Court decision that embraced the “fighting words” doctrine is now two-thirds of a century old, *Feiner v. New York*.²⁶³ It spoke of a possible “fighting words” exception to free speech—that case no longer lives with any vigor.

Feiner upheld the disorderly conduct misdemeanor conviction of Irving Feiner, who was speaking on a street corner, calling President Truman a “bum,” and the American Legion the “Nazi Gestapo.”²⁶⁴ Some in the crowd were hostile and others favored Mr. Feiner. After he had spoken for about a half hour urging blacks to “rise up in arms,” the police arrested him and led him away in an effort to prevent violent reaction.²⁶⁵ The Court reasoned,

It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace.²⁶⁶

Notice that the Court did say, as a factual matter, that Mr. Feiner was *inciting* the crowd and upheld the conviction. Justices Black, Douglas, and Minton dissented.²⁶⁷

Feiner was the high-water mark for the “fighting words” doctrine. Subsequent Supreme Court cases chipped away at it over the years.²⁶⁸ For example, in *Gooding v. Wilson*, Mr. Johnny C. Wilson said to police officers who were attempting to restore

²⁵⁸ *Id.* at 3, 5–6.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 4.

²⁶² *Id.* at 5.

²⁶³ 340 U.S. 315, 331–32 (1951).

²⁶⁴ *Id.* at 330 (Douglas, J., dissenting).

²⁶⁵ *See id.* (Douglas, J., dissenting).

²⁶⁶ *Id.* at 321.

²⁶⁷ *Id.* (Black, J., dissenting); *id.* at 329 (Douglas, J., joined by Minton, J., dissenting).

²⁶⁸ *See, e.g., Gooding v. Wilson*, 405 U.S. 518 (1972).

order to a public building: “White son of a bitch, I’ll kill you,” and to another: “You son of a bitch, if you ever put your hands on me again, I’ll cut you all to pieces.”²⁶⁹ The Georgia statute prohibited “opprobrious words or abusive language, tending to cause a breach of the peace”²⁷⁰ The state standard allowed juries to determine guilt as “measured by common understanding and practice”²⁷¹—a phrase too broad and not necessarily limited to incitement. What the defendant said would not “tend to *incite* an *immediate* breach of the peace”²⁷² and the Court overturned Wilson’s conviction.²⁷³

After *Brandenburg* and *Hess*, the Court held that the state could not allow a tort for intentional infliction of emotional distress because a congregation of the Westboro Baptist Church picketed military funerals to communicate its belief that God hates the United States for its tolerance of homosexuality, particularly in America’s military.²⁷⁴ The offensive picketers peacefully displayed their signs stating, for example, “Thank God for Dead Soldiers.”²⁷⁵ The Court explained, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”²⁷⁶

One case in the Sixth Circuit illustrates the reluctance of some judges to recognize the modern full-bodied protection of free speech.²⁷⁷ The first opinion in that case ignored the lessons of *Brandenburg* and *Hess* and applied the “fighting words” test to restrict free speech.²⁷⁸ In the second opinion, the *en banc* Sixth Circuit overturned the panel and embraced *Brandenburg* and *Hess*.

The case arose because a Christian evangelical group was “preaching hate and denigration to a crowd of Muslims, some of whom responded with threats of violence” during a city festival celebrating Arab culture.²⁷⁹ The police responded by removing the evangelicals, who then filed a civil rights claim under 42 U.S.C. 1983 against the sheriff and deputies, alleging that they

²⁶⁹ *Id.* at 534 (Blackmun, J., dissenting).

²⁷⁰ *Id.* at 519.

²⁷¹ *Id.* at 528.

²⁷² *Id.* at 522 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (emphasis added)).

²⁷³ *See id.* at 520.

²⁷⁴ *Snyder v. Phelps*, 562 U.S. 443, 459 (2011).

²⁷⁵ *Id.* at 448.

²⁷⁶ *Id.* at 458 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

²⁷⁷ *See Bible Believers v. Wayne Cty.*, 805 F.3d 228 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2013 (2016).

²⁷⁸ *Bible Believers v. Wayne Cty.*, 765 F.3d 578, 597 (6th Cir. 2014) *rev’d*, 805 F.3d 228 (6th Cir. 2015).

²⁷⁹ *Bible Believers*, 805 F.3d at 234.

violated the evangelicals' rights to freedom of speech, free exercise of religion, and equal protection by cutting off their protests.²⁸⁰ The trial court entered summary judgment for the defendants, and the Sixth Circuit panel affirmed.²⁸¹ But the *en banc* Sixth Circuit reversed and protected the hate speech.²⁸²

The state may not silence the speaker as expedient or efficient alternative to containing rioting individuals' lawless behavior because there is no right to a heckler's veto.²⁸³ The *en banc* court recognized that *Feiner* and "fighting words" only exist when the speaker is engaged in *incitement* within the meaning of *Brandenburg* and *Hess*.²⁸⁴ As the *en banc* Sixth Circuit makes clear:

Maintenance of the peace should not be achieved at the expense of the free speech. The freedom to espouse sincerely held religious, political, or philosophical beliefs, especially in the face of hostile opposition, is too important to our democratic institution for it to be abridged simply due to the hostility of reactionary listeners who may be offended by a speaker's message.²⁸⁵

The incantation of "fighting words" no longer offers a justification to restrict speech. It is one thing if a speaker *incites* a lynch mob—that meets the *Brandenburg* and *Hess* test—but quite another if the speaker promotes hate speech or advocates positions that upset the crowd, even if the crowd responds with mayhem.²⁸⁶ As *Bible Believers* explained, in light of the present case law, "[t]he better view of *Feiner* is summed up, simply, by the following truism: when a speaker incites a crowd to violence, his *incitement* does not receive constitutional protection."²⁸⁷ "Incitement" is a term of art that requires speech, plus something else, such as inciting a lynch mob to lynch in a narrow factual context.²⁸⁸ That restriction is a bequest from the ancient Greeks.

B. Provocative Speech in Schools

Dariano v. Morgan Hill Unified School District is a peculiar case, because it endorses a heckler's veto.²⁸⁹ This case held that a public school could prohibit students from wearing

²⁸⁰ *Id.* at 241–42.

²⁸¹ *Id.* at 242.

²⁸² *Id.* at 233, 242.

²⁸³ *Id.* at 252, 265 (overruling *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975) because there is no right to a heckler's veto).

²⁸⁴ *Id.* at 248.

²⁸⁵ *Id.* at 252.

²⁸⁶ *Id.* at 245 (quoting 5 ROTUNDA & NOWAK, *supra* note 83, § 20.39(a)) (noting that "[t]he authority of *Feiner* has been undercut significantly in subsequent [Supreme Court] cases").

²⁸⁷ *Bible Believers*, 805 F.3d at 245.

²⁸⁸ See *supra* Part VI.E. (discussing Marc Antony's funeral oration as an example of a speech that does not meet the strict *Brandenburg* and *Hess* test).

²⁸⁹ 767 F.3d 764, 777–78 (9th Cir. 2014).

a symbol of the American Flag on their clothing because doing so might upset some Mexican American students.²⁹⁰ Yes, we live in world where a public school can ban the American Flag because it is hate speech, but the government cannot ban burning the American Flag.²⁹¹ Those who support the decision in *Dariano* explain that it was correct for the court to “balance” the interests involved; that is only what the First Amendment requires, we are told.²⁹²

However, that is not what the Supreme Court ruled when it decided a very similar issue in 1969.²⁹³ We were in the middle of the Vietnam War, and the disputes between the hawks and doves did not end with debates in Congress and protests in the streets. They continued in our public high schools. The Supreme Court decision on this issue was *Tinker v. Des Moines Independent School District*.²⁹⁴ Some high school students—the doves—claimed a constitutional right to wear black armbands as a symbol to protest the Vietnam War.²⁹⁵ The Court has long held that the First Amendment protects not only words but also symbols, such as flags, banners, pictures of donkeys and elephants.²⁹⁶

The principals of all of the Des Moines schools sided with the hawks. They adopted a policy, first, to ask any student to remove the armband protesting the war.²⁹⁷ If the student objected, the school would suspend her until she returned without the armband.²⁹⁸ Oddly enough, the principals imposed no ban on students wearing national political campaigns buttons; some students even wore the Iron Cross, traditionally a symbol of Nazism.²⁹⁹ However, a symbol of peace was just too much for the schools. They had to draw the line.

The Court decided against the school district.³⁰⁰ The Court acknowledged that the nature of the students’ rights is different because a school is not a public forum in the sense that a public street is, however, neither students nor teachers “shed their constitutional rights to freedom of speech or

²⁹⁰ *Id.* at 777.

²⁹¹ *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 420 (1989); *United States v. Eichman*, 496 U.S. 310, 318–19 (1990).

²⁹² *See, e.g.*, Julie Hilden, *A Ninth Circuit Panel Balances First Amendment Rights Against School Safety*, VERDICT (Mar. 3, 2014), <https://verdict.justia.com/2014/03/03/ninth-circuit-panel-balances-first-amendment-rights-school-safety> [http://perma.cc/US2G-59FT].

²⁹³ *See generally* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 504.

²⁹⁶ *See, e.g.*, *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

²⁹⁷ *Tinker*, 393 U.S. at 504.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 510–11.

³⁰⁰ *Id.* at 514.

expression at the schoolhouse gate.”³⁰¹ For example, during a history class about the Civil War, no student would have a right to disrupt the lesson by asserting a right to talk about the Vietnam War. Similarly, the geography teacher can limit discussion to issues of geography that relate to that day’s lesson. However, wearing black armbands (like wearing pierced earrings) does not disrupt the education of the school. The *Tinker* Court understood this distinction:

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance *on the part of petitioners*. There is here no evidence whatever of *petitioners’ interference*, actual or nascent, *with the schools’ work* or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.³⁰²

Tinkers made clear that the students wearing armbands protesting—the doves—were not interfering with anything. Some of the students opposed to the doves—the hawks—were upset. A “few students [the hawks] made hostile remarks to the children wearing armbands,”³⁰³ but if schools were going to punish anyone, they should punish the hawks. *Tinker* did not approve of any “heckler’s veto.” If the hawks decided to beat up the doves, that would not authorize the school to restrict the free speech of the doves.

Tinker acknowledged that any “word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance.”³⁰⁴ Nonetheless, the “Constitution says we must take this risk,” and our openness is “the basis of our national strength” and part of the warp and woof of our “often disputatious” society. If the heckler is disturbing the speaker, the law interferes to protect the speaker, not the heckler.³⁰⁵

There have been a few cases since *Tinker* where the Supreme Court has clarified (but not undercut) its holding. For example, a school assembly is also not a public forum. If the school provides for an assembly for all the students (including some as young as fourteen years of age), where students could speak on behalf of candidates for student government, then the school could require the students not to engage in lewd speech.³⁰⁶

³⁰¹ *Id.* at 506.

³⁰² *Id.* at 508 (emphasis added).

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 508–09.

³⁰⁶ See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

If the high school students in a journalism class, under the supervision of a teacher, publish a school newspaper, the high school educators could exercise editorial control over the newspaper.³⁰⁷ The high school student newspaper is not a public forum; instead, it is part of a course for credit, under the teacher's supervision. More recently, the Court held that the school could confiscate a student's banner advocating illegal drug use and ban "student speech at a school event" from promoting illegal drug use, in violation of school policy.³⁰⁸ All of these cases cited and reaffirmed *Tinker*.

The response of the Ninth Circuit in *Dariano* was to reject *Tinker* and uphold the heckler's veto.³⁰⁹ *Dariano* upheld the power of the Morgan Hill Unified School District to order students to cover up the U.S. flag shirts or go home, because, the District claimed, if some students wore those colors on Cinco de Mayo, the fifth of May, celebrating Mexican heritage and pride, other students might turn to violence.³¹⁰ The school ban on the students wearing American flag colors, as the district court explained, was "in order to protect their own safety."³¹¹

However, these same school administrators did not ask any students to refrain from wearing the colors of the Mexican flag because, they said, students wearing American flags "were threatened with violence," but students with Mexican flag colors were not.³¹² One might say that the Anglo students were threatened, but the "Mexican students" (the term the court repeatedly used) were not. Hence, "all students whose safety was in jeopardy were treated equally."³¹³

The court invented a most unusual rule: If hecklers threaten students who do nothing but wear colors that reflect the American flag, the school authorities should restrict the peaceful students, not the rowdy hecklers. If that is the law, what the lawyers for the principals in *Tinker* should have advised them was that they could punish the doves if only the hawks had physically threatened and hit the doves. Surely, that cannot be what the *Tinker* Court intended.

Recall, *Tinker* found it telling that the school principals did not ban all symbols; they allowed students to wear Democratic

³⁰⁷ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988).

³⁰⁸ *Morse v. Frederick*, 551 U.S. 393, 394 (2007).

³⁰⁹ *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 766 (9th Cir. 2014).

³¹⁰ See *id.* at 767.

³¹¹ *Dariano v. Morgan Hill Unified Sch. Dist.*, 822 F. Supp. 2d 1037, 1046 (N.D. Cal. 2011), *aff'd*, 767 F.3d 764 (9th Cir. 2014).

³¹² *Id.* at 1045–46.

³¹³ *Id.*

campaign buttons even if that upset Republicans.³¹⁴ The principals allowed students to wear a symbol of the Nazis, the Iron Cross.³¹⁵ The fact that principals distinguished among the types of buttons that were verboten was evidence that the school principals were banning symbols because of their content, their message. This was not a case where the school principals said, for example, that no students could wear armbands or any other symbols on their school band uniforms because the whole point of uniforms is to be, well, uniform.

Yet, in California, the rule is different. Mexican students can wear Mexican flag colors, but others cannot wear American flag colors. Why? The trial court claimed that the Mexican students were threatening the other students, but the trial court found no evidence that anyone was threatening the Mexican students, so the school only protected the hecklers.³¹⁶

Let us apply the Ninth Circuit's reasoning to other situations. Assume that some students wear the Star of David and other students object and threaten them. These other students wear the Iron Cross. The Star of David students (perhaps grandchildren of those who barely survived the Holocaust) do not threaten violence. The Ninth Circuit rule would allow the Iron Cross—but not the Star of David—because only the Iron Cross students threatened violence. As the trial court said in *Dariano*, to support its restriction of free speech, a male student “shoved a Mexican flag at [a student with an American flag symbol] and said something in Spanish expressing anger at Plaintiffs’ clothing.”³¹⁷ The remedy that the *Dariano* court chose was not to punish the student who “shoved a Mexican flag” at the other student, but to take away the free speech rights of that other student.

That is not what our high schools should be teaching students. We live in a diverse society and, in the words of *Tinker*, “apprehension of disturbance is not enough to overcome the right to freedom of expression.”³¹⁸ Instead, the Ninth Circuit and the Morgan Hill Unified School District prefer to teach schoolchildren that, if you want to shut up other fellow students, just rely on the heckler's veto. This school district is not very good at teaching tolerance: Earlier, gay students sued this same school district for failing to take action to protect them from harassment from their fellow students.³¹⁹ It would

³¹⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510–11 (1969).

³¹⁵ *Id.*

³¹⁶ *Dariano*, 822 F. Supp. 2d at 1046.

³¹⁷ *Id.* at 1044.

³¹⁸ *Tinker*, 393 U.S. at 509.

³¹⁹ See generally *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003).

be much better if the school followed Rodney King's plea that we all should learn to "get along."

VIII. CONCLUSION

A newspaper exchange occurred several years ago in a prominent legal newspaper on the pros and cons of government restrictions on the press corps covering the first Persian Gulf War.³²⁰ It illustrated a peculiar American tradition. While we cling to our First Amendment rights to engage in robust debate about national affairs and, ultimately, to dissent from the policies of our government, we also indulge a penchant for robustly debating the conditions under which we should carry out our robust debates about national affairs. You might call this the First Amendment squared.

If there is any disadvantage to this preoccupation, it is that outsiders—for example, dictators like Kim Jong-un of North Korea—may interpret failure of the United States Government to stifle debate and dissent as a sign of weakness and divisiveness, perhaps not understanding that dissent in America is par for the course.

None of this gives cause to limit or even question our traditional freedoms. But it's worth a moment of appreciation for what we enjoy and a warning about the importance of preserving our expressive freedoms even—especially—when they become most inconvenient.

The lesson that strength lies in free speech goes back at least as far as ancient Athens. Strength does not lie in enforced silence, but rather in robust dissent. The lessons of history should teach us that any efforts by war supporters to attack dissent would be adopting the rules of dictators as our own. Our way is to slug it out domestically. There is no point at which debate is closed. There is no point at which the only acceptable course of action is to rally 'round. Those who will argue—as some always do—that our soldiers will be demoralized by domestic dissent sell them short and do not understand the premium our Constitution places on free speech, or the power that freedom yields.

The free speech that we now protect in times of war is handmaiden to the free speech we must protect in times of peace. Hateful speech is, well, hateful, but the remedy, history teaches us, is more speech, not less. We protect the rights of Nazis to

³²⁰ See *Press Limits: Censorship or Prudence?*, LEGAL TIMES, Jan. 28, 1991, at 19.

march in Skokie, Illinois, so civil rights protestors can march in Selma, Alabama.³²¹

If we gathered members of the early Congress (which enacted the Alien and Sedition Laws) and members of the Supreme Court (during the time it adopted the “bad tendency test” in the beginning of the twentieth century), they would advise us that a country could not conduct a war successfully if the government allows those opposed to it to speak out against it openly. They would advise us that allowing people to spew hurtful speech, could cause unrest and dissension. Throughout most of our history, any such gathering would produce the same answer. Yet Herodotus, Pericles, Aeschylus, and their fellow Athenians knew better.

There are those who say it is more difficult for a democracy to go to war because it cannot conduct the war successfully if the people oppose it. That is a good thing, not a bad thing. In modern times, no democracy has warred against another. As Pericles reminds us, “The great impediment to action is, in our opinion, not discussion, but the want of knowledge that is gained by discussion preparatory to action.”³²²

When the world is full of democracies and the despots and terrorists whom they harbor are no more, then we will have lasting peace. On the home front, there will always be those who preach hate, but we will learn to turn away and ignore their message or undercut the speech we do not like with more speech, rather than enforced silence. American’s experience with free speech tells us something else. The United States has not only survived but it has *thrived*, when it allows dissent, even in times of war. And when it punished dissent, our history teaches us that the people who enforce the censorship are not wise Platonic guardians.

Under modern free speech doctrine, the government may not prohibit or punish hateful, provocative, or offensive speech unless it proves *incitement*, a term of art that requires the government to prove that the speaker both subjectively and objectively intended to incite immediate, unthinking lawless violence before a volatile crowd in a situation that makes this intention likely to be successful. The government, under this

³²¹ See *Williams v. Wallace*, 240 F. Supp. 100, 110 (M.D. Ala. 1965) (enjoining defendants from interfering with a proposed civil rights march along U.S. Highway 80 from Selma to Montgomery which sought government redress for being deprived of the right to vote).

³²² Pericles, *supra* note 54, at 118–19.

test, could prohibit haranguing a lynch mob but could not punish hate speech.

As Senator John F. Kennedy said, while running for President, “We must know all the facts, and hear all the alternatives, and listen to all the criticisms. Let us welcome controversial books and controversial authors. For the Bill of Rights is the guardian of our security as well as our liberty.”³²³ When he said that, he echoed the ancient Greeks. There is little new under the sun.

³²³ John F. Kennedy, Response to Questionnaire, in Irving Kolodin, *The Candidates and the Arts*, SATURDAY REV., Oct. 29, 1960, at 42, 44; see also TATYANA ECKSTRAND, *THE LIBRARIAN’S BOOK OF QUOTES* 10 (2009); LIBRARY OF CONGRESS, *RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS* 29 (2010).

Keeping it Real: How the FCC Fights Fake Reality Shows with 47 U.S.C. 509

George Brietigam*

I. INTRODUCTION

The early 2000s was an exciting time for primetime entertainment. A new breed of television program was sweeping the nation's airwaves that would forever change the American zeitgeist—reality television.¹

Survivor (2000) is widely credited as the series that popularized and defined the modern concept of reality television.² Commentators almost universally regard Mark Burnett's pioneering program as the first commercially successful reality game show, and the numbers back up their assertion. During the summer of 2000, an average of 28.3 million viewers tuned into CBS Wednesday nights to see which “survivor” would be the next to be “voted off” the island.³ The show's finale attracted an unprecedented 51.1 million viewers,⁴ greatly surpassing anyone's wildest expectations, beating out the World Series, NBA finals, NCAA men's basketball finals, and the Grammy Awards of that year.⁵ To put *Survivor*'s first season viewership in perspective, *Game of Thrones*, the most watched show during the summer of 2017, only attracted an average of 13.1 million viewers (less than

* J.D. Candidate, Expected May 2019, Chapman University Dale E. Fowler School of Law; California State University, Long Beach, B.A. Theatre Arts, 2015. Special thanks to the always entertaining Professor Judd Funk, my faculty advisor, for his guidance and direction. Another shout-out goes to Professor John Hall, whose critical early feedback greatly shaped the direction this Article took. But, most of all, thank you to the poor 2L *Chapman Law Review* Staff Editors who got stuck fixing my countless typos and Bluebooking errors over winter break: Alexis Fasig, Jillian Friess, Kimia Hashemian, Bethany Ring, and Paige Williams. You guys are the true MVPs.

¹ Note, “television” and “TV” are used interchangeably throughout this Article.

² See RICHARD M. HUFF, REALITY TELEVISION 11 (2006).

³ See Russ Britt, *CBS announces ‘Survivor’ sequels*, MARKET WATCH (Jan. 9, 2001, 1:47 PM), <https://www.marketwatch.com/story/cbs-sets-plans-for-survivor-sequels> [<http://perma.cc/M57N-VY8G>].

⁴ *Id.*

⁵ See, e.g., Bill Carter, *CBS Is Surprise Winner in Ratings Contest*, N.Y. TIMES (Aug. 24, 2000), <https://www.nytimes.com/2000/08/24/us/cbs-is-surprise-winner-in-ratings-contest.html> [<http://perma.cc/Q4TR-VSPG>].

half of *Survivor's* average in 2000).⁶ In 2009, a likewise comparatively small 37.8 million viewers tuned into the inauguration of America's first black President (13 million fewer viewers than *Survivor's* season one finale).⁷ *Survivor's* astronomically high ratings resulted in a wave of advertising revenue that far exceeded CBS's wildest expectations, and the icing on the cake was that *Survivor* was actually significantly cheaper to create than CBS's traditional scripted shows, which required union writers, expensive sets, and highly-paid actors for each episode.⁸

Survivor's unexpected massive commercial success in the summer of 2000 spurred a race between the networks to capitalize on the emerging reality television market, and to create their own popular reality game shows. During the immediate months and years that followed, dozens of iconic shows that have since become a part of the American zeitgeist were born, including *Big Brother* (2000), *The Amazing Race* (2001), *American Idol* (2002), *The Bachelorette* (2003), and *The Apprentice* (2004).⁹

But an inevitable cynicism soon followed the birth of the genre that self-describes itself as "real." Allegations that reality shows are secretly "scripted," "staged," "rigged," or "creatively edited" are as old as the medium itself. Case in point, shortly after *Survivor's* season one finale, Stacy Stillman, a contestant on the show, filed a lawsuit against CBS, and *Survivor's* production company, alleging that the show's creator and executive producer, Mark Burnett, materially altered the outcome of the game by approaching two contestants and convincing them to vote her off the island instead of another contestant, who Burnett thought would be better for the show's ratings.¹⁰

According to Stillman's complaint, Burnett discovered, through the taped private interviews producers routinely had

⁶ See, e.g., Michael Schneider, *The 50 Most-Watched TV Shows of Summer 2017: Winners and Losers*, INDIEWIRE (Sept. 1, 2017, 6:01 PM), <http://www.indiewire.com/2017/09/most-watched-tv-show-summer-2017-game-of-thrones-americas-got-talent-1201872421/> [<http://perma.cc/FY4R-KX9W>].

⁷ See, e.g., *Nearly 37.8 Million Watch President Obama's Oath And Speech On TV*, NIELSON (Jan. 21, 2009), <http://www.nielsen.com/us/en/insights/news/2009/nearly-378-million-watch-president-obamas-oath-and-speech.html> [<http://perma.cc/ZXX2-4XCQ>].

⁸ See, e.g., Brian Stelter, *On Reality TV, Even 'Survivor' Looks Mortal*, N.Y. TIMES (Oct. 17, 2008), <https://www.nytimes.com/2008/10/19/business/media/19reality.html> [<http://perma.cc/5KR9-V9RL>].

⁹ See, e.g., Oliva Singh, *The 33 longest-running reality TV shows of all time*, INSIDER (July 17, 2018, 12:47 PM), <https://www.thisisinsider.com/longest-running-reality-tv-shows-of-all-time-ranked-2017-12> [<http://perma.cc/G3AQ-CPMA>]; *The Apprentice*, IMDB, <https://www.imdb.com/title/tt0364782/> [<http://perma.cc/KDB4-96NB>].

¹⁰ See Compl. ¶¶ 29–35, *Stillman v. CBS Corp.*, No. 318613 (Cal. Super. Ct. 2001), 2001 WL 36013844 consolidated with *SEG, Inc. v. Stillman*, No. BC245328 (Cal. Super. Ct. 2001), 2001 WL 36012815.

with the contestants, that a majority of the players on her tribe were intending to vote out Rudy Boesch, the elderly, gruff, politically incorrect, and quippish former Navy SEAL who, hands-down, proved to be the audience favorite of the season.¹¹ Stillman alleged that Burnett foresaw that Rudy would be a popular player, and that it would benefit the show's ratings to keep him in the game longer. Rudy, who was holding his own at an impressive seventy-two-years-old, was the only remaining contestant over the age of forty,¹² and he, quite hilariously, butted heads with the younger, more carefree and liberal contestants. Much like a drill sergeant, Rudy was quick and savage with his politically incorrect quips, and gave the best sound bites of the season. But, while his rogue and abrasive behavior made for great television, *Survivor* is a social game and, not surprisingly, a majority of the tribe that he routinely offended wanted him eliminated by just the third episode.¹³

Stillman alleged that Burnett personally approached two contestants who were intending to vote Rudy out of the game, and told them that it would benefit their tribe to vote Stillman out instead of Rudy.¹⁴ Both contestants allegedly listened to Burnett's advice and cast their outcome-determinative votes for Stillman instead of Rudy.¹⁵ Stillman was eliminated, and Rudy went on to place third in the game, winning \$85,000 after he was eliminated during the season finale.¹⁶ Burnett's alleged instincts were also proven true, and Rudy became the audience favorite of the season.¹⁷ In fact, he was quite possibly the reason why so many people tuned in to watch.¹⁸

Stillman, an attorney by day, sued CBS and *Survivor's* production company for fraud and unfair competition under California Business and Professions Code 17200.¹⁹ In her complaint, she also interestingly resurrected an archaic criminal statute, alleging that Burnett violated 47 U.S.C. 509,²⁰ a law that

11 According to polls, about sixty-nine percent of viewers wanted to see the seventy-two year-old former Navy SEAL win the game. See Mike Holtzclaw, *Rudy Mania Not Just a Hampton Roads Thing*, DAILY PRESS (Aug. 23, 2000), <https://www.dailypress.com/news/dp-xpm-20000823-2000-08-23-0008230051-story.html> [<http://perma.cc/4K7V-2WNW>] ("On the show's official Web site, [sixty-nine] percent of the fans pick Rudy to win.")

12 See Compl., *supra* note 10, ¶ 32.

13 See *id.* ¶ 31.

14 *Id.* ¶¶ 30–31.

15 *Id.* ¶ 33.

16 *Celebrity Welcome For 'Survivor' Rudy*, CBS NEWS (Aug. 27, 2000, 1:47 PM), <https://www.cbsnews.com/news/celebrity-welcome-for-survivor-rudy/> [<http://perma.cc/684T-SKBV>].

17 See, e.g., Holtzclaw, *supra* note 11.

18 See *id.*

19 Compl., *supra* note 10, ¶¶ 52–56.

20 *Id.* ¶ 51.

makes it a *federal crime punishable by imprisonment*, to alter the outcome of a broadcast contest of intellectual knowledge, intellectual skill, or chance with the intent to deceive the viewing public.²¹ CBS responded to Stillman's complaint by countersuing her for five million dollars in liquidated damages for breaching her confidentiality agreement and for defamation.²² Their case settled out of court, and will be discussed in greater detail *infra*.²³

Stillman's *Survivor* controversy blew up during the first season of the very first modern American reality show ever, but as the reality television boom began to dominate network programming, more and more of these incidents soon surfaced. In the coming months and years, incidents surfaced far more egregious than Stillman's *Survivor* scandal, suggesting that "reality television" might not be as real as the self-describing name leads viewers to believe.

For example, only six months after Stillman filed her lawsuit against CBS, a former producer of UPN's *Manhunt*, a reality game show similar to *Survivor* that marooned contestants on a supposedly deserted island, blew the whistle on his former show.²⁴ The producer admitted his show actually shot several scenes in a park in Los Angeles, instead of on a deserted island, and scripted key moments of the series that were presented to viewers as spontaneous.²⁵ Then, just two months after that, *Talk or Walk* participant David Lerman filed a complaint with the Federal Communications Commission (FCC), alleging that producers talked his girlfriend into dumping him on the show to make his episode more "entertaining," allegedly causing him to attempt suicide shortly thereafter.²⁶

Stories of purportedly "real" reality shows being "scripted" or "rigged" seemed to surface almost as frequently as the new shows aired. Surprisingly, in 2003, NBC themselves even tried capitalizing on the scandals by creating a five-part documentary series on their Bravo network, *The Reality of Reality*, which

²¹ See 47 U.S.C. § 509 (2017).

²² See *SEG, Inc. v. Stillman*, No. B151712, 2003 WL 21197133, at *1 (Cal. Ct. App. 2003).

²³ See *infra* Part II.B.

²⁴ See, e.g., Mark Armstrong, *Ex-"Manhunt" Producer: It Was Rigged*, E! NEWS (Aug. 15, 2001, 6:00 PM), <http://www.eonline.com/news/42022/ex-manhunt-producer-it-was-rigged> [<http://perma.cc/4FFL-LUM2>].

²⁵ See *id.*

²⁶ See, e.g., Michael Starr, *This show's a killer . . . and it nearly killed me, says 'Walk or Talk' dating game player*, N.Y. POST (Oct. 18, 2001, 4:00 AM), <https://nypost.com/2001/10/18/this-shows-a-killer-and-it-nearly-killed-me-says-walk-or-talk-dating-game-player/> [<http://perma.cc/YQ6T-G6S2>].

exposed some of the behind-the-scenes deceptions.²⁷ The documentary confirmed much of what viewers had suspected: The “reality” in “reality TV” is often very loosely defined.

Commentators suggested that the FCC could try cracking down on fake reality shows using 47 U.S.C. 509, the archaic statute mentioned in Stillman’s *Survivor* complaint that makes it a federal crime—punishable by fine and imprisonment—to engage in any scheme to prearrange or predetermine “the outcome of a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance . . . with the intent to deceive the listening or viewing public.”²⁸ Even though this federal law was originally intended to apply to traditional trivia “quiz shows” of the 1950s,²⁹ and had largely gone unenforced for decades, a plain reading of the statute suggested it likely could be applied to modern reality game shows.

In 2005, a law review article appeared in the *Cardozo Arts & Entertainment Law Journal*, providing the first academic analysis of the application of 47 U.S.C. 509 to modern reality shows.³⁰ That article provided an overview of the *Survivor* incident, a history of the statute, and then advocated for tougher FCC enforcement of reality television productions through the statute.

In 2007, another law review article appeared in the *Cardozo Arts & Entertainment Law Journal*, authored by Cardozo Entertainment Law faculty member Kimberlianne Podlas, giving a more in-depth analysis of the statute’s applicability to reality shows.³¹ The article analyzed the statute by identifying what specific production interference the author thought would likely be illegal under the law, compared to the type of production interference that would be permissible creative discretion.³² Professor Podlas also explained that not all reality shows are likely to be covered by the statute, since many would probably not fit under the deceptively narrowly-tailored language.³³ Professor Podlas based her opinions on a plain text reading of the statute since case law was completely non-existent at that time.

²⁷ See *Bravo Gets Real When the Cable Network Examines the Reality Television Genre in Its Five Part Documentary Series ‘The Reality of Reality’*, BRAVO http://www.bravotv.com/The_Reality_Of_Reality/about/ [<http://perma.cc/X794-36EE>] [hereinafter *Bravo Gets Real*].

²⁸ See 47 U.S.C. § 509 (2017).

²⁹ For a full discussion of the history of this statute, see *infra* Part II.

³⁰ See Tara Brenner, *A Quizzical Look into the Need for Reality Television Show Regulation*, 22 CARDOZO ARTS & ENT. L.J. 873, 874–76 (2005).

³¹ See Kimberlianne Podlas, *Primetime Crimes: Are Reality Television Programs ‘Illegal Contests’ in Violation of Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 141, 141–42 (2007).

³² See *id.* at 141–43.

³³ See *id.* at 143.

Professor Podlas ultimately concluded that only reality shows that challenge contestants using *intellectual* skills, *intellectual* knowledge, or *chance* are covered.³⁴ She elaborated that a predominance test would likely be used to determine whether a complex reality show, where contestants compete using a variety of different skills (social, intellectual, and physical), would be predominately “intellectual” enough to qualify.³⁵ Professor Podlas gave the opinion that a game like *American Idol* is a contest of a predominately non-intellectual skill (singing) and therefore probably would not be covered by 47 U.S.C. 509.³⁶ However, she concluded a game like *Survivor*, which she believes is a game of predominately intellectual skills, might qualify.³⁷ Admittedly though, determining which modern reality contests are “intellectual” enough to subject networks to enforcement under the statute is not an easy task, and certainly reasonable minds can differ on what the word “intellectual” even means. Years after Professor Podlas’s article was published, a class action complaint against *American Idol* actually quoted her article and then proceeded to plead, contrary to what she actually argued, that singing was indeed an “intellectual skill” that qualified under the statute.³⁸ Unfortunately for our analysis, that lawsuit was dismissed on other grounds, saving the question of whether singing is intellectual enough for another day.³⁹

Since the publishing of Professor Podlas’s article in 2007, academic discussion on the application of 47 U.S.C. 509 to reality shows has been silent. Meanwhile, stories in the media relating to reality show deceptions have not shown any signs of abating. This leads us to the topic of this Article: All these years later, how did the FCC decide to interpret 47 U.S.C. 509?

While there has been some academic discussion on whether 47 U.S.C. 509 can be applied to reality shows, and some speculation on what shows and what conduct might be covered, there has been no academic discussion on the FCC’s actual enforcement of the statute. Make no mistake, while there is still a distinct lack of appellate-level case law on the subject, the FCC has indeed commenced many different 47 U.S.C. 509 investigations into broadcasters, and has even levied enforcement action against a few

³⁴ *Id.* at 156.

³⁵ *Id.* at 158–59, 170.

³⁶ *Id.* at 170.

³⁷ *Id.*

³⁸ See Compl. ¶ 1924, ¶ 1935 n.67, *Andrews v. Freemantle Media, Inc.*, No. 13 CIV 5174, (S.D.N.Y. 2013), 2013 WL 3819593.

³⁹ See *infra* Part IV.

of them.⁴⁰ Private lawsuits have also been attempted using the statute.⁴¹ So, just how accurate were the predictions made by Professor Podlas in her law review article regarding what shows and conduct would qualify under 47 U.S.C. 509?

To find out, this author filed a Freedom of Information Act request with the FCC and received back hundreds of internal documents from every 47 U.S.C. 509 investigation that has been conducted into allegedly rigged contests from year 2000 to December 2017—when the request was filed. The answers to the above questions were found within those documents.

This Article analyzes seventeen years of FCC investigations into broadcasters alleged to have rigged games and cheated their contestants out of prizes. It examines, in detail, some of these investigations in order to shed some light on how the FCC actually interprets and enforces 47 U.S.C. 509. The examined incidents range from a 2010 Fox game show that was pulled prior to airing after it was revealed producers might have given contestants questions and answers in advance, to an incident where a radio station employee and fifteen of her co-conspirators were arrested on felony charges after an on-air radio contest was rigged to allow the employee's friends to win cash prizes.⁴² This Article also looks at some private causes of action that aggrieved contestants have attempted after they were allegedly cheated out of prizes.

This Article concludes that the FCC predominately enforces 47 U.S.C. 509 against rigged radio contests, although the Commission sometimes investigates television shows for possible violations of the statute. Further, the FCC appears to narrowly interpret the “intellectual skill” element of the statute, as evidenced by the summarily dismissal of a complaint into an allegedly rigged comedy contest, on the basis that stand-up comedy is an “intellectual skill” for the purposes 47 U.S.C. 509. Lastly, this Article wraps up with an analysis of some of the private lawsuits that have been attempted by contestants, and concludes that 47 U.S.C. 509 does not create a private cause of action, and reality show contestants face uphill battles winning lawsuits on the claim that producers rigged the series and cheated them out of prize money.

⁴⁰ See *infra* Part III.

⁴¹ See *infra* Part IV.

⁴² See *infra* Part III.

II. HOW WE GOT HERE

A. The Quiz Show Scandals of the 1950s

The birth of 47 U.S.C. 509 can be traced to the quiz-show mania of the 1950s. CBS's *The \$64,000 Question* (1955) was the innovative show responsible for launching America's obsession with trivia game shows.⁴³ The format of *The \$64,000 Question* will appear familiar to modern audiences, and probably very unspectacular: A contestant on the show would choose a trivia category, be asked a question by the host, and money would be awarded for each correct answer.⁴⁴ While this game appears vanilla now, the format was pioneering entertainment then and audiences loved it. *The \$64,000 Question* beat every other Tuesday night program in the ratings for the 1955 to 1956 season, including *I Love Lucy*.⁴⁵

Envious of CBS's commercial success with *The \$64,000 Question*, other networks scrambled to develop their own trivia quiz shows. NBC's answer was *Twenty One*⁴⁶ (1956), hosted by the late Jack Berry.⁴⁷ *Twenty One* featured two contestants competing against one another by answering trivia questions.⁴⁸ For each round, the contestants would be told the category ahead of time and they would select a point-value, ranging from one to eleven, based on their knowledge of the subject matter.⁴⁹ If the contestant answered correctly, they would see the chosen point-value added to their score, but if they answered incorrectly, they would have the points subtracted.⁵⁰ The first contestant to reach twenty-one points won a cash prize, and also won the opportunity to compete against the next contestant.⁵¹ The loser received nothing, and was eliminated from further participation in the game.⁵² Thus, the same contestant could remain on the show knocking out challengers multiple episodes in a row.

⁴³ *E.g.*, Thomas Doherty, *Quiz Show Scandals*, MUSEUM BROADCAST COMM., <http://www.museum.tv/eotv/quizshowsca.htm> [<http://perma.cc/VG7B-KDVK>].

⁴⁴ TIM BROOKS & EARLE MARSH, *THE COMPLETE DIRECTORY TO PRIME TIME NETWORK AND CABLE TV SHOWS 1946–PRESENT 1251* (9th ed. 2007).

⁴⁵ *See id.* at 1681.

⁴⁶ Note, this Article uses "*Twenty One*," consistent with episodes from the game show, but, sources diverge on whether it is "*Twenty-One*" or "*Twenty One*."

⁴⁷ *See* Bridget Byrne, *NBC Revives Scandal-Plagued "Twenty-One,"* E! NEWS (Sept. 27, 1999), <https://www.eonline.com/news/38766/nbc-revives-scandal-plagued-twenty-one> [<http://perma.cc/5FRW-586U>].

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *See id.*

Unfortunately for NBC, *Twenty One* entered the quiz-show game late and had to compete against close to twenty other game shows that crowded the airwaves competing for attention, and the first episodes of *Twenty One* proved to be quite dull. The show's questions turned out to be way too difficult for the contestants to answer correctly, resulting in contestants maintaining zero to zero tied scores for entire episodes, which made for lousy television.⁵³ After its anti-climactic premiere, *Twenty One's* sponsor, Geritol, told the producers that the program needed to improve or they would pull their support.⁵⁴

From that moment on, *Twenty One's* producers decided to take complete control over the program and manipulate it to achieve better ratings.⁵⁵ They first decided to approach the game like they were creating a traditional scripted program, casting archetypical contestants whose characters could be easily identified by audiences, selecting their wardrobe and hairstyle, and even coaching them on how to behave.⁵⁶ Dan Enright, the show's creator, recalls micromanaging contestants to the point of even telling them to "pat" the sweat off their eyebrow, instead of wiping it.⁵⁷

One of *Twenty One's* coached contestants was Herb Stempel. In real life, Herb was a married man who was doing quite well financially and had a high IQ. However, the show wanted to portray him as an underdog—a penniless G.I. who was working his way through college. Dan Enright personally selected a cheap oversized double-breasted suit for Herb, a blue shirt with a frayed collar, and a cheap watch that ticked so loudly that the studio's microphones could pick it up in order to build suspense.⁵⁸ He was given a "square" haircut, glasses, and the direction from Enright to act meek and timid while taping, and to always politely call the host "Mr. Berry" instead of "Jack" like the other contestants.⁵⁹

⁵³ *E.g.*, Walter Karp, *The Quiz-Show Scandal*, AM. HERITAGE (May 1989), <https://www.americanheritage.com/content/quiz-show-scandal> [<http://perma.cc/Z28Y-R8LF>].

⁵⁴ *See, e.g.*, Katie Venanzi, *An Examination of Television Quiz Show Scandals of the 1950s*, THE BEAT BEGINS: AMERICA IN THE 1950S (1997), <http://www.plosin.com/beatbegins/projects/venanzi.html> [<http://perma.cc/H7YQ-KAG2>].

⁵⁵ *See, e.g.*, Myrna Oliver, *Dan Enright, Key Figure in '50s Game Show Scandals, Dies at 74*, L.A. TIMES (May 24, 1992), http://articles.latimes.com/1992-05-24/news/mn-385_1_game-show [<http://perma.cc/EJ8W-VY6S>].

⁵⁶ *See, e.g., id.* (documenting how the producers of *Twenty One* "worked to make [Herb Stempel] fit into their idealized image").

⁵⁷ *See id.*

⁵⁸ *See, e.g.*, KENT ANDERSON, TELEVISION FRAUD: THE HISTORY AND IMPLICATIONS OF THE QUIZ SHOW SCANDALS 49 (1978).

⁵⁹ *See* Karp, *supra* note 53.

The producers also gave Herb the questions and answers in advance.⁶⁰ They completely choreographed his appearances, telling him when to sigh, stutter, or pause before answering to create maximum tension.⁶¹ They set him up to win week after week, and this metaphorical David's prize money eventually swelled to over \$50,000 as he easily beat his Goliath opponents.⁶²

The plan worked—America fell in love with Herb. The underdog resonated with middle America, and audiences saw him as a relatable hometown boy who was finally getting his big break. Each week, the country would tune in to the show to witness Herb knock out another elite competitor. Audiences loved watching a meek, average Joe like Herb beat snooty competitors at their own intellectual game, and ratings for the show soared.⁶³

Unfortunately for Herb, the producers could not just let him keep winning forever. Eventually, the show decided that another contestant had to beat him, and *Twenty One's* producers set up a new contestant, described as a “telegenic natural,” with the answers in advance and told Herb it was time to gracefully lose, take his winnings, and run.⁶⁴ However, nobody at *Twenty One* counted on just how bitter Herb would be about the game being thrown in the opposite direction. Even after the network allowed him to cheat for weeks, handing him an inordinate amount of prize money and fame in the process, Herb ended up blowing the whistle.⁶⁵

When the news broke, not only were NBC's viewers outraged, the conscious of a much more innocent and honest country was shocked.⁶⁶ The 1950s were apparently a time of much stronger morals, and folks could not understand how a show that presented itself in such an “official” manner could be rigged, and the country demanded accountability.⁶⁷ A New York Grand Jury convened and investigated the show but ended up concluding that the producers had not broken any laws.⁶⁸ It turned out, while *Twenty One's* tactics of completely choreographing a supposedly bona fide game show might have been dishonest, there was simply nothing on the books that made the conduct illegal. This inflamed the country even more, and Congress held hearings on the matter, subpoenaing a total of fifty-one witnesses; including

⁶⁰ *See id.*

⁶¹ *See* Oliver, *supra* note 55.

⁶² *See* ANDERSON, *supra* note 58, at 50.

⁶³ *See* Brenner, *supra* note 30, at 882.

⁶⁴ *See id.* at 883.

⁶⁵ *See id.*

⁶⁶ *See id.* at 884.

⁶⁷ *See id.*

⁶⁸ *See id.* at 884–85.

network executives, producers, sponsors, and former quiz-show contestants from a variety of programs.⁶⁹ During the hearings, it came to light that production interference in these quiz-shows was actually fairly common in the industry, and the scandals were not just limited to *Twenty One*.⁷⁰ For the first time, America had the revelation that a lot of what was being presented as “real” on television was actually tweaked by producers to achieve better ratings.

The congressional subcommittee charged with investigating these scandals found a “complex pattern of calculated deception of the listening and viewing audience. Contests of skill and knowledge whose widespread audience appeal rested on the carefully nurtured illusion that they were honestly conducted were revealed as crass frauds.”⁷¹

Congress responded to these “crass frauds” by passing 47 U.S.C. 509, a statute that makes it a federal crime for broadcast shows falling under FCC jurisdiction to “engage in any artifice or scheme for the purpose of prearranging or predetermining . . . the outcome of a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance . . . with [the] intent to deceive the listening or viewing public.”⁷² Anyone found to violate the law may be subjected to criminal prosecution in their individual capacity and may be “fined not more than \$10,000 or imprisoned not more than one year, or both.”⁷³

Immediately after the law passed, there was little occasion for the FCC to actually enforce it. The fallout from the quiz-show scandals was enough to cause the networks to self-regulate.⁷⁴ They were not going to make the mistake that inflamed the country and led to Congressional hearings more than once—at least not until memories faded, America’s conscious scarred over, and reality television came along, over four and a half decades later.

B. Reality TV’s Birth and Subsequent Scandals of the 2000s

Fast forward to 2000. If you were old enough to be alive during the 1950s quiz-show scandals, the reality television boom

⁶⁹ See H.R. REP. NO. 86-1800, at 3533 (1960).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² 47 U.S.C. § 509(a) (2017); see also Brenner, *supra* note 30, at 887.

⁷³ 47 U.S.C. § 509(c) (2017).

⁷⁴ The Standards and Practices Department at each network is responsible for self-regulating network shows, ensuring that gameshows follow FCC regulations. See generally *Standards and Practices*, MUSEUM BROADCAST COMM., <https://museum.tv/eotv/standardsand.htm> [<http://perma.cc/ATC9-AVQQ>]. For a discussion on how 47 U.S.C. 509 has influenced contestant agreements see *infra* Part IV.

of the early 2000s and their subsequent scandals might have seemed like déjà vu. Yes, America's favorite *Survivor*, Rudy Boesch, was very much like *Twenty One's* Herb Stempel. Both men were former servicemen and underdogs who captured the nation's attention out-playing much stronger contestants at their own games.⁷⁵ Herb was the meek small-town boy, penniless and humble, working his way through college and beating elite university professors at intellectual trivia games. Rudy was a seventy-two-year-old former Navy SEAL stranded on a deserted island, surrounded by a liberal group of college kids in their physical prime.⁷⁶ Audiences loved tuning in and watching this stoic representative of "The Greatest Generation" out-perform contestants young enough to be his grandchildren, while making Clint Eastwood worthy quips along the way.

To fully understand the scandal that occurred during the first season of *Survivor*, some background about the game might be helpful. The series maroons a group of strangers together on a deserted island with minimal supplies. The contestants are divided into "tribes," which compete against each other in "immunity challenges." The tribe that loses an immunity challenge is then forced to go to "tribal council," where the members of the tribe must vote to eliminate one of their own teammates. Around midway through the game, the tribes merge together into a single tribe, where the contestants then compete against each other in "individual immunity challenges." When only two contestants remain, a "jury" of former contestants convenes to vote for the "sole survivor," who wins a million-dollar cash prize. The motto of *Survivor* is "Outwit, Outlast, Outplay," a testament to a long and very complex game where contestants compete against each other physically, mentally, and socially.⁷⁷

Survivor proved to be a very successful series for CBS. Nineteen years after the first season premiere, the game is still going strong, and CBS has just aired *Survivor's* thirty-eighth season.⁷⁸ According to lifelong host Jeff Probst, production of the

⁷⁵ See *supra* note 11 and accompanying text. See also *supra* notes 56–58 and accompanying text.

⁷⁶ See Lauren Hunter, *Sole 'Survivor': Richard masterminds \$1 million win*, CNN (Aug. 24, 2000), <http://www.cnn.com/2000/fyi/news/08/24/new.survivor/index.html> [<http://perma.cc/T8YV-SQBK>].

⁷⁷ For a full explanation of the rules of the game, see generally, Andy Dehnart, *Survivor rules: the contract that details pay, tie-breakers, prohibited behavior and more*, REALITY BLURRED (May 31, 2010, 8:00 PM), <https://www.realityblurred.com/realitytv/2010/05/survivor-rule-book/> [<http://perma.cc/ULT6-BHPM>].

⁷⁸ Two seasons are aired a year. See Stelter, *supra* note 8.

series now runs like a well-oiled machine.⁷⁹ Being one of the highest rated shows on CBS, the series now receives a generous budget from the network.⁸⁰ The production also now has the luxury of a full-time crew consisting of over 400 employees that are present at any given time on location during taping.⁸¹ *Survivor* also now efficiently films two seasons back-to-back using the same crew and island (as soon as one group of contestants leaves, another group is flown in, thereby reducing costs).⁸² There is now even an entire team of crewmembers, called the “Dream Team,” whose sole job it is to stand-in as the contestants to “test” the challenges.⁸³ The crew is very experienced, with staff frequently returning for multiple contracts. Just about every problem that could be experienced by the series has been experienced, and the game is now as close to running itself as any game could possibly be.

However, production on the very first season of the show did not run nearly as smoothly. Mark Burnett and his skeletal team of TV pioneers were blazing new trails when they began filming sixteen contestants on a deserted island in the middle of nowhere, and they faced a lot of uncertainty. Their budget was much smaller than it is now, allowing only for a bare bones crew. Lifelong host Jeff Probst admits, “There was an ‘amateurish’ feeling to our early seasons, especially season one . . . we had cameras in the shots, we didn’t always have great audio—but it was really compelling because it was so raw. Our show is now much more polished”⁸⁴ During the first season, producers crudely created very simple challenges without much support (one challenge was literally just seeing which contestant could hold onto a totem pole in the ground the longest; another was seeing who could eat the most disgusting bugs found on the island), as opposed to the complex obstacle courses and puzzles featured in current seasons, designed by a fully-staffed “Challenge Department,” and constructed

⁷⁹ See Andy Dehnart, *How Survivor is produced: Jeff Probst reveals many behind-the-scenes details*, REALITY BLURRED (Sept. 22, 2018, 11:40 AM), <https://www.realityblurred.com/realitytv/2018/09/jeff-probst-survivor-producers-guide-interview/> [<http://perma.cc/3L6Q-EVS4>].

⁸⁰ See Stelter, *supra* note 8.

⁸¹ See Lash Augsburger, *Working Crew on Survivor TV Show: pt 2- Life on Crew*, LASH WORLD TOUR (Oct. 3, 2012), <http://www.lashworldtour.com/2012/10/crew-survivor-tv-show-pt-2-life-crew.html> [<http://perma.cc/9SQH-R3VM>].

⁸² See Dalton Ross, *Jeff Probst wants ‘Survivor’ to stay in Fiji permanently*, ENT. WKLY. (Sept. 12, 2017), <https://ew.com/tv/2017/09/12/survivor-jeff-probst-fiji/> [<http://perma.cc/4CWD-4D75>].

⁸³ See Dalton Ross, *Survivor: How a teen came up with the first challenge twist of season 35*, ENT. WKLY. (Sept. 21, 2017, 10:00 AM), <http://ew.com/tv/2017/09/21/survivor-heroes-healers-hustlers-challenge/> [<http://perma.cc/9VPD-UFWN>].

⁸⁴ See Andy Dehnart, *What we learned from Jeff Probst’s AMA*, REALITY BLURRED (May 20, 2014, 2:27 PM), <https://www.realityblurred.com/realitytv/2014/05/survivor-cagayan-probst-ama/> [<http://perma.cc/WE85-TPWM>].

by an experienced Art Department.⁸⁵ When problems and issues arose during the first season, the production did not have any experience or much support to fall back on. They just had to wing decisions and hope the show turned out okay.

In a declaration in Stillman's lawsuit, Mark Burnett described his first season experience as "sailing in 'uncharted waters.'"⁸⁶ Back then, Burnett, the self-made businessman (who not long before was making a living selling t-shirts at a space he rented in Venice Beach) was not the established game show titan that he is today, and CBS green-lighting *Survivor* was his shot at creating something new and big.⁸⁷ Needless to say, he and his producers were a little on edge about how this new format of a show would be received.

The first season cast a variety of personalities and demographics in an attempt to appeal to wide audiences, including three senior citizens: Sonja Christopher (sixty-three-years-old), B.B. Anderson (sixty-four-years-old), and former Navy SEAL Rudy Boesch (seventy-two-years-old).⁸⁸ One of the now self-evident *Survivor* truths learned that season is that (for reasons beyond the scope of this Article) the older contestants often get voted out first by the predominately younger players. That season, Sonja went first, followed by B.B. the next episode.⁸⁹ According to Stillman's lawsuit, the quippish seventy-two-year-old war-hero Rudy was about to be sent home next before Mark Burnett stepped in and saved the last remaining contestant over thirty-eight.⁹⁰

In her complaint, Stillman speculated on information and belief about Burnett's motivation to save Rudy. She alleged that Burnett was afraid that losing Rudy would cause a "critical demographic" of older viewers to tune out.⁹¹ Stillman also speculated that Burnett had the instincts to know that Rudy would be a popular contestant who had the potential for anchoring the show, explaining that he was the type of contestant

⁸⁵ See *Production*, SURVIVOR WIKI (last updated Dec. 2018), <https://survivor.fandom.com/wiki/Production> [<http://perma.cc/BF9M-N56B>].

⁸⁶ Decl. of Mark Burnett in Opp'n to Def.'s Special Mot. to Strike Compl. ¶ 2, SEG Inc. v. Stillman, No. BC 245328 (Cal. Ct. App. 2003), 2001 WL 36016692.

⁸⁷ See Carmine Gallo, *From T-Shirt Salesman To Mega Producer: Mark Burnett Shares Five Keys For Personal Transformation*, FORBES (Feb. 27, 2014), <https://www.forbes.com/sites/carminegallo/2014/02/27/from-t-shirt-salesman-to-mega-producer-mark-burnett-shares-five-keys-for-personal-transformation-2/#155abb5a2b85> [<http://perma.cc/64BL-8F49>].

⁸⁸ See Compl., *supra* note 10, ¶ 32.

⁸⁹ See *id.*

⁹⁰ *Id.* ¶ 31.

⁹¹ *Id.* ¶ 32.

who gave sound-bites that “played well to a television audience.”⁹² Burnett knew ahead of time how all the contestants would likely vote at tribal council, since he had access to all of their privately recorded interviews where they revealed their thoughts about the game and who they wanted to vote out.⁹³ Contestant Dirk Been recalled that the producers “knew everything that was going on. [Burnett] basically knew what as individuals each one of us was thinking.”⁹⁴

Stillman explained that after her tribe lost the immunity challenge in the third episode, Burnett and a co-producer pulled contestant Dirk Been aside to have a private chat with him.⁹⁵ Dirk would later reveal in a deposition that, prior to this conversation, he was leaning toward voting Rudy off the island, and not Stillman.⁹⁶ Dirk explained, however, that Burnett talked strategy with him, and told him his best tactic was “to form an alliance against [Stillman] and vote [Stillman] off because Rudy . . . is the guy that you will need in the future.”⁹⁷ Dirk explained in his deposition that he took Burnett’s advice very seriously because Burnett was the executive producer of the show and had access to far more information than he did.⁹⁸

Stillman alleged that after his conversation with Dirk, Burnett immediately approached another contestant, Sean Kenniff.⁹⁹ Stillman alleged that prior to talking to Burnett, Sean was also planning to cast his vote for Rudy and not her.¹⁰⁰ Stillman alleged that Burnett likewise suggested to Sean that he should vote her off the island instead of Rudy.¹⁰¹

In his deposition, Dirk recalled speaking to Sean shortly after they had their conversations with Burnett. He testified that Sean confirmed to him that Burnett told him he should keep Rudy in the game and vote out Stillman instead.¹⁰² Dirk testified, “At that point me and Sean had pretty much decided that we were going to vote for [Stillman] based off the knowledge that—what we believed [Burnett] had told us.”¹⁰³

⁹² *Id.*

⁹³ *See id.* ¶ 28.

⁹⁴ Dep. of Dirk Henry Been at 41:20–42:6, *SEG, Inc. v. Stillman*, No. BC 245328 (Cal. Ct. App. 2003).

⁹⁵ *See Compl.*, *supra* note 10, ¶¶ 29–30.

⁹⁶ *See Dep. of Dirk Henry Been*, *supra* note 94, at 44:5–11.

⁹⁷ *See id.* at 32:23–33:9.

⁹⁸ *Id.* at 42:7–18.

⁹⁹ *See Compl.*, *supra* note 10, ¶ 30.

¹⁰⁰ *See id.* ¶ 31.

¹⁰¹ *See id.*

¹⁰² Dep. of Dirk Henry Been, *supra* note 94, at 39:23–40:7.

¹⁰³ *Id.* at 41:9–13.

That night, Sean and Dirk both cast their outcome-determinative votes for Stillman instead of Rudy.¹⁰⁴ Stillman went home, and Rudy remained on the island, eventually placing third, winning \$85,000 after being eliminated in the finale.¹⁰⁵

As luck would have it, Dirk was voted off the island just a few days later, and sent to the same hotel as Stillman and the other contestants who had been voted out. The ousted contestants got together one night to go out for dinner.¹⁰⁶ It was then that Dirk decided to tell Stillman about Burnett's conversation with him and Sean on the beach.¹⁰⁷ Dirk later wrote an angry letter to Burnett where he decried that he felt "cheap and used."¹⁰⁸

During the subsequent lawsuit, Dirk would prove to be Stillman's star witness, giving a seemingly candid deposition that remained remarkably consistent during cross-examination by CBS's lawyers, and confirmed just about all of Stillman's allegations.¹⁰⁹ Kenniff, conversely, would become CBS's star witness, when he, along with Burnett, denied Stillman and Dirk's version of events in signed declarations filed with the court.¹¹⁰ The matter quickly turned into a he-said/she-said situation.

The case's discovery period concluded with Stillman and Dirk alleging one version of events, and Burnett and Sean alleging another. Each side actually agreed on most of the facts, but what they disagreed about was what Burnett's intent was when he met with the two contestants on the beach.¹¹¹ Burnett and Sean both conceded that the conversations on the beach took place, but maintained that the conversations were routine, and Burnett was not specifically trying to "save" Rudy or "target" Stillman.¹¹² Burnett and Sean both explained that the producers routinely spoke to the contestants on the beach and raised hypothetical voting scenarios with them in order to get them to consider alternative strategies to keep the game more alive, and

¹⁰⁴ See Compl., *supra* note 10, ¶ 33.

¹⁰⁵ See *Big Paychecks for 'Survivor' Cast Members*, ABC NEWS (Aug. 25, 2000), <https://abcnews.go.com/Entertainment/story?id=116137&page=1> [<http://perma.cc/DP2K-EVET>].

¹⁰⁶ Dep. of Dirk Henry Been, *supra* note 94, at 28:22–29:3.

¹⁰⁷ *Id.* at 29:19–30:13.

¹⁰⁸ *Id.* at 57:3–18.

¹⁰⁹ *Id.* at 44:5–25.

¹¹⁰ See Decl. of Mark Burnett in Opp'n to Def. Stacey E. Stillman's Special Mot. to Strike Compl., *supra* note 86, ¶¶ 10–13; Decl. of Sean Kenniff ¶¶ 13–17, SEG, Inc. v. Stillman, No. BC 245328 (Cal. Ct. App. 2003), 2001 WL 36016693.

¹¹¹ Nobody denies that Burnett approached the two contestants on the beach and discussed strategy with them. See Dec. of Mark Burnett in Opp'n to Def. Stacey E. Stillman's Special Mot. to Strike Compl., *supra* note 86, ¶ 12; Dec. of Sean Kenniff, *supra* note 110, ¶ 14.

¹¹² See Dec. of Mark Burnett in Opp'n to Def. Stacy E. Stillman's Special Mot. to Strike Compl., *supra* note 86; see also Dec. of Sean Kenniff, *supra* note 110, ¶ 12.

to also get the contestants to open up more for their on-camera interviews.¹¹³ Sean pointed out that Burnett always made it a habit to conclude conversations where he discussed voting strategy with contestants by saying “vote your conscious,” which signaled to him that Burnett wanted to make it clear that the decision of who to vote for was ultimately his alone.¹¹⁴ Burnett defended these strategy talks with his contestants by pointing out that all the contestants signed a contract that granted the production virtually unlimited discretion on how the game would be ran.¹¹⁵ He also explained that in his business judgment these talks were necessary to get contestants to open up and talk candidly about their planned strategies to facilitate better production of the series.¹¹⁶

Stillman’s fraud case soon came down to the factual question of whether Burnett had deceptive intent when he spoke with the two contestants on the beach. It will forever be a mystery which side a jury would have taken, since the parties entered into a confidential settlement agreement prior to trial.¹¹⁷ The FCC also never investigated the show for possible 47 U.S.C. 509 violations.

After this in-depth discussion of the first season of *Survivor*, it is only fair to point out that, quite impressively, no other allegations of deception regarding the series have ever come out in thirty-eight seasons. To the contrary, contestants and series insiders alike frequently comment that the series now takes production interference and the show’s integrity very seriously.¹¹⁸ Stillman’s early incident quite possibly shaped *Survivor* into one of the most real reality shows presently on air, and the scandals that soon began to surface throughout the reality television world made her complaint seem very tame in comparison.

¹¹³ See Dec. of Mark Burnett in Opp’n to Def. Stacy E. Stillman’s Special Mot. to Strike Compl., *supra* note 86, ¶ 9.

¹¹⁴ See Dec. of Sean Kenniff, *supra* note 110, ¶ 6.

¹¹⁵ See Dec. of Mark Burnett in Opp’n to Def. Stacy E. Stillman’s Special Mot. to Strike Compl., *supra* note 86, ¶ 4.

¹¹⁶ *Id.* ¶ 9.

¹¹⁷ Ianic Roy Richard, *The Stacey Stillman Case: A Deep Dive*, MEDIUM (Aug. 18, 2017), <https://medium.com/a-tribe-of-one/the-stacey-stillman-case-a-deep-dive-caa7816a27a1> [<http://perma.cc/A664-G9RK>].

¹¹⁸ Candid Reddit AMAs (“ask me anything”) with former contestants and crewmembers can be enlightening. See Rob Cesternino (u/RobCesternino), REDDIT (Sept. 5, 2012), https://www.reddit.com/r/IAmA/comments/zenas/i_was_a_two_time_contestant_on_survivor_ama/ [<http://perma.cc/ANH3-QVEH>] (“I don’t think that production tried to manipulate our games on Survivor”); Anonymous Survivor Cameraman (u/survivorguy), REDDIT (Nov. 15, 2011), https://www.reddit.com/r/IAmA/comments/mdd5l/have_worked_on_the_camera_crew_on_many_seasons_of/ [<http://perma.cc/V7PV-5A66>] (responding to whether a contestant has ever asked for his secret assistance he replied, “[N]ope. [W]ould tell them no anyhow. [That’s] a firing!!”).

In August of 2001, just six months after Stillman's complaint, news broke that a producer on UPN's *Manhunt*, another reality game show that marooned contestants on a supposedly deserted island, had quit the series in protest after Paramount TV asked him to rig challenges and to re-shoot several scenes in a Los Angeles park.¹¹⁹ A judge on the series substantiated the producer's claims, adding that he was told by a different producer to give an immunity card to a player to keep him in the game longer.¹²⁰ Contestants also blew whistles regarding some questionable tactics the production employed creating the series, including producers physically preventing contestants from aiding injured players.¹²¹

Then, just two months after UPN pulled *Manhunt*, a participant on *Talk or Walk*, a relationship show, filed a complaint with the FCC regarding his experience on the program.¹²² According to news sources, the contestant alleged that producers secretly told his girlfriend to break up with him on-air because they thought it would make for entertaining television.¹²³ The contestant's girlfriend did not want to do this at first, but they ultimately convinced her to "walk" off the show and out of his life forever. This was in 2001, prior to the age of cell phones, social media, and instant communication, so he actually left the taping thinking she really broke up with him. According to news reports, the publicly embarrassed contestant allegedly attempted suicide before his girlfriend could tell him what happened.¹²⁴

Shortly after that, a judge on MTV's *Surf Girls* complained to the media about producers vetoing his decision regarding who to vote off the show.¹²⁵ Prior to the series airing, Quicksilver pro and *Surf Girls* judge Jon Rose told *Transworld Surf* magazine that he wanted to vote "some annoying girl' off the program," but the producers wanted to keep her in the show because she was

¹¹⁹ See Armstrong, *supra* note 24.

¹²⁰ See Melinda Smith, *Coming Up to Date on the Manhunt Scandal*, REALITY NEWS ONLINE (July 10, 2002), <http://archive.li/2hBQe#selection-485.0-489.8> [<http://perma.cc/FAV3-92MH>].

¹²¹ See *id.*

¹²² See Starr, *supra* note 26.

¹²³ See *id.*

¹²⁴ See *id.* While this news report talks about an FCC complaint the contestant filed regarding this incident, the FCC had no such complaint on file when the author of this Article contacted them with a FOIA request. The FCC explained over the phone that old documents are sometimes purged for storage reasons, and sometimes news agencies report FCC matters inaccurately. It is difficult to say which was the case here.

¹²⁵ See Steve Rogers, *'Surf Girls' Fixed? Judge Reportedly Claims His Decision Was Overruled by Show Producers*, REALITY TV WORLD (May 12, 2003), <http://www.realitytvworld.com/news/surf-girls-fixed-judge-reportedly-claims-his-decision-was-overruled-by-show-producers-1173.php> [<http://perma.cc/X4MP-VBKN>].

the one responsible for causing all the drama.¹²⁶ When he said he was going to vote her off, the producers simply vetoed his decision and told him to pick someone else instead. That article was published the same day the first episode of the series was scheduled to air, and MTV chose not to respond to it.¹²⁷ MTV aired the whole season just like nothing happened, and nobody seemed to mind at all. The controversy just went away all by itself, possibly signaling to reality television producers that audiences simply do not really care much about these allegations.

Unlike the quiz-show controversies of the 1950s, which ended in congressional investigations and a new criminal law prohibiting on-air deception, America's conscience was not nearly as shocked by the reality show controversies of the early 2000s. The viewing public did not seem to care very much, and audiences continued to prove that they would keep watching the allegedly staged shows despite the controversies.

MTV's lack of response to their judge on *Surf Girls* openly admitting to the media that producers completely rigged the show might have been telling, but even more telling was NBC's idea to capitalize on the controversies by creating a five-part series about them.

The Reality of Reality (2003) was, quite oddly, created by a network that makes a good chunk of their money broadcasting reality shows.¹²⁸ The documentary explains, through interviews with actual reality show producers and crewmembers, the different ways that America's favorite reality shows are manipulated to increase entertainment value. Clearly, NBC's network executives did not think airing the whistle-blowing show would be harmful to their existing cash-cow reality shows, including their then-upcoming premier of what would prove to be yet another long-living Mark Burnett hit, *The Apprentice* (2004).¹²⁹

C. Academia's Response to the Reality Television Scandals

Academics and entertainment commentators alike began suggesting that 47 U.S.C. 509 might apply to certain broadcast reality game shows. In 2005, the Cardozo Arts and Entertainment Law Journal published the first scholarly article on the topic of possible FCC enforcement of the archaic quiz-show statute against modern reality shows.¹³⁰ The article concluded

¹²⁶ *Id.*

¹²⁷ Both the episode and the article appeared May 12, 2003. *See id.*

¹²⁸ *Bravo Gets Real*, *supra* note 27.

¹²⁹ *See The Apprentice*, *supra* note 9.

¹³⁰ *See Brenner*, *supra* note 30, at 874.

that the statute likely applies to modern reality game shows and advocated for FCC enforcement.¹³¹

In 2007, Kimberlianne Podlas penned another law review article on the applicability of 47 U.S.C. 509 to modern reality shows.¹³² In her article, Podlas went into greater detail analyzing the statute, and specifically addressed which reality shows are likely covered under the law, and which types of manipulations would be unlawful. Since published case law was completely non-existent at the time, Professor Podlas had to engage in a plain-text analysis of the statute. She made several points:

First, she states the statute requires the specific intent “to deceive the listening or viewing public.”¹³³ She notes that the U.S. Supreme Court has generally held that criminal statutes requiring this type of intent “requires that a person act with a particular mental state to deceive, as opposed to acting negligently or merely deceptively.”¹³⁴ This intent element would undoubtedly be hard to prove, because the fact finder would be forced to get into the producer’s head and assume the worst. The producer in most cases will likely be able to present an alternative, non-deceptive, and innocent explanation regarding the alleged manipulative conduct. It is probably no coincidence that the ultimate factual issue in Stillman’s fraud lawsuit in *Survivor* centered on what Mark Burnett’s intent was when he suggested to two contestants that it might benefit them to vote Stillman out of the game instead of another player. Stillman said Burnett’s intent was deceptive, while Burnett said his intent was just a routine and legitimate facilitation of the game that all the contestants had agreed to prior to coming on the show when they signed their contracts.¹³⁵

Second, Podlas points out that the construction of the statute suggests that its intent must be read in conjunction with its requirement that the deception be actually connected to the outcome of the contest.¹³⁶ Simply put, a causal connection between the deception and outcome is needed. She concludes that “artifice or secret assistance that does not affect the outcome might be unethical, but might not be illegal.”¹³⁷ Thus, unless the

¹³¹ See *id.* at 900.

¹³² Podlas, *supra* note 31, at 142.

¹³³ *Id.* at 154–55.

¹³⁴ *Id.* at 154 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197–99 (1976)).

¹³⁵ See Dec. of Mark Burnett in *Opp’n to Def. Stacey E. Stillman’s Special Mot. to Strike Compl.*, *supra* note 86, ¶ 12.

¹³⁶ Podlas, *supra* note 31, at 155.

¹³⁷ *Id.*

deception can be proven to have actually affected the outcome of the game, it might not be covered.

Finally, and perhaps most restrictively, Professor Podlas cautiously noted that only certain reality shows are even covered by the statute.¹³⁸ The statute actually specifically enumerates that the interference must occur in a contest of (1) “intellectual knowledge,” (2) “intellectual skill,” or (3) “chance.”¹³⁹ Whenever “skill” is mentioned in the statute, “intellectual” precedes it.¹⁴⁰ Thus, unless the reality competition is *intellectual* in nature, or a game of chance, a plain reading of the statute suggests the game is probably not covered. Professor Podlas concludes, because of the intellectual or chance element, reality game shows like *American Idol*, *So You Think You Can Dance?*, and other contests featuring predominately non-intellectual skills (like singing, dancing, modeling, or dating) are probably not covered.¹⁴¹ However, she believes that shows like *Survivor* probably do meet the element, since the social politics needed to win make the game one of “strategy and cleverness,” which therefore makes the game predominately intellectual in nature.¹⁴²

Professor Podlas’s opinion that social politicking is an intellectual skill, while singing is not, is interesting. The “intellectual” element is responsible for much of the ambiguity of this statute. What exactly does the word “intellectual” even mean? Colorful arguments can be made that any skill that requires some sort of brainpower could be classified as “intellectual.” Any lines that get drawn here are bound to be arbitrary and subject to differing opinions. For example, as will be discussed *infra*, the FCC has specifically held that comedy is not an intellectual enough skill for the purposes of the Commission’s enforcement of this statute.¹⁴³ Compare that interpretation to the group of singers on *American Idol* who filed a class action complaint pleading that singing is an intellectual skill that qualifies under 47 U.S.C. 509 (while simultaneously quoting Professor Podlas’s law review article for support for other matters).¹⁴⁴

I suppose there are two dueling schools of thoughts regarding the intellectual element: Either it can be read narrowly, or

¹³⁸ *Id.* at 156.

¹³⁹ See 47 U.S.C. § 509 (2017).

¹⁴⁰ Podlas, *supra* note 31, at 156.

¹⁴¹ *Id.* at 160–61.

¹⁴² *Id.* at 161.

¹⁴³ See Letter to Compl. from FCC Re: Case EB-09-IH-1750, *infra* note 146, at 1 n.3 (“Because the [Comedy] Contest was not one of intellectual knowledge, intellectual skill, or chance, the federal statute that regulates contests does not apply to this case.”).

¹⁴⁴ See *infra* Part IV.

expansively. On one hand, it was the quiz-show controversies that gave birth to this law in the first place, so it makes sense that the law would be narrowly interpreted to require that the contest be at least as intellectual as the quiz shows that were responsible for the statute's creation. It was trivia "quiz shows" that Congress was targeting after all. However, the counterargument to that is Congress did not stop at enumerating "intellectual" games; they also added "games of chance" to the contests to be covered. Why would Congress deliberately add games of chance to the statute if their sole intention was to cover trivia quiz shows? The answer might have to do with history.

Back when this statute was enacted, the only two types of game shows in existence were games of intellectual skill and games of chance. American television had yet to experiment with broadcast contests of non-intellectual skills, like singing, dancing, comedy, modeling, or dating.¹⁴⁵ Congress could not outlaw what it did not yet know about. The fact that Congress chose to include games of chance into the law, even though it was only intellectual quiz shows that were marred in the controversy, demonstrates that the legislature intended to be all encompassing with the statute. Congress simply did not want *any* game show to be deceptively rigged by producers. The source of the controversy had nothing to do with the nature of the rigged contests being "intellectual;" it was the deception that America was upset about. There is nothing in the legislative history to suggest Congress was intentionally trying to exempt non-intellectual game shows that would later be invented. A good case can be made that Congress actually intended to cover all broadcast games with 47 U.S.C. 509, especially when it is considered how ambiguous the qualifier "intellectual" actually is.

It has been over a decade since Professor Podlas published her article analyzing the applicability of 47 U.S.C. 509 to modern reality shows. How correct was she regarding how the courts would interpret the statute? Although searches on Westlaw and LexisNexis reveal that there still have been no appellate level court cases discussing the statute in great detail, the FCC has had the opportunity to interpret the statute when conducting investigations and levying administrative enforcement action against broadcasters.

To understand how the FCC interprets the statute, the author of this Article filed a Freedom of Information Act request with the agency, seeking its raw reports from every 47 U.S.C. 509

¹⁴⁵ The Dating Game (1965) was the earliest game show this author could identify that competed contestants using a non-intellectual skill. Production on that series did not begin until after 47 U.S.C. 509 was enacted.

investigation that it conducted from year 2000 to 2017.¹⁴⁶ The FCC was responsive to the request, and turned over a mountain of redacted documents, never before publicly released, providing a window into their investigations into broadcast television and radio programs that have been alleged to have violated 47 U.S.C. 509 by airing rigged contests.

Analyzing these documents, it becomes clear that the FCC has actually been pretty active since the *Survivor* incident investigating broadcasters for possible violations of this law. For example, in 2010, a Fox game show was pulled prior to the first episode airing, likely due to an FCC investigation into the show's producers' allegedly giving contestants the questions and answers before taping.¹⁴⁷ There was even a case where an employee of a broadcaster was arrested for rigging a radio contest. That employee was convicted of a state felony, and the station fined by the FCC, after an investigation found that the employee had rigged an on-air contest so her friends would win, and then split cash prizes with them.¹⁴⁸

These investigations provide insight into how the FCC is choosing to enforce 47 U.S.C. 509, and patterns quickly become discernible.

III. HOW THE FCC IS PRESENTLY ENFORCING 47 U.S.C. 509

A. Introduction to The FOIA Request

To understand how the FCC internally investigates 47 U.S.C. 509 complaints, the author of this Article filed a Freedom of Information Act request with the agency. The request sought all documents connected to FCC investigations into broadcasters under FCC jurisdiction alleged to have violated 47 U.S.C. 509.¹⁴⁹ This request sought responsive documents from the year 2000 to December 17, 2017, when the request was filed.¹⁵⁰

The FCC responded to the request with the suggestion that it be amended to exclude documents that were (1) internal FCC correspondences and (2) "materials subject to pending requests

¹⁴⁶ See Letter from the FCC to George Brietigam Re: FOIA Control No. 2018-000243 (Feb. 20, 2018) (on file with author).

¹⁴⁷ See Letter from Parent of Former Contestant to FCC Re: TV Game Show Cheating Incident (Dec. 17, 2009) (on file with author).

¹⁴⁸ See Seattle Police Department Incident Report (Jan. 29, 2010) (on file with author); see also Fisher Broadcasting - Seattle Radio, L.L.C., 27 FCC Rcd. 5690, 5697 ¶ 14 (2012).

¹⁴⁹ See Letter from the FCC to George Brietigam Re: FOIA Control No. 2018-000243, *supra* note 146.

¹⁵⁰ See *id.*

for confidentiality.”¹⁵¹ The FCC explained that excluding these documents would expedite the fulfillment of the request by many months, since internal agency communications are protected by the deliberative process privilege, and broadcasters would have to be given an opportunity to respond to any request for records that contained confidential proprietary information. The request for documents was thus narrowed accordingly. The author of this Article and the FCC also agreed upon the methodology that the agency would use to locate responsive documents. The FCC would: (1) poll the individual Enforcement Bureau managers responsible for overseeing enforcement of 47 U.S.C. 509 and have them identify cases; and (2) query their case management databases using permutations of the term “contest rigging” and “47 U.S.C. 509.”¹⁵²

Two months later, the FCC released 479 pages of responsive documents connected to nine different investigations into programs suspected of violating 47 U.S.C. 509 from the year 2000 to December 2017.¹⁵³

Additionally, it was discovered from those documents that in 2008 the Seattle Police Department investigated a local radio station employee, and recommended felony criminal charges against her and fourteen co-conspirators, for rigging an on-air radio contest.¹⁵⁴ A Washington State Public Records Request was accordingly filed with the Seattle Police Department, requesting access to that investigation. The Seattle Police Department released seventy-five pages of records relating to its criminal investigation of that radio station employee, who was eventually convicted of felony grand theft.¹⁵⁵

B. Answers Emerge

The investigations were scrutinized, and patterns began to emerge.

First, more than half of the FCC’s investigations into broadcasters suspected of violating 47 U.S.C. 509 (a statute originally intended to apply to televised quiz shows) are actually

¹⁵¹ *See id.*

¹⁵² Telephone call with William Knowles-Kellett, Attorney, Enforcement Bureau, Investigations and Hearings Division, Federal Communications Commission (Jan. 12, 2018).

¹⁵³ *See* Letter from the FCC to George Brietigam Re: FOIA Control No. 2018-000243, *supra* note 146.

¹⁵⁴ *See* Letter from Fisher Broadcasting - Seattle Radio, L.L.C. to the FCC (Apr. 18, 2008) (on file with author).

¹⁵⁵ *See* Seattle Police Department Incident Report, *supra* note 148.

related to complaints of rigged radio contests.¹⁵⁶ Indeed, while it is clear that the FCC does actively enforce 47 U.S.C. 509, the bulk of those investigations relate to the “caller 49 will receive \$1000” type of contests that are frequently heard on the radio. In those cases, 47 U.S.C. 509 is usually a secondary violation that is only briefly addressed by the Commission, with 47 C.F.R. 73.1216 being the charge that takes center stage—a far more frequently enforced regulation that requires broadcast contests be run “substantially as announced.”¹⁵⁷ In those rigged radio contest cases, with only one major exception to be discussed in detail *infra*, the broadcaster violating the rule generally receives a modest penalty, and is ordered to enact a remedial plan, but the individual violator generally does not see the criminal liability contemplated by 47 U.S.C. 509.

Second, the FCC appears to agree with Professor Podlas’s interpretation of the “intellectual” element, and narrowly defines the skills that are sufficiently “intellectual” enough to qualify a contest for enforcement. Contests that exploit non-intellectual skills, like singing, dancing, or even comedy, receive no protection under the statute, with the Commission summarily dismissing such complaints without any investigation.¹⁵⁸

For example, in 2009 a losing contestant on the “Classic Comedy Contest”, broadcast by WNCX FM, Cleveland, filed a complaint with the FCC alleging that the contest was rigged.¹⁵⁹ The contest aired stand-up comedy acts of amateur comedians, and invited the public to vote for their favorite act on the station’s website.¹⁶⁰ The top online vote-getter received ten points, the second-highest received nine points, and so on, “with the tenth-most popular entrant receiving [only] one point.”¹⁶¹ In addition to the points awarded based off of the online votes, a panel of station judges also awarded points to their favorite contestants.¹⁶² The top three contestants with the highest

¹⁵⁶ See Table of 47 U.S.C. 509 Investigations Year 2000 to 2017 from George Brietigam (compiling information from all of the documents released by the FCC) (on file with author).

¹⁵⁷ See Letter to Complainant from FCC Re: Case EB-09-IH-1750 (Jan. 14, 2010) (addressing 73.1216 violation in detail, dismissing 47 U.S.C. 509 violation) (on file with author); New Northwest Broadcasters, L.L.C., 19 FCC Rcd. 9352 (2004) (addressing the 73.1216 violation in more detail, with the 47 USC 509 violation only briefly mentioned).

¹⁵⁸ See Letter to Complainant from FCC Re: Case EB-09-IH-1750, *supra* note 157, at 1 n.3 (informing Complainant that his 47 USC 509 claim will not be investigated because comedy is not an intellectual skill qualifying under 47 USC 509).

¹⁵⁹ See *id.* at 1.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 2.

number of combined online and judge votes won the opportunity to perform at a comedy club.¹⁶³

A losing contestant alleged that the station judges were given such a disproportionate amount of points to award contestants that it allowed the station to essentially just select the winners with the impact of the online votes being deceptively small.¹⁶⁴ The FCC dismissed the claim without an investigation, declaring that comedy is not an “intellectual skill” for the purposes 47 U.S.C. 509.¹⁶⁵ The FCC reasoned in a letter to the complainant, “because the contest was not one of intellectual knowledge, intellectual skill, or chance, the federal statute that regulates contests does not apply to this case.”¹⁶⁶ The FCC also dismissed the complainant’s allegation that the contest was not run “substantially as announced” under 47 C.F.R. 73.1216.¹⁶⁷ The FCC reasoned that the contest was indeed run according to its published rules; those rules specified how many points the judges would be allowed to award, and how many points the collective online community could award.¹⁶⁸ The complainant’s frustration that the published rules were unfair did not amount to a violation under 47 C.F.R. 73.1216.¹⁶⁹

Based on the FCC’s narrow interpretation of what qualifies as an “intellectual skill,” Professor Podlas was probably correct in her assertion that a lot of reality shows probably do not come under 47 U.S.C. 509’s jurisdiction. Based on the summary dismissal of the above complaint, a show like *Last Comic Standing* would almost certainly not be covered. It is also doubtful that other reality talent shows, like *American Idol*, *So You Think You Can Dance?*, *The X Factor*, *America’s Got Talent*, or *The Voice* would come under the jurisdiction of 47 U.S.C. 509. If comedy is not “intellectual” enough, then neither is singing, dancing, or magic.

But what about the more complicated reality game shows where contestants compete using a variety of skills? For example, in *Survivor* contestants are plopped into a stressful social setting where they must use tribal politics to avoid being voted out by their fellow contestants. In addition, they also compete in challenges for immunity that vary greatly in the type of skills

¹⁶³ *Id.* at 1–2.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1 n.3

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *See id.* at 2–3.

¹⁶⁹ *Id.*

that are used, with some being entirely physical (like obstacle courses), others entirely mental (like puzzles), and some mixed. What determines if a game is intellectual enough to fall within the purview of 47 U.S.C. 509? Unfortunately, after the FOIA request, we are nowhere near closer to the answer. Complex shows like *Survivor* may, or may not, fall under the jurisdiction of 47 U.S.C. 509. As will be discussed *infra*, attorneys for these shows generally proceed on the assumption that they do fall within the scope of 47 U.S.C. 509.¹⁷⁰

The fact that two decades have passed by with no FCC enforcement of 47 U.S.C. 509 against a complex reality game show might be telling. Of all the investigations into broadcast television shows suspected of violating 47 U.S.C. 509, half were investigations into game shows that use the simple quiz-show format similar to the ones seen during the quiz-show controversies of the 1950s.¹⁷¹

For example, in December of 2009, the FCC received a complaint regarding the planned Fox game show, *Our Little Genius*.¹⁷² The father of a contestant alleged that a member of the production gave him several questions and answers prior to his son's taping.¹⁷³ He also alleged that his son was inexplicably canceled from the program after he asked too many questions about the integrity of the questions.¹⁷⁴

Our Little Genius was a planned Fox game show that was going to feature child prodigies, aged six to twelve, who would compete for money answering advanced level questions in their "area of expertise" (such as calculus, music theory, astronomy, and physics).¹⁷⁵ The parents of the prodigies would control how far their child would get in the game, based on how much confidence they had that their little genius would correctly answer the question.¹⁷⁶ If the parents thought a topic was too tough for their child to answer, they could lock in their winnings and take the money before the child had the opportunity to answer.¹⁷⁷

In a letter to the FCC, the father of the canceled contestant reveals facts that suggest that the creators of *Our Little Genius*

¹⁷⁰ See *infra* Part IV.

¹⁷¹ See Table of 47 U.S.C. 509 Investigations year 2000 to 2017, *supra* note 156.

¹⁷² See Letter from Parent of Former Contestant to FCC Re: TV Game Show Cheating Incident, *supra* note 147.

¹⁷³ See *id.*

¹⁷⁴ *Id.*

¹⁷⁵ See *Our Little Genius* Series Rules, reprinted as *Exhibit A in Appendix 3 in FCC Compl. EB-10-IH-0412* (on file with author).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

might have greatly overestimated the ability of six-year-old children to correctly answer doctorate level questions about complex topics, like physics and music theory, without some assistance. He reveals that after the first contestants had been taped, but prior to his child's scheduled taping, he was sent an addendum to his contract altering the rules to the game in his favor.¹⁷⁸ The addendum read, "In connection with Game Play, in the event that the Little Genius answers Question 1, 2, 3, or 4 incorrectly, the Contestants will be entitled to the one (1) time opportunity, but not the obligation, to restart game play with a new Question Set. . . ."¹⁷⁹ One likely explanation for this change of rules was that the children who had already completed taping had difficulty correctly answering enough questions to make the show engaging. The whole excitement of the show centered on little children being able to answer extremely advanced questions correctly. If the children were immediately confused at question number one, the entire premise of the series would obviously be ruined.

The father then reveals that a few days prior to the taping, somebody from the production contacted him to get "feedback about whether or not the topics were familiar [to his child] . . ."¹⁸⁰ This person explained that the purpose of getting feedback on possible topics was to "make sure [the child] d[id] well on the show."¹⁸¹ But, the father claims this person not only disclosed the topics, he also dropped some pretty big hints about what the actual questions and answers would be.

The father explained that the caller oddly began stressing *very specific* things that his child needed to know. "He told us that it was very important to know that the hemidemisemiquaver is the British name for the sixty-fourth note."¹⁸² He also "placed specific emphasis on knowing the time signature of the polka."¹⁸³ He "emphasized that it was important to be able to list [four] types of modulation techniques" and that the child "needed to know the Italian names for the three piano pedals. Then he proceeded to list them as the sostenuto, forte, and una corda pedals."¹⁸⁴ The father

¹⁷⁸ See Letter from Parent of Former Contestant to FCC Re: TV Game Show Cheating Incident, *supra* note 147.

¹⁷⁹ See Addendum to the Series Rules – "Our Little Genius," *reprinted in Appendix 4 in* FCC Compl. EB-10-IH-0412 (on file with author).

¹⁸⁰ See Letter from Parent of Former Contestant to FCC Re: TV Game Show Cheating Incident, *supra* note 147.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

concluded that it was “very likely that he was giving us the answers to at least four questions”¹⁸⁵

A few days later, the father and his child arrived at the studio for the taping of his episode.¹⁸⁶ Prior to the taping, the father along with three other families, attended a meeting with the production company’s attorney.¹⁸⁷ The purpose of the meeting was for the attorney to explain in detail the game show’s rules. In the meeting the father expressed concern “about the quality of the game show questions and how they were prepared.”¹⁸⁸ He then recalls that, “[s]hortly after that meeting we were informed that our game show taping was being postponed, and later in the day we were informed that our participation in the game show was cancelled.”¹⁸⁹

In his letter to the FCC, the contestant’s father attached his contract with the game show, which provides a lot of insight into the production’s knowledge of the implications of 47 U.S.C. 509. Paragraph twenty-two of that agreement reads:

I am aware that it is a federal offense, punishable by fine and/or imprisonment for anyone to do anything which would rig or in any way influence the outcome of the Series with the intent to deceive the viewing public . . . [i]f anyone tries to induce me to do any such act, I must **immediately** notify the Producer as provided in Paragraph [forty-five].¹⁹⁰

The FCC launched an investigation into the matter. After interrogatories and subpoenas were sent to the production company, Fox, and several contestants, it was announced that the series was voluntarily being pulled and would never air.¹⁹¹ In an act of goodwill, the production company and Fox told the contestants who had already competed and won money that they would still be given their prize money, even though their contracts explicitly stated that winnings were only due upon the their episode actually airing.¹⁹² The FCC abandoned their investigation shortly thereafter with no enforcement action.¹⁹³

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See Our Little Genius Contestant Release Agreement ¶ 22, *reprinted in Appendix 2 in* FCC Compl. EB-10-IH-0412 (emphasis added) (on file with author).

¹⁹¹ See Michael Schneider, *Fox pulls ‘Our Little Genius,’* VARIETY (Jan. 7, 2010), <http://variety.com/2010/scene/markets-festivals/fox-pulls-our-little-genius-1118013460/> [<http://perma.cc/K395-S66P>].

¹⁹² See Brian Lowry, *Quiz Show Scandal? Fox Yanks ‘Our Little Genius,’* VARIETY (Jan. 7, 2010), <http://variety.com/2010/voices/opinion/quiz-show-scandal-fox-yanks-our-little-genius-4874/> [<http://perma.cc/Q2YD-3TNW>]; see Our Little Genius Contestant Release

In his letter to the FCC, the father of the contestant confusingly ponders, "It is reasonable to ask why would [the production company] want to reveal questions and answers and apparently help contestants win more prize money?"¹⁹⁴ The answer is likely the same reason why the producers of *Twenty One* counter-intuitively wanted to help Herb Stempel win more money. The whole appeal of a show like *My Little Genius* is to wow audiences with children who possess Ph.D. level understandings of complex topics. It is hardly the basis of an interesting show if these children perform exactly how viewers would expect them to by not knowing any of the questions correctly. These games actually benefit from contestants shockingly performing well and winning a lot of money through increased ratings and higher advertising bids. It is the advertising dollars that the shows are after; the prize money is chump change.

No enforcement action resulted from the abandoned *My Little Genius* investigation.¹⁹⁵ Even when these FCC investigations do find wrongdoing, FCC enforcement action appears to be quite minimal. Despite 47 U.S.C. 509 being a criminal statute that could potentially subject violators to federal prison, only one investigation over the course of the past two decades has actually resulted in a criminal indictment against a broadcast employee.¹⁹⁶

C. A Rigged Radio Contest Leads to Arrests in Washington

In April of 2008, an attorney for Fisher Communications, licensee of Seattle radio station KVI (AM), self-reported an incident of possible contest rigging to the FCC that was uncovered during a routine internal audit.¹⁹⁷

Fisher informed the FCC that, the year prior, their KVI affiliate ran daily contests where listeners had the opportunity to win \$1000 cash prizes. At set times throughout the day, the station would announce the randomly selected name of a member of the KVI Listener's Club, and that member would then have

Agreement, *supra* note 190, ¶ 8 (explaining the payment of winnings in the event the episode is not broadcast is in the producer's sole discretion).

¹⁹³ No documents were received from the FCC explaining a disposition of the case. An FCC enforcement official who wished to be unnamed informed the author that the investigation into *Our Little Genius* was never officially closed, but instead was "abandoned," citing "enforcement discretion," after attorneys for the production informed them the series would not air.

¹⁹⁴ See Letter from Parent of Former Contestant to FCC Re: TV Game Show Cheating Incident, *supra* note 147.

¹⁹⁵ See *supra* note 193.

¹⁹⁶ See generally Seattle Police Department Incident Report, *supra* note 148.

¹⁹⁷ See Letter from Fisher Broadcasting - Seattle Radio, L.L.C. to the FCC, *supra* note 154.

only thirty minutes to call in and claim their \$1000 prize.¹⁹⁸ After calling to claim their prize, the winners were supposed to complete a W9 tax form before the station would release their \$1000 winnings.¹⁹⁹

In January of 2008, accountants for Fisher determined that KVI did not receive tax paperwork from several of the \$1000 winners.²⁰⁰ The station initially assumed that it was a mere oversight from their former promotions coordinator, who was in charge of running the contest, and who had quit her job after the contest ended a few months prior. The station contacted the winners, requesting that they complete the tax paperwork. One of the winners did not respond until about four months later—not so coincidentally after he broke up with his girlfriend, who happened to know the station’s former promotion’s coordinator.²⁰¹ That winner left a message at the station requesting somebody contact him. He blew the whistle as soon as his call was returned.

The contest winner told the station that he did not fill out a W9 because he never collected his prize.²⁰² He said that a former employee of KVI rigged the contest, and he did not want to have any part of it.²⁰³ He explained that his ex-girlfriend’s acquaintance knew the former promotions coordinator in charge of running the contest who entered him into the KVI Listener’s Club.²⁰⁴ Then, instead of randomly selecting the winner, the promotions coordinator intentionally selected his name to win the \$1000 prize.²⁰⁵ He went on to explain that the promotions coordinator made agreements with people she knew promising to select them as winners in exchange for one-half of the prize money.²⁰⁶ To prove his inside knowledge of the scheme, he told the station that their records would show that the very next day his ex-girlfriend was the winner of the contest.²⁰⁷ He also told the station that they would likely find his ex-girlfriend’s acquaintance’s name as one of the winners as well.²⁰⁸ He explained that he never picked up his prize, because he felt “bad about the situation.”²⁰⁹

¹⁹⁸ *Id.*

¹⁹⁹ *See* Seattle Police Department Incident Report, *supra* note 148, at 32.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 33.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 34.

²⁰⁷ *Id.* at 32.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 33.

KVI quickly verified the whistle-blower's claims. The station confirmed that his ex-girlfriend did indeed win the contest the day immediately after him.²¹⁰ They also discovered that the ex-girlfriend's acquaintance had won the contest as well. Upon further scrutiny, they also noticed "unusual demographic patterns" of younger listeners winning the contest at an unusual frequency, noting that KVI, a conservative talk radio station, normally had a predominately older demographic.²¹¹ KVI also noted that the younger winners tended to enter the KVI Listener's Club only a day or two prior to winning, which seemed like too big of a coincidence.²¹² The station began to suspect that this alleged fraud ran pretty deep.

KVI contacted the Seattle Police Department, who initiated a criminal investigation into the former promotions coordinator, and several suspicious winners, for embezzlement. Fisher Communications also contacted their attorneys, who advised them to self-report the incident to the FCC, who then subsequently began their own investigation.²¹³

At the conclusion of their investigation, the Seattle Police Department arrested a total of fifteen people.²¹⁴ The promotions coordinator was arrested for felony grand theft,²¹⁵ and fourteen contest winners were arrested as her co-conspirators.²¹⁶ The King's County Prosecutor's Office elected to only indict the promotion's coordinator.²¹⁷ She was ultimately convicted of felony grand theft, received probation and a stayed sentence, and ordered to pay Fisher Communications \$14,000 in restitution.²¹⁸

The FCC and Fisher Communications entered into a consent decree, mandating that KVI adopt policies and controls to prevent similar incidents from occurring in the future, including creating a mandatory training program for employees that addresses 47 U.S.C. 509 and related Commission rules.²¹⁹ The consent decree also mandated Fisher send the FCC periodic compliance reports and pay a \$7000 "voluntary contribution" to

²¹⁰ *Id.* at 34.

²¹¹ *Id.* at 33.

²¹² *Id.*

²¹³ See Letter from Fisher Broadcasting - Seattle Radio, L.L.C. to the FCC, *supra* note 154.

²¹⁴ See Seattle Police Department Incident Report, *supra* note 148, at 3–12.

²¹⁵ *Id.* at 47.

²¹⁶ *Id.* at 47–52.

²¹⁷ See Jennifer Sullivan, *KVI ex-employee sentenced for rigging radio contest*, SEATTLE TIMES (July 30, 2010), <https://www.seattletimes.com/seattle-news/kvi-ex-employee-sentenced-for-rigging-radio-contest/> [http://perma.cc/2EL5-GH5B].

²¹⁸ *Id.*

²¹⁹ Fisher Broadcasting - Seattle Radio, L.L.C., 27 FCC Rcd. 5690, 5695–96 (2012).

the United States Treasury,²²⁰ which seems like a very polite way of telling them to pay a fine.

This is the only case this author identified where an employee of a broadcaster was actually held criminally liable for interfering with the outcome of a broadcast contest. And this was for a state theft charge investigated by local police and prosecuted by local prosecutors, not a federal 47 U.S.C. 509 charge. This likely could have been the pioneering criminal 47 U.S.C. 509 case, but it appears that, for whatever reason, it was decided that a state theft charge was simply the better option. As a result, there still has not been one person charged criminally under 47 U.S.C. 509 since the statute's enactment.

D. Insights Drawn from the Investigations

It is apparent that the FCC actively enforces 47 U.S.C. 509, along with the other Commission rules that regulate broadcast contests. The FCC has yet, however, tried to apply the statute to a complex reality game show. There are several possible explanations for this.

First, reality game shows might simply be too complicated for this narrowly drafted statute. As discussed in detail *supra*, 47 U.S.C. 509 requires the meddled game to be one of “intellectual skill,” “intellectual knowledge,” or chance. As noted in the FCC’s investigation into WNCX FM’s “Classic Comedy Contest,” the Commission does not interpret comedy to be an “intellectual skill” that qualifies the contest for enforcement under the section.²²¹ If comedy contests do not qualify, where wit is a key element, there leaves little room for many other skill-based contests that do. While colorful arguments can be made that skills like comedy, singing, dancing, tattooing, modeling, or even dating can be intellectual in nature, the FCC apparently does not want to expand the definition of “intellectual” so far, and interprets this element as applying predominately to standard run-of-the-mill quiz shows.

Additionally, the production interference has to be done with the specific intent to “deceive” the listening or viewing public.²²² With that specific intent requirement, it becomes really easy for a producer to still be able to influence, and possibly even swing, a complex reality game show in favor of one contestant while staying on the right side of the statute.

²²⁰ *Id.* at 5697.

²²¹ See Letter to Complainant from FCC Re: Case EB-09-IH-1750, *supra* note 157, at 1 n.3.

²²² See 47 U.S.C. § 509 (2017).

For example, assume that the producers on a new complex reality game show want to keep a ratings friendly contestant in the game longer. Assume further that the producers know from their extensive casting process that this contestant is really good at solving complicated sliding puzzles. There would be no 47 U.S.C. 509 violation if the producers decided that the next challenge for some sort immunity would be a sliding puzzle challenge. There would be no “deception” to the viewing public when the contestant wins that challenge, fair-and-square, and becomes immune from the next vote, since the viewing public witnessed the challenge, observed the contestant win it, and the contestant received no special outside aide. Even though the producers had a good idea that the contestant would win—and intentionally chose that challenge for that reason—the “deception” element of this statute is lacking.

This makes sense. It was never the intent of this statute to completely castrate producers from their freedom to run their televised games as they saw fit. Congress just did not want television game shows blatantly lying to viewers; absolute fairness to contestants was never demanded. The statute was aimed to protect the viewer, and not the contestant.

Producers are still free to exercise their creative discretion when creating the rules for their shows and then “shaking up” their games midway through. They can adopt rules that might benefit one contestant over another, and then even do things mid-game like abruptly switch teams to a certain player’s detriment, or even select challenges that they know a favorite contestant has a propensity to win. This unchecked freedom in how producers are allowed to run their games gives them ample opportunity to *lawfully* influence the outcome of the game, in a more transparent way that will simply not be “deceitful” enough to trigger the statute. Therefore, there is little reason for producers to violate 47 U.S.C. 509 considering they have the ability to sway their games while remaining on the right side of the law.

Finally, there may simply be a lack of aggrieved reality show contestants complaining to the FCC about potential violations. If a contestant is bitter enough, they might file a complaint just to spite the production, but an FCC complaint will not get the contestant much in terms of compensation, or even attention. Private lawsuits and press releases tend to be the preferred method of addressing alleged wrongs.

IV. PRIVATE CAUSES OF ACTION

Private lawsuits and press releases have been the route most aggrieved reality show participants have taken after allegedly being cheated out of prizes.

In 2001, attorney turned *Survivor* contestant Stacey Stillman did not choose to take her complaint to the FCC when she alleged the show's executive producer swayed other contestants into voting her out to save another.²²³ Instead, she filed a private lawsuit in a court of law and then took her gripe to the media, to be scrutinized in the court of public opinion.²²⁴ Doing this, she was almost certainly expecting some sort of cash settlement from CBS, or court awarded damages, which she would not receive just by submitting an FCC complaint. Although Stillman suggested in her complaint that the production violated 47 U.S.C. 509, she did not attempt to use that statute as a private cause of action.²²⁵ Instead, she proceeded on fraud and unfair competition theories.²²⁶

However, twelve years later, in 2013, aggrieved contestants did try to use 47 U.S.C. 509 as a private cause of action. In a 260-page class-action complaint, former *American Idol* contestants attempted to rescind their Contestant Agreements using the statute.²²⁷ Several former African-American contestants, who were all disqualified from the program after failing background checks, alleged that the background checks disparately impacted black males and deceived the viewing public into believing that only judge and viewer votes selected the winner.²²⁸ They alleged in their complaint that "utilizing the private background information of Black *American Idol* Contestants as a means to decide which Semi-Finalist or Finalists would advance through the Contest (as opposed to utilizing the purported voting system) violates subdivision three of Section 509 as a scheme directed at predetermining some portion of the outcome."²²⁹

Their lawsuit was dismissed for failure to state a claim.²³⁰ The Second Circuit affirmed the dismissal, and held regarding the 47 U.S.C. 509 claim, "the District Court did not err in holding that neither 47 U.S.C. 509 nor 47 C.F.R. 73.1216 creates a private cause of action allowing [the plaintiff] to rescind his contestant agreement."²³¹

²²³ See generally Compl., *supra* note 10.

²²⁴ See generally *id.*; see also Newsweek Staff, *Stacey Stillman Speaks*, NEWSWEEK, (Feb. 9, 2001, 7:00 PM), <https://www.newsweek.com/stacey-stillman-speaks-155591> [<http://perma.cc/45RK-TDRV>].

²²⁵ See Compl., *supra* note 10, ¶ 51.

²²⁶ See *id.* ¶¶ 44, 53.

²²⁷ See Compl., *supra* note 38, ¶ 1903.

²²⁸ *Id.* ¶ 1938.

²²⁹ *Id.*

²³⁰ *Andrews v. Fremantlemedia, N.A., Inc.*, 613 Fed.Appx. 67, 67 (2d Cir. 2015).

²³¹ *Id.* at 69.

Unfortunately for our analysis, the court did not discuss the statute at length, or even clarify the ongoing question of whether a show like *American Idol*, a singing competition, would even be covered by 47 U.S.C. 509 since the statute supposedly only covers contests of intellectual skills or chance. In their complaint, the plaintiffs were careful to plead facts that argued *American Idol* was, in fact, a contest of intellectual skill. They pleaded: “The purported *American Idol* contest rewards Contestants with natural singing ability, trained singing ability, stage presence, an attractive physical appearance (more often than not), and intellectual skill or knowledge required to select songs and strategize one’s position in the Contest relative to other Contestants.”²³² The court did not address this assertion, and only held that 47 U.S.C. 509 does not create a private cause of action.²³³ The question of whether *American Idol*, a singing competition, is intellectual enough to come into the reach of the statute was saved for another day.

Even though Professor Podlas, and apparently even the FCC, subscribe to a narrow definition of the word “intellectual,” it is clear from reality show contestant agreements that productions are erring on the side of caution. For example, in the *American Idol* complaint discussed above, the plaintiff reveals a telling provision from his Contestant Agreement. The agreement warns, “[I]t is a *federal offense* punishable by fine and/or imprisonment for anyone to do anything which would rig or in any way *influence the outcome* of the [*American Idol*] Series *with the intent to deceive the viewing public*.”²³⁴ While the agreement does not specifically mention 47 U.S.C. 509, the word choice of the agreement makes it apparent that it is indeed what the agreement is addressing. Clearly, the producers of *American Idol* suspect the statute might apply to them, whether singing is “intellectual,” or not.

A 2010 leaked *Survivor* contestant agreement likewise suggests that the producers of that show feel that 47 U.S.C. 509 might apply to *Survivor*. It reads:

I will not rig or in any way influence the outcome of the Series with intent to deceive the viewing public (including, without limitation, colluding to share any prize money), and I will not accept any information or special or secret assistance in connection with the Series. I agree that I will not participate in any such act or any other deceptive or dishonest act with respect to the Series. I acknowledge and agree that any agreement between me and any other contestant(s) to share the Prize, if awarded to me or such other

²³² Compl., *supra* note 38, ¶ 1924.

²³³ See *Andrews*, 613 Fed.Appx. at 69.

²³⁴ Compl., *supra* note 38, ¶ 1915 (emphasis in original).

contestant(s), shall constitute a deceptive or dishonest act hereunder. If anyone tries to induce me to do any such act, I shall immediately notify Producer and a representative of CBS.²³⁵

Nineteen years after the original *Survivor* incident, we are no closer to knowing whether or not 47 U.S.C. 509 even applies to the series. There has simply been no court guidance on what “intellectual” means. While the FCC summarily dismissed a complaint relating to a comedy contest on the grounds that comedy is not “intellectual” enough of a skill, there is no saying whether a complex show like *Survivor*, where contestants arguably use hundreds of skills to win the game, qualifies or not. Clearly the attorneys who drafted *Survivor*’s contestant agreement felt there is a possibility the show might be covered by the statute.

These reality show contestant agreements also generally do a really good job at keeping fraud lawsuits from displeased contestants at bay. They put contestants on notice that the producers are essentially granted unfettered discretion in how they run the game, which mitigates potential fraud or breach of contract claims. For example, the leaked *Survivor* contestant agreement informs contestants:

I understand that Producer reserves the right, in its sole discretion, to change, add to, delete from, modify or amend the terms, conditions and rules affecting the conduct of the contestants on the Series, the Series activities, the elimination of contestants from the Series and the granting of prizes . . . I further understand that the Series may entail twists, of which I may or may not be aware, and that such twists may influence the outcome of the Series.²³⁶

This type of language makes it very easy for producers to essentially do whatever they want in terms of creating or even changing rules midway through games, for whatever reason they want to. Contestants are on notice this can happen, and they sign a contract agreeing to it. The production thereby mitigates the risk of possible fraud claims that the contestant lost the game because producers meddled by changing the rules, not honoring the rules, or entering contestants into a “twist” that the contestant did not benefit from. As stated *infra*, such will also not likely run afoul of 47 U.S.C. 509, since the viewing public is not being “deceived” in any way. The result of all this is that producers can freely meddle with the rules of their reality game shows to achieve whatever result they want, so long as they do not do it in a way that deceives the viewing public in violation of 47 U.S.C. 509. Pretty much, as long as whatever interference the

²³⁵ *Survivor* Contestant Agreement, ¶ 19 (on file with the author).

²³⁶ *Id.* ¶¶ 3, 7.

producer decides to throw at the game is shown on television, there is likely no remedy for the contestant in terms of either FCC enforcement or private fraud claims.

Lawsuits are not always attempted on just fraud or contract law theories, however. In 2013, a former participant on A&E's *Storage Wars* filed a wrongful termination lawsuit alleging that he was fired after complaining to producers about the show's practice of "salt[ing]" storage lockers with valuable items and then telling participants how much to bid, therefore predetermining the outcome of the show.²³⁷ That participant believed that the practice violated 47 U.S.C. 509, informed producers, and was subsequently let-go. Although A&E rightfully pointed out that the statute, and the rest of The Communications Act of 1934, as amended, does not apply to *Storage Wars*, since it is a cable program, a Los Angeles judge emphasized that the fired employee "doesn't need to 'prove' an actual violation to prevail on his wrongful termination claim, only that he was fired for reporting his 'reasonably based suspicions.'"²³⁸ The case settled, and the participant even returned to the series afterwards.²³⁹

V. THE FUTURE OF FAKE REALITY SHOWS

Since the FCC has not yet enforced 47 U.S.C. 509 against a complex reality game show, and since private causes of actions are unlikely to succeed, what needs to change? This author believes everything is fine just the way it is.

Times have changed. Long gone are the days where the entire country sat down and watched the same three broadcast networks. Also, long gone are the innocent times of the mid-twentieth century where rigged game shows would reasonably cause Americans to become so outraged that they would call for congressional investigations. When Dan Enright was caught completely choreographing *Twenty One* in the 1950s, he was caught lying to just about everyone who owned a television. Everybody was watching the same shows back then, and there was a (somewhat) reasonable expectation that what was broadcast over the heavily regulated airwaves was the truth. Now, living in the Instagram age, it's no surprise to anybody that what is presented as real in the media

²³⁷ Eriq Gardner, *Fired 'Storage Wars' Star Wins Round in Rigging Lawsuit*, HOLLYWOOD REP. (Sept. 3, 2013), <https://www.hollywoodreporter.com/thr-esq/fired-storage-wars-star-wins-619655> [http://perma.cc/96JM-57PE].

²³⁸ *Id.*

²³⁹ Austin Siegemund-Broka, *Hollywood Docket: 'Storage Wars' Rigging; Disney's Legal Bill; 'Ricky Bobby' Saloon*, HOLLYWOOD REP. (Aug. 8, 2014), <https://www.hollywoodreporter.com/thr-esq/hollywood-docket-storage-wars-rigging-724115> [http://perma.cc/2LTF-FFKG].

often is not. Expectations have changed greatly since 47 U.S.C. 509 was passed. Anyone living today who is shocked at the idea that producers can (and do) manipulate their shows for entertainment value needs to crawl out from under their rock.

Additionally, a lot of FCC regulations just don't make as much sense today compared to when literally every television channel was broadcast over the airways. The FCC only has the authority to regulate broadcast networks (currently ABC, CBS, NBC, Fox, and The CW). The FCC does not regulate cable networks, like AMC, the Paramount Network, or TruTV, or streaming services, like Amazon Prime and Netflix. The rest of the internet is also not regulated by them either. So, why are we placing such a big burden on just five networks to follow all of Title 47 of the U.S. Code when the vast majority of the modern media does not have to?

The average cable package now comes with over two hundred channels.²⁴⁰ Even cable is becoming an outdated way to consume media. “Cord cutting” is the latest trend where consumers are ditching traditional television altogether and instead subscribing to streaming services, like Amazon Prime, which includes access to tens of thousands of titles, commercial free, that can be consumed at the viewer's convenience.²⁴¹ Amateur viral web videos are also competing for consumer attention (and we all know how real and genuine a lot of those are). With all these alternative forms of media available, it makes little sense to require five television networks—with exponentially diminishing audiences—to abide by an entire volume of laws that nobody else has to abide by. If anything, 47 U.S.C. 509, like the rest of Title 47, should be slowly walked back in the age where unregulated digital media has completely overtaken traditional broadcast media.

VI. CONCLUSION

Nineteen years after *Survivor* made academia, and the tabloids alike, question whether an archaic criminal statute might apply to reality shows, we are not much closer to an answer. This author's FOIA request has revealed that the FCC has been very restrained in applying 47 U.S.C. 509 to modern reality game shows, with the bulk of enforcement instead focused

²⁴⁰ See John Dilley, *How Much Should I Be Paying for Cable TV?*, (Sep. 27, 2017), <https://www.cabletv.com/blog/how-much-should-i-pay-for-cable-tv/> [http://perma.cc/CQ5J-DN7L].

²⁴¹ See, e.g., Luke Bouma, *From live TV streaming to big mergers: five cord-cutting trends to watch in 2019*, TING (Jan. 3, 2019), <https://ting.com/blog/five-cord-cutting-trends-2019/> [http://perma.cc/V4JB-52B7].

on radio and traditional quiz-style game shows. A plain reading of the statute, and one case that was summarily dismissed by the FCC, suggests that the statute might only be applicable only to contests of a narrowly defined “intellectual” nature, or contests of pure chance. But, without any appellate level court decisions on the matter, it is still impossible to say with certainty if the statute is really so limited.

Private lawsuits relating to production interference are also unlikely to be very successful. Courts have held that 47 U.S.C. 509 does not create a private cause of action for aggrieved contestants,²⁴² and the airtight contracts that grant producers unfettered discretion regarding how they run their games removes the realistic shot of fraud claims.²⁴³

Contestants are largely left without a remedy when they feel they have been scripted out of their shot at winning a prize. But, at the end of the day, maybe angry contestants should just take a deep breath, enjoy their time on television, and the instant fame that came with it, and contemplate the wise mantra of *Mystery Science Theatre 3000*, “It’s just a show; I should really just relax.”²⁴⁴

²⁴² See *Andrews v. Fremantlemedia, N.A., Inc.*, 613 Fed.Appx. 67, 67, 69 (2d Cir. 2015).

²⁴³ See, e.g., *Survivor Contestant Agreement*, ¶¶ 3, 7, 19 (on file with the author).

²⁴⁴ *MST3k Mantra*, TV TROPES, <https://tvtropes.org/pmwiki/pmwiki.php/Main/MST3KMantra> [http://perma.cc/SJE5-35TW].

“I Now Pronounce You Husband and Son”: Confronting the Need to Amend Adult Adoption Codes to Facilitate Same-Sex Marriage*

Hope C. Blain**

I. INTRODUCTION

“We never thought we’d see the day” where same-sex marriage was legal in Pennsylvania, said Nino Esposito.¹ But with the Supreme Court’s legalization of same-sex marriage in *Obergefell v. Hodges*,² Nino Esposito and his partner of forty years, Drew Bosee, saw that elusive day become a reality for all Americans. Except, Mr. Esposito and Mr. Bosee still could not marry. The problem: They were legally father and son. In 2012, three years before the Supreme Court legalized same-sex marriage across the nation, Mr. Esposito and Mr. Bosee adopted each other.³ For them, their decision to adopt was motivated by a desire to secure inheritance and medical visitation rights, and more importantly, it was motivated by a desire to be legally considered a family.⁴

* For the inspiration of my title, see Rich Schapiro, *Gay Pennsylvania Couple Seeks to Annul Adoption that Fetched them Inheritance Rights Now that Same-Sex Marriage is Legal*, N.Y. DAILY NEWS (Nov. 3, 2015, 10:52 PM), <http://www.nydailynews.com/news/national/gay-pa-couple-annul-adoption-wed-article-1.2422060> [<http://perma.cc/SM58-DG8N>].

** J.D. Candidate, Expected May 2019, Chapman University Dale E. Fowler School of Law. Thank you to Professor Stephanie Lascelles, my faculty advisor, for her mentorship, guidance, and insight during the writing process. Also, thank you to my family for their unending love, support, and patience throughout my life—but especially during law school.

¹ Evan Perez & Ariane de Vogue, *Couple Seeks Right to Marry. The Hitch? They’re Legally Father and Son*, CNN (Nov. 3, 2015, 3:55 PM), <https://www.cnn.com/2015/11/03/politics/same-sex-marriage-adoption-father-son-pennsylvania/index.html> [<http://perma.cc/JEH2-9RB4>].

² 135 S. Ct. 2584, 2604 (2015) (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

³ Yanan Wang, *These gay men became ‘father and son.’ Now they want to get married but can’t*, WASH. POST (Nov. 5, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/11/05/these-gay-men-became-father-and-son-now-they-want-to-get-married-but-cant/?utm_term=.80781b46a6f4 [<http://perma.cc/34AG-LGTS>].

⁴ See *id.*

With the legalization of same-sex marriage, the couple sought to annul their adoption and exercise their inherent right to marry.⁵ On March 23, 2015, Mr. Esposito and Mr. Bosee filed a petition to revoke their adoption with the Allegheny County Court of Common Pleas Orphan's Court in Pennsylvania.⁶ Their petition even included an affidavit of Mr. Bosee's consent to the adoption annulment.⁷ Yet, the Orphan's Court rejected the couple's petition reasoning that state law barred the adoption revocation.⁸ On appeal, the Superior Court reversed and found that denying the adoption annulment "frustrated the couple's ability to marry," which directly conflicted with *Obergefell*.⁹ While the Superior Court remanded the case and expressly gave the lower court the authority to annul same-sex adult adoptions, it failed to provide any guidance or requirements to swiftly effectuate the adoption annulments.¹⁰ Now, years after the couple attempted to annul their adoption, it seems they have still not been able to marry as they await the formal revocation of their adoption.¹¹

Stuck in this legal limbo-land, Mr. Esposito and Mr. Bosee are not alone. While there is "no reliable data—or even flimsy data" regarding the number of same-sex adult adoptions,¹² many same-sex couples across the nation turned to adult adoption to create a legal family unit.¹³ In fact, adult adoption was arguably the only way to legally formalize same-sex relationships, allowing couples to secure essential insurance benefits and inheritance rights.¹⁴ However, with the legalization of same-sex marriage in

⁵ *In re Adoption of R.A.B.*, 153 A.3d 332, 333 (Pa. Super. Ct. 2016).

⁶ *Id.*

⁷ *Id.* Note, this Article uses the terms "adoption revocation," "adoption annulment," and "adoption termination" interchangeably.

⁸ See Schapiro, *supra* note *. The Orphan's Court reasoned that state law prohibited the adoption revocation since Pennsylvania's adoption code does not contain any provision regarding adoption revocation and, historically, only permitted revocation under rare circumstances, such as clear and convincing evidence of fraud. 17 WEST'S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017).

⁹ *Adoption of R.A.B.*, 153 A.3d at 336.

¹⁰ *Id.*

¹¹ See *id.* It is unclear if the couple is now married. See Chris Potter, *Adoption decision ends marriage predicament for gay couples in Pennsylvania*, PITT. POST-GAZETTE (Dec. 21, 2016, 9:12 PM), <http://www.post-gazette.com/local/north/2016/12/21/Pennsylvania-court-ruling-clears-way-for-gay-Fox-Chapel-couple-to-marry/stories/201612210196> [<http://perma.cc/H42D-D39B>].

¹² Elon Green, *The Lost History of Gay Adult Adoption*, N.Y. TIMES (Oct. 19, 2015), <https://www.nytimes.com/2015/10/19/magazine/the-lost-history-of-gay-adult-adoption.html> [<http://perma.cc/PC4X-9DSE>] ("The practice seems to have taken hold amid the tumult of the 1970s and 1980s, during rampant discrimination and the onset of the AIDs crisis.")

¹³ Brynne E. McCabe, *Adult Adoption: The Varying Motives, Potential Consequences, and Ethical Considerations*, 22 QUINNIPIAC PROB. L. J. 300, 306 (2009).

¹⁴ See Gwendolyn L. Snodgrass, *Creating Family Without Marriage: The Advantages and Disadvantages of Adult Adoption among Gay and Lesbian Partners*, 36 BRANDEIS J. FAM. L. 75, 75–76 (1998) (noting that same-sex couples could also use wills, insurance policies, partnership agreements, and durable powers of attorney to establish some

2015, the motivations behind these adult adoptions became obsolete since *all* couples now had the right to marry.¹⁵ Yet, even with the recognition of this fundamental right, some same-sex couples who adopted each other, like Mr. Esposito and Mr. Bosee, cannot easily exercise their right to marry because adoption is often irrevocable and most states lack any formal revocation process.¹⁶ Thus, confronted with couples that cannot exercise their constitutional right to marry, states¹⁷ must reform their adoption codes to effectuate the efficient annulment of same-sex adult adoptions.

Adoption, including adult adoption, did not exist at common law.¹⁸ Instead, adoption is a product of state-specific statutory language.¹⁹ Therefore, given adoption's statutory origins, any solution to Mr. Esposito's, Mr. Bosee's, and countless other same-sex couples' problem should be statutory in nature. However currently, many state adoption codes fail to even mention adult adoption revocation and lack any statutory revocation procedure.²⁰ Instead, most adoption codes highlight the extreme permanency of adult adoption or only permit adoption revocation within an extremely narrow timeframe.²¹ In fact, only one state provides a detailed adult adoption revocation procedure—California.²² California's Family Code dedicates an entire section to adult adoption revocation and details a comprehensive process for individuals seeking revocation.²³ Further, not only does California's adoption code provide a comprehensive revocation procedure, it ensures that both the

legally recognized rights, but “adoption [was] the only solution that [created] a bona fide family relationship”).

¹⁵ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

¹⁶ See Schapiro, *supra* note *; see also Peter N. Fowler, *Adult Adoption: A “New” Legal Tool for Lesbians and Gay Men*, 14 GOLDEN GATE U. L. REV. 667, 706 (1984) (“Except in very narrow circumstances, or unless the statute provides for it, once an individual has adopted her/his lover, the adoption cannot be abrogated.”).

¹⁷ Unless otherwise indicated, for the purposes of this Article, “states” includes all fifty states and the District of Columbia.

¹⁸ McCabe, *supra* note 13, at 302.

¹⁹ See *id.*

²⁰ See, e.g., CAL. FAM. CODE § 9340 (1993).

²¹ See, e.g., ARK. CODE ANN. § 9-9-216 (2018) (“[U]pon the expiration of one (1) year after an adoption decree is issued, the decree cannot be questioned by any person including the petitioner [the individual that sought the adoption], in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter”); see also ALASKA STAT. ANN. § 25.23.130 (West 1974) (“[A]ll legal relationships between the adopted person and the natural parents and other relatives of the adopted person, so that the adopted person thereafter is a stranger to the former relatives for all purposes” (emphasis added)).

²² See CAL. FAM. CODE § 9340 (1993).

²³ See generally *id.* Within California's Family Code, Division 13 “Adoption” includes Part 3 “Adoption of Adults and married Minors” which includes Chapter 3 “Procedure for Terminating Adult Adoption.” See *id.*

adoptee and the adopter are protected by requiring the consent of both parties.²⁴ Although improvements can be made to California's adoption code, all states should look to California's statutory language as a model and amend their respective codes accordingly.

This Article proceeds in four parts. Part I briefly discusses the current need to amend state adoption codes to allow same-sex couples that adopted each other pre-*Obergefell* to efficiently annul their adult adoption and marry. Part II provides background on the legal avenues open to same-sex couples to solidify their relationships pre-*Obergefell*. This section also discusses the history and ramifications of *Obergefell*. Part III delves into the problem—same-sex couples that adopted each other pre-*Obergefell* often cannot, or at least cannot efficiently, annul their adoption. Part IV provides a solution. This Part outlines the need to amend state adoption codes by comparing states that lack statutory guidance²⁵ with the one state that has a clear statutory framework for adult adoption revocation—California.²⁶ Part IV advocates for states to adopt language similar to California's statutory language, which requires that both the adoptee and the adopter provide consent before a formal adoption revocation is granted.²⁷ Further, Part IV discusses the importance of implementing a statutory framework, as opposed to relying on equitable relief, since courts and same-sex couples alike need clear and comprehensive *statutory* requirements.

II. BACKGROUND

Adoption is “[t]he creation by judicial order of a parent-child relationship.”²⁸ Adult adoption is the creation of a parent-child relationship between two adults.²⁹ In both the adoption of a child and of an adult, the adoption bestows significant inheritance, medical, and countless other rights upon those involved.³⁰ A noteworthy difference between child adoption and adult adoption is the underlying motivation. Unlike the motivations behind child adoption, which usually center on a desire to provide a child

²⁴ *Id.*

²⁵ *See, e.g.*, 17 WEST'S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017).

²⁶ *See* CAL. FAM. CODE § 9340 (1993).

²⁷ *Id.*

²⁸ *Adoption*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* Fowler, *supra* note 16, at 677 (“[T]he adoptive parent in an adult adoption bears no legal duty of support for her/his adult child.”). While adoption has ancient roots and can be traced back to the Code of Hammurabi, adoption did *not* exist at common law and is the product of state specific statutes. *See* 17 WEST'S PA. PRAC., FAMILY LAW § 32:1 (7th ed. 2017).

²⁹ *See Adoption, supra* note 28.

³⁰ *See* Fowler, *supra* note 16, at 679 (“In every American jurisdiction, if an unmarried intestate decedent is survived by an adopted child, but no natural-born descendants, the adopted child inherits the entire estate.”).

with basic necessities,³¹ adult adoption has been historically utilized for “strictly economic purposes, especially inheritance.”³²

A. American Adult Adoption: A Legal Avenue for Same-Sex Couples

Before the nationwide legalization of same-sex marriage, adult adoption served as one avenue to legally formalize same-sex relationships. Other legal options, like civil unions and domestic partnerships, existed, but were often not as widely available as adult adoption. For example, as of November 2014, only four states allowed for civil unions between same-sex couples and only six states and the District of Columbia allowed for domestic partnerships between same-sex couples,³³ whereas most states recognize, and have recognized adult adoption for decades.³⁴ Further, adoption bestowed more expansive benefits than the other available options.³⁵

For example, one available method to formalize same-sex relationships was a domestic partnership. Yet, a domestic partnership was a “municipality-based convention, unrecognized by state legislatures,” that only extended limited employment benefits to the domestic partner—with those benefits chosen at the complete discretion of the employer.³⁶ Further, unlike adoption, domestic partnerships did not “create heirs or establish property or inheritance rights.”³⁷

Another common means of formalizing same-sex relationships pre-*Obergefell* were cohabitation contracts.³⁸ Cohabitation contracts allowed same-sex couples to live together as if married, provide companionship, and share earnings and property.³⁹ However, the contract was only enforceable if legitimate consideration, independent of the sexual relationship, existed.⁴⁰ And even if the

³¹ See *supra* text accompanying note 16.

³² *In re Adult Anonymous II*, 452 N.Y.S.2d 198, 200 (N.Y. App. Div. 1982).

³³ Jodi B. Mileto, Note, *Fallout from Obergefell: The Dissolution of Unconventional Adoptions to Pave the Way for Same-Sex Marriage Equality*, 120 W. VA. L. REV. 285, 294 (2017).

³⁴ See Fowler, *supra* note 16, at 673 (commenting that Arizona and Nebraska were the only states that did not authorize adult adoption in 1984); see also *Who May Adopt, be Adopted, or Place a Child for Adoption*, CHILD WELFARE INFORMATION GATEWAY (2016), <https://www.childwelfare.gov/pubPDFs/parties.pdf#page=5&view=SummariesofStatelaws> [<http://perma.cc/G2AC-SJP9>] (noting, that as of 2016, Louisiana, Missouri, Idaho, South Carolina, and Wyoming did not permit adult adoption).

³⁵ Snodgrass, *supra* note 14, at 77.

³⁶ *Domestic Partnership*, BLACK’S LAW DICTIONARY (10th ed. 2014); see also Snodgrass, *supra* note 14, at 76.

³⁷ Snodgrass, *supra* note 14, at 76.

³⁸ See *id.* at 77; see generally Whorton v. Dillingham, 202 Cal. App. 3d 447 (1988).

³⁹ Snodgrass, *supra* note 14, at 77.

⁴⁰ See *id.*

contract was enforceable, property distribution was the only right provided by the contract and was only enforced upon the dissolution of the relationship.⁴¹ Thus, unfortunately, cohabitation contracts only provided enforceable rights if the relationship ended.

Similarly, other legal avenues, such as “[w]ills, insurance policies, trusts, health-care proxies, partnership agreements[, and] durable powers of attorney,” were available, but none created the depth of legal rights that accompanied adoption.⁴² For example, wills, especially reciprocal wills, and trusts provided an avenue for same-sex couples to leave property to each other. But, “the greatest threat to each [of these options was a] surviving blood relative wielding a charge of undue influence.”⁴³ Such a threat was not uncommon. Due to the stigma of homosexuality, wills and trusts made by homosexual individuals were historically more likely to be successfully challenged than wills and trusts made by heterosexual individuals.⁴⁴ Thus, using a will or trust to create inheritance rights was a gamble for same-sex couples. There was no guarantee that the same-sex partner would ever receive the bequeathed property.⁴⁵

Thus, while each aforementioned option provided some legal benefits to same-sex couples, they often had severe limitations. Moreover, they all failed to establish inalienable inheritance rights and create a cognizable family unit.

Unlike other options available in the pre-*Obergefell* world, adult adoption allowed same-sex couples to “formally and legally express their commitment to one another by creating a family unit.”⁴⁶ Not only did adoption bestow the legal label of “family” on a same-sex couple, it also provided vast legal rights, including inheritance, successorship, next-of-kin, and beneficiary rights.⁴⁷ Such comprehensive rights and privileges illustrate why same-sex couples often chose adult adoption over other legal avenues.

One of the most significant benefits of adoption was the creation of inheritance rights, which vested immediately upon the adoption and required no other legal instrument.⁴⁸ Further, “every state honor[ed] the rights of an adopted child [or adult] to inherit the estate of an unmarried intestate decedent over the

⁴¹ *See id.*

⁴² *Id.* at 75–77. Unlike adoption, the other avenues were merely contract-based methods to secure rights. *Id.* at 76.

⁴³ *Id.* at 78.

⁴⁴ *Id.* at 79.

⁴⁵ *Id.*

⁴⁶ *Id.* at 80–81.

⁴⁷ *Id.* 81–83.

⁴⁸ *Id.* at 81.

rights of the decedent's 'nonimmediate' blood relatives."⁴⁹ Thus, through the fairly simple legal act of adoption, same-sex couples were able to cut off blood relatives and solidify their inheritance rights. In addition to inheritance rights, adoption also established successorship rights. For example, same-sex couples successfully used adult adoption to "safeguard possession" of rent-controlled apartments upon the death of a partner.⁵⁰ Moreover, adoption also provided benefits during the lives of both partners through next-of-kin privileges.⁵¹ The next-of-kin designation allowed a person to be legally recognized as the "closest living relative of another," which in turn provided "privileges in case of hospitalization or imprisonment [and conferred] decision-making authority in case of emergency or incapacity."⁵² Additionally, adult adoption also allowed same-sex couples to take advantage of beneficiary privileges.⁵³ Beneficiary privileges allowed a surviving same-sex partner to collect "insurance policies, retirement funds, and employee benefits."⁵⁴ In short, with the vast benefits and rights conferred by adult adoption, it was often used to create a pseudo-marriage between same-sex couples.

Many have argued that the use of adult adoption in this way—creating a parent-child relationship when there is clearly a sexual relationship—perverts adoption's purpose.⁵⁵ While it is true that the parent-child relationship is a legal fiction within these same-sex adult adoptions, many courts have found that the motivations behind these adult adoptions are legitimate and sincere.⁵⁶ For example, in *In re Adoption of Adult Anonymous*, the New York Family Court of Kings County granted a same-sex couple's petition for adoption.⁵⁷ The couple, a twenty-two-year-old male and his twenty-six-year-old male partner, desired to create "a legally cognizable relationship."⁵⁸ The court granted the adoption despite challenges stemming from public policy and morality concerns.⁵⁹ Moreover, in *In re Adult Anonymous II*, the Supreme Court of New York reversed an order denying a

⁴⁹ *Id.*

⁵⁰ *Id.* at 82 (noting that adult adoption was used to successfully bypass New York City's rent and eviction regulations which "provide[d] that no surviving spouse or relative of a deceased tenant will be evicted so long as that person lived with the tenant while the tenant was alive").

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 83.

⁵⁴ *Id.*

⁵⁵ See, e.g., Fowler, *supra* note 16, at 668–69.

⁵⁶ See, e.g., *In re Adult Anonymous II*, 452 N.Y.S.2d 198, 199–201 (N.Y. App. Div. 1982); see also McCabe, *supra* note 13, at 307–08.

⁵⁷ *In re Adoption of Adult Anonymous*, 435 N.Y.S.2d 527, 531 (N.Y. Fam. Ct. 1981).

⁵⁸ *Id.* at 527.

⁵⁹ *Id.* at 531; see also McCabe, *supra* note 13, at 308.

same-sex couple's adult adoption.⁶⁰ The court found that the couple's motivation for entering into the adoption—to avoid eviction—was sincere and not a manipulation of the adoption statute.⁶¹ Furthermore, the court noted that “[h]istorically . . . [adult] adoption has served as a legal mechanism for achieving economic, political, and social objectives rather than the stereotypical parent-child relationship.”⁶² Thus, as the precedent cases and literature make clear, same-sex adult adoption was not a perversion of adoption, but rather a sincere attempt to create a family—the very purpose of adoption.

But the rights created by adoption come at a price: Finality. Absent a showing of undue influence or fraud, adult adoption is often irrevocable.⁶³ Therefore, even if the romantic relationship ends, the legal relationship of parent-child remains. Case in point, if the romantic relationship sours and the adopter or “parent” disinherits the adoptee or “child” by excluding the adoptee from his or her will, the adoptee will *always* have standing to contest the adopter's will because the adoptee is *forever* a bona fide child of the adopter.⁶⁴ As such, the irrevocability of adult adoption is considered its most significant flaw because it creates an immutable legal relationship, remaining even after death.

Moreover, adult adoption's permanency also forever removes the adoptee from his or her biological bloodline.⁶⁵ Thus, adult adoption terminates the adoptee's natural right to inherit from his or her biological parents and places the adoptee into the adopter's bloodline. Once the adult adoption is complete the adoptee can never restore his or her right to inherit from the biological parents.⁶⁶ This is highly problematic for the adoptee if the same-sex relationship ends and the adoptee is excluded from the adopter's will. In this scenario, the adoptee would be up the proverbial creek without a paddle; she would not inherit from her biological parents or her same-sex partner, the adopter.⁶⁷

⁶⁰ *Adult Anonymous II*, 452 N.Y.S.2d at 201.

⁶¹ *Id.* at 199–200.

⁶² *Id.* at 200.

⁶³ See 17 WEST'S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017); *but see* CAL. FAM. CODE § 9340 (1993). Further, even in the presence of fraud, an adoption often cannot be revoked. See ARK. CODE ANN. § 9-9-216 (2018).

⁶⁴ Snodgrass, *supra* note 14, at 83–84.

⁶⁵ *Id.* at 84.

⁶⁶ *Id.*

⁶⁷ In this situation the adoptee would have two options: (1) seek a devise from the biological parents, which would be moot if they are both deceased, or (2) contest the adopter's will. See *id.*

Same-sex adult adoption may also bring about significant psychological ramifications. Same-sex couples that turn to adult adoption have to cope with the legal dynamics of their relationship—father and son by day, lovers by night. While courts have consistently upheld the motivations behind these adoptions,⁶⁸ their legal fiction may create tension between relatives, friends, and even between the same-sex couple.⁶⁹ Therefore, while adult adoption was a viable option for same-sex couples, it was an inappropriate method to achieve the legal status that these couples desired and deserved: Marriage.⁷⁰

B. *Obergefell* & its Outcomes

At its core, *Obergefell v. Hodges*, which legalized same-sex marriage, is about the interlocking constitutional guarantees of liberty and equality.⁷¹ Justice Kennedy began the monumental decision by highlighting the foundation of our country—the Constitution—which “promises liberty to *all* within its reach, a liberty that includes certain specific rights that allow persons within a lawful realm, to define and express their identity.”⁷² The Constitution’s promise of liberty and equality was the cornerstone of Justice Kennedy’s opinion.

The petitioners in *Obergefell* were fourteen same-sex couples and two men whose same-sex partners were deceased.⁷³ The petitioners had filed individual actions in federal district court arguing that their respective states violated the Fourteenth Amendment by denying them the right to marry or by failing to recognize their marriages lawfully performed in other states.⁷⁴ The respondents were state officials responsible for enforcing state laws that denied same-sex couples the ability to marry.⁷⁵ In each action, the district courts found for the petitioners.⁷⁶ But the Sixth Circuit, consolidating the cases, reversed, finding that states do not have a constitutional obligation to license or recognize same-sex marriage.⁷⁷

⁶⁸ See *In re Adoption of Adult Anonymous*, 435 N.Y.S.2d 527, 531 (N.Y. Fam. Ct. 1981); see also *In re Adult Anonymous II*, 452 N.Y.S.2d 198, 200, 201 (N.Y. App. Div. 1982).

⁶⁹ Snodgrass, *supra* note 14, at 84.

⁷⁰ See Lisa R. Zimmer, *Family, Marriage, and the Same-Sex Couple*, 12 CARDOZO L. REV. 681, 691 (1990).

⁷¹ 135 S. Ct. 2584, 2604 (2015).

⁷² *Id.* at 2593 (emphasis added).

⁷³ *Id.*

⁷⁴ *Id.* The states at issue were Michigan, Kentucky, Ohio, and Tennessee. *Id.* All of these states defined marriage as a union between one man and one woman. *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

Before addressing the substance of the petitioners' legal claims, the Court delved into the "transcendent importance" of marriage and the tragic outcomes caused by prohibiting same-sex marriage.⁷⁸ Noting marriage's significance, the Court stated that "marriage is essential to our most profound hopes and aspirations" and arises "from the most basic human needs."⁷⁹ Further, as the Court aptly noted, it was and is the importance of marriage that instigated the petitioners' claims.⁸⁰ Far from trying to demean the institution of marriage, as the respondents genuinely believed, the petitioners sought the ability to be a part of an institution they revered.⁸¹

Turning to the facts, the Court outlined the petitioners' challenges.⁸² Take petitioners April DeBoer and Jayne Rowse of Michigan as an example. Ms. DeBoer and Ms. Rowse celebrated their relationship in a commitment ceremony in 2007.⁸³ Over the years their family had grown.⁸⁴ In 2009, they adopted a baby boy and took in another baby boy that was abandoned by his biological mother.⁸⁵ "The next year a baby girl with special needs joined their family."⁸⁶ But in the eyes of Michigan law, Ms. DeBoer and Ms. Rowse could never truly be a "family" because they *both* could not be their children's legal parents.⁸⁷ Under Michigan law, only married couples and single individuals could adopt children, "so each child [could] have only one woman as his or her legal parent."⁸⁸ This legal separation, caused by the couple's unmarried status, posed serious problems for their family. If there was an emergency, schools, hospitals, and first-responders would have to "treat the three children as if they had only one parent."⁸⁹ And if Ms. DeBoer or Ms. Rowse became ill or died, the other woman would have no legal rights over the children she had not adopted—she might even lose those children.⁹⁰ This ever-present uncertainty, caused by the couples' inability to marry, led them to take legal action.⁹¹

⁷⁸ *Id.* at 2594.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 2595.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *See id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

Similarly, petitioner James Obergefell's claim stemmed from the same uncertainty caused by his inability to marry his partner. Together for over two decades, Mr. Obergefell and his partner, John Arthur, promised to marry before Mr. Arthur died.⁹² However, same-sex marriage was illegal in their home state of Ohio.⁹³ "To fulfill their . . . promise, [Mr. Obergefell and Mr. Arthur] traveled from Ohio to Maryland, where same-sex marriage was legal.⁹⁴ Struggling with the debilitating effects of ALS, Mr. Arthur was unable to move, so the couple was married inside a medical transport plane on a tarmac in Maryland.⁹⁵ Mr. Arthur died three months later.⁹⁶ Although they were lawfully married in Maryland, "Ohio law [did] not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate."⁹⁷ Thus, "[b]y statute, [Mr. Obergefell and Mr. Arthur] must remain strangers even in death"⁹⁸

Turning to the legal claims at hand, the Court determined that same-sex couples have a fundamental right to marry by analyzing two core constitutional principles—liberty and equality.⁹⁹ The Court found that marriage was a constitutional liberty guaranteed by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁰ To reach its conclusion, the Court discussed four interrelated principles.¹⁰¹

First, the Court reasoned that marriage is a highly personal choice rooted in the concept of individual autonomy.¹⁰² Looking at past precedent, the Court determined that personal decisions regarding marriage, including same-sex marriage, are "among the most intimate that an individual can make" as these decisions have the power to define an individual, while simultaneously binding that individual to another.¹⁰³ And, thus, the right to marry, like other intimate personal choices

⁹² *Id.* at 2594. Mr. Arthur was diagnosed with amyotrophic lateral sclerosis ("ALS") in 2011. *Id.* This condition has no known cure. *Id.*

⁹³ *Id.* at 2593.

⁹⁴ *Id.* at 2594.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 2598, 2603.

¹⁰⁰ *Id.* at 2602–03. The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. The liberties protected by the Due Process Clause include "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell*, 135 S. Ct. at 2597.

¹⁰¹ *Obergefell*, 135 S. Ct. at 2599.

¹⁰² *Id.*

¹⁰³ *Id.*; see also *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

“concerning contraception, family relationships, procreation, and childrearing,” deserves protection under the Constitution.¹⁰⁴

Second, the Court opined that the right to marry is guaranteed by the Constitution “because it supports a two-person union unlike any other in its importance to the committed individuals.”¹⁰⁵ Drawing on the Court’s decision in *Turner v. Safley*, which held that inmates could not be denied their right to marry,¹⁰⁶ and *Loving v. Virginia*, which invalidated interracial marriage bans,¹⁰⁷ the Court found that same-sex couples, too, have the right to find companionship and participate in a legally-recognized relationship.¹⁰⁸

Third, the Court reasoned that safeguarding *all* individuals’ right to marry protects children, the future of American society.¹⁰⁹ By recognizing same-sex marriage, same-sex relationships are afforded legal legitimacy, which in turn allows children of same-sex couples “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”¹¹⁰ In other words, it ensures that children of same-sex couples are not labeled the “other.” Thus, excluding same-sex marriage would cause these children to “suffer the stigma of knowing their families are somehow lesser.”¹¹¹

Fourth, the Court noted that the right to marry is protected under the Constitution because, quite simply, marriage is the “keystone of [American] social order.”¹¹² It is an essential building block of American life. The Court reasoned that the fundamental importance of marriage in America is evident in “the constellation of benefits” awarded to couples just by virtue of their marriage.¹¹³ In fact, the Court listed fourteen categories of benefits awarded to married couples.¹¹⁴ And the Court reasoned

¹⁰⁴ *Obergefell*, 135 S. Ct. at 2599; see also *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (finding that it would be contradictory “to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society”).

¹⁰⁵ *Obergefell*, 135 S. Ct. at 2599.

¹⁰⁶ 482 U.S. 78, 79 (1987).

¹⁰⁷ 388 U.S. 1, 2 (1967).

¹⁰⁸ See *Obergefell*, 135 S. Ct. at 2600 (“Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”).

¹⁰⁹ *Id.*

¹¹⁰ *United States v. Windsor*, 570 U.S. 744, 772 (2013).

¹¹¹ *Obergefell*, 135 S. Ct. at 2600.

¹¹² *Id.* at 2601.

¹¹³ *Id.*

¹¹⁴ *Id.* Marital benefits in the United States include:

[T]axation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision-making

that excluding same-sex couples from the opportunity to receive any of these benefits “demeans gays and lesbians [and] lock[s] them out of a central institution of the Nation’s society.”¹¹⁵ With these benefits in mind, the Court declared that the continued prohibition of same-sex marriage was inconsistent with the tenants of the Constitution: “Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.”¹¹⁶

Additionally, the Court also reasoned that denying same-sex couples their fundamental right to marry violated the Equal Protection Clause of the Fourteenth Amendment.¹¹⁷ Quite simply, the Court opined that marriage laws that deny same-sex couples the ability to marry, while affording opposite-sex couples that ability, are unequal and, thus, unconstitutional.¹¹⁸ Therefore, the Court held that the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment prohibited any law that deprived same-sex couples of their inherent right to marry.¹¹⁹

C. Adoption v. Marriage—Why the need to get Hitched?

Since adult adoption affords same-sex couples vast legal benefits,¹²⁰ one may ask why couples would trouble themselves with the hassle of the adoption revocation process to simply marry.¹²¹ While there is considerable overlap between the benefits offered by adoption and marriage,¹²² the motivations to revoke an adult adoption and subsequently marry include significant economic and legal benefits unique to marriage. And, perhaps, the most important motivation to marry is psychological

authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules.

Id.

¹¹⁵ *Id.* at 2602.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2604.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2604–05.

¹²⁰ See Snodgrass, *supra* note 14, at 75–76 (noting that same-sex couples also had the option to use wills, insurance policies, partnership agreements, and durable powers of attorney to establish some legally recognized rights, but “adoption [was] the only solution that [created] a bona fide family relationship”).

¹²¹ In many states, adoption is irrevocable. See *e.g.*, 17 WEST’S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017).

¹²² Buchanan, No. 2015 DRB 4111, 2016 WL 2755848, at *1 (D.C. Super. Ct. Mar. 18, 2016) (implying that comparable hospital visitation rights and inheritance rights are bestowed by both adoption and marriage).

and stems from securing the status of a married individual—a status that has eluded same-sex couples for decades.¹²³

As *Obergefell* noted, there are numerous economic benefits to marriage¹²⁴ (many of which differ or are more advantageous than adoption benefits). In fact, laws benefiting married individuals “permeate nearly every field of social regulation in this country—taxation . . . social welfare, inheritance, adoption, and on and on.”¹²⁵ Of the hundreds of federal financial marital benefits, the social security system is arguably the most valuable because it provides spousal benefits for retirement, disability, and survivorship.¹²⁶ For example, most married couples, and even some divorced couples, “have the option to claim either their own Social Security benefits or spousal benefits under their spouse’s earnings.”¹²⁷ This benefit can result in sizable monetary benefits if one spouse earned significantly less than the other or did not pay into Social Security for a prolonged period.¹²⁸ These options are simply not available to adult adoptees since the Social Security Administration places significant restrictions on an adoptee’s ability to collect benefits.¹²⁹

Moreover, federal and state tax and inheritance laws often provide significant benefits to married individuals. Marriage, unlike adoption, allows individuals to file joint tax returns and escape gift and estate taxes.¹³⁰ In fact, the new federal tax law may privilege married individuals more than ever before.¹³¹ For instance, in the 2017 tax year, married couples faced a possible tax penalty for filing jointly if their individual incomes were at or

¹²³ See KATHLEEN E. HULL, *SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW* xiii (2006) (noting that during the 1970s same-sex couples throughout the nation unsuccessfully sought marriage rights).

¹²⁴ *Obergefell*, 135 S. Ct. at 2601.

¹²⁵ David L. Chambers, *What if? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 447 (1996).

¹²⁶ See Beth Braverman, *The Financial Benefits of Marriage*, CONSUMER REP. (last updated Feb. 8, 2018), <https://www.consumerreports.org/marriage/financial-benefits-of-marriage/> [<http://perma.cc/B6NZ-B936>]; M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 DRAKE L. REV. 1081, 1092 (2010).

¹²⁷ Braverman, *supra* note 126; *Benefits for your spouse*, SOC. SECURITY ADMIN., <https://www.ssa.gov/planners/retire/applying6.html> [<http://perma.cc/NV4G-FXB7>].

¹²⁸ *Benefits for your spouse*, *supra* note 127.

¹²⁹ *Can children and students get Social Security benefits?*, SOC. SECURITY ADMIN. (last updated July 2, 2018), <https://faq.ssa.gov/en-US/Topic/article/KA-02053> [<http://perma.cc/H26K-L4PS>] (noting that adopted children may receive their parents social security benefits only if they are unmarried and are either minors or adults with a disability that begin before they were twenty-two years old).

¹³⁰ HULL, *supra* note 123, at 119.

¹³¹ *Cf.* Braverman, *supra* note 126 (discussing that, while the new tax law benefits married individuals, it severely limits married individuals’ ability to take sizable itemized deductions, capping them at \$10,000).

exceeded \$80,000.¹³² But that penalty will largely disappear in the 2018 tax year.¹³³ Under the new tax law, “only households with a combined income of \$600,000 or more will pay a tax penalty for getting hitched.”¹³⁴ Clearly, adult adoption does not provide a comparable benefit.¹³⁵ Furthermore, while both adult adoption and marriage provide some level of inheritance rights, marriage provides more secure inheritance rights. Case in point, if the adopter in a same-sex adult adoption marries another person, then the adoptee would not automatically inherit from the intestate adopter. In that situation, marriage trumps adoption. Marriage would allow the surviving spouse to collect the entirety of adopter’s estate, leaving the adoptee with nothing.¹³⁶ Further, an adoptee child’s inheritance rights can generally be terminated by excluding them from a will, whereas, in some states a spouse is *guaranteed* a share of their partner’s estate.¹³⁷

Intrinsically tied to its financial benefits, marriage, unlike adoption, provides a formal legal exit strategy—divorce.¹³⁸ State and federal laws provide married individuals seeking marriage dissolution with rules and guidelines concerning property distribution, alimony, and child support.¹³⁹ These guidelines are a far cry from the overwhelming grey-area that surrounds adult adoption revocation. In fact, unlike the clear legal procedure available to dissolve a marriage, there is no universal mechanism to annul an adult adoption.¹⁴⁰ Thus, when a relationship ends, married individuals have defined legal procedures to follow, whereas, adopted same-sex couples only have uncertainty. In short, instead of grappling with the finality of adoption and the immense time and money associated with seeking adoption revocation,

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ In fact, with the elimination of the personal exemption from federal income tax, there is arguably less of a financial incentive to adopt, as the adopter can no longer take the adoptee’s personal exemption. I make this point fully knowing that most adult adoptees would not be considered a dependent; thus historically, the adopter would likely not be able to take a personal exemption for the adult adoptee. However, arguably, some same-sex adult adoptees have been claimed as a dependent by the adopter for federal income tax purposes.

¹³⁶ This situation presumes that the adopter died intestate.

¹³⁷ See HULL, *supra* note 123, at 119. For example, Oklahoma, Louisiana, and Puerto Rico have “forced heir” statutes that prohibit spousal disinheritance. 95 C.J.S. § 80 (2018). Whereas, Vermont, Florida, Pennsylvania, and Washington have statutes that prohibit the testator from depriving the surviving spouse of a certain share of the estate, unless the surviving spouse consents or waives their right to the share. *Id.*

¹³⁸ Mileto, *supra* note 33, at 293.

¹³⁹ See EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY 13 (2004).

¹⁴⁰ Mileto, *supra* note 33, at 303–04.

“marriage even makes separation and divorce more streamlined by allowing access to legal and financial guidelines.”¹⁴¹

While certainly not as significant as the benefits discussed above, another marital benefit is spousal evidentiary privilege.¹⁴² Both federal and state law shield married couples from testifying against each other in certain legal proceedings and deem marital communications confidential.¹⁴³ Such an evidentiary privilege simply does not extend to the parent-child relationship. This benefit, while arguably not as important or heavily utilized as tax or inheritance benefits, illustrates the importance of marriage in American society. Namely, all of these benefits, including the evidentiary privilege, were created by the government to “protect and foster [the] emotional attachments” between *only* one sect of American society—married individuals. No other relationship is given such sweeping protection and privilege under the law.

Americans’ reverence for the institution of marriage leads to the most significant motivation behind same-sex couples’ desire to annul their adoption and marry: Securing the label of “married.” Same-sex couples fought for decades to secure this label because the word itself “carries prestige [and] status” in American culture.¹⁴⁴ As *Obergefell* eloquently stated, marriage “[promises] nobility and dignity to *all* persons, without regard to their station in life.”¹⁴⁵ Thus, faced with an opportunity to marry—an opportunity that most same-sex couples never thought would come—it seems natural that individuals like Mr. Esposito and Mr. Bosee would fervently desire to revoke their adoptions and exercise their constitutional right to marry.

¹⁴¹ *Id.* at 293.

¹⁴² Other minor marital benefits include the ability to recover damages in tort for actions committed against a spouse. See HULL, *supra* note 123, at 119. Married individuals have the right to recover economic losses in wrongful death cases involving their spouse and also have the opportunity to seek loss of consortium resulting from the death or injury of their spouse. See 2 AM. LAW OF TORTS § 8.22 (2018) (defining consortium as encompassing the financial support and services rendered by spouses, including the intangible elements of “affection, society, companionship, and sexual relations”) (internal citations omitted). However, it should be noted that adoption has comparable benefits. See Snodgrass, *supra* note 14, at 82–83. Adoption allows the adopter or adoptee to recover damages in torts for actions committed against the adoptee or adopter, respectively. *Id.* Adoption also allows the adoptee to seek loss of parental consortium, however such action is not as widely recognized or accepted as loss of spousal consortium. See *Can children claim loss of consortium for a parent’s injury, or vice versa?* ROTTENSTEIN LAW GROUP LLP, <http://www.rotlaw.com/legal-library/can-children-claim-loss-of-consortium-for-a-parents-injury-or-vice-versa/> [<http://perma.cc/GZU5-2EEX>].

¹⁴³ WOLFSON, *supra* note 139, at 14.

¹⁴⁴ Mileto, *supra* note 33, at 293.

¹⁴⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (emphasis added).

With the legalization of same-sex marriage, Mr. Esposito and Mr. Bosee and other same-sex couples can legally transition from a parent-child relationship to a spousal partnership. Such a change, legally and psychologically, allows their relationship and other same-sex relationships to be celebrated with the same legitimacy as heterosexual marriages. In sum, adult adoption, while a viable option, never provided an adequate definition for the relationship between same-sex couples.¹⁴⁶ Now same-sex couples have the opportunity to take part in a legal and social institution that truly reflects their intimate union. As *Obergefell* noted, “[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.”¹⁴⁷ Now the question is how to efficiently facilitate the marriage of these adopted same-sex couples.

III. THE PROBLEM: APPLYING *OBERGEFELL* TO EXISTING SAME-SEX ADULT ADOPTIONS

While the Court in *Obergefell* opened the door for approximately ten million Americans to marry,¹⁴⁸ it also created the very predicament that Mr. Esposito, Mr. Bosee, and other same-sex couples now face. By legalizing same-sex marriage, the Court eliminated the motivations behind same-sex adult adoption and also indirectly highlighted an inherent flaw of adult adoption: Irrevocability.¹⁴⁹ While the Court strived to allow *all* individuals to marry, its holding cannot be fully achieved because adult adoption cannot easily be revoked in most states. In fact, the Court in *Obergefell*, unknowingly, created a new legal hurdle for some same-sex couples.

Unlike marriage, which can be legally terminated through divorce, “divorcing” an adult adoptee is an unsettled legal matter.¹⁵⁰ Generally, adult adoptions are irrevocable, but may be revoked under “narrow circumstances, or [if] the statute provides for it.”¹⁵¹ Thus, given adoption’s general irrevocability, adopted same-sex couples face an utter lack of legal mechanisms or procedures when attempting to revoke their adoptions. In fact, many states lack any statutory reference to adult adoption

¹⁴⁶ Zimmer, *supra* note 70, at 691.

¹⁴⁷ *Obergefell*, 135 S. Ct. at 2608.

¹⁴⁸ Gary Gates, *In U.S. More Adults Identifying as LGBT*, GALLUP (Jan 11, 2017), <http://news.gallup.com/poll/201731/lgbt-identification-rises.aspx> [<http://perma.cc/5856-S3BW>] (finding that 4.1% of the American population, roughly 10 million people, identifies as LGBT [Lesbian, Gay, Bisexual, and Transgender]).

¹⁴⁹ See Richard C. Ausness, *Planned Parenthood: Adult Adoption and the Right of Adoptees to Inherit*, 41 ACTEC L.J. 241, 246 (2016).

¹⁵⁰ Mileto, *supra* note 33, at 301.

¹⁵¹ Fowler, *supra* note 16, at 706.

revocation.¹⁵² The remainder of this Part discusses multiple cases where same-sex couples that adopted each other pre-*Obergefell* confront the utterly inefficient adult adoption revocation process.

A. The District of Columbia: *Buchanan*¹⁵³

In 2002, Donald Ray Buchanan and Thomas Ainora entered into an adult adoption to secure legal protections and rights since they were unable to marry.¹⁵⁴ However, with the legalization of same-sex marriage in 2015, the couple, who had been together for over thirty years, filed a petition to terminate their adoption so they could marry.¹⁵⁵

On February 19, 2016, the Superior Court of the District of Columbia granted Mr. Buchanan and Mr. Ainora's Consent Petition for Termination of Parental Rights.¹⁵⁶ While not expressly granted or prohibited by statute, the court found it had the equitable authority to terminate Mr. Ainora's parental rights to Mr. Buchanan.¹⁵⁷ In utilizing its equitable authority, the court was mindful that this situation was atypical: "Mr. Buchanan [was] not a 'child' who must be placed with a family, but rather [was] a sixty-seven year old" who fully consented to both entering into and, subsequently, terminating the parent-child relationship.¹⁵⁸ Furthermore, the court reasoned that terminating the adoption was in the best interest of the adoptee, Mr. Buchanan, because:

Mr. Buchanan's physical, mental, and emotional health will only be enriched upon termination, as he will finally be able to marry his partner of over three decades and receive the societal and personal recognition and protection associated with such. . . . Mr. Buchanan's relationship with Mr. Ainora will only be strengthened if they are allowed to marry, and the romantic and loving nature of their relationship will finally be accurately reflected in their legal statuses.¹⁵⁹

The court also opined that terminating the adoption was not only in the best interest of Mr. Buchanan, but was also in the best interest of Mr. Ainora, as it would allow both individuals to enjoy the "plethora of legal, financial, and personal benefits of marriage."¹⁶⁰

At the heart of the court's decision was dignity.¹⁶¹ The court desired to bestow upon the couple the dignity and freedom to

¹⁵² See 17 WEST'S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017).

¹⁵³ *Buchanan*, No. 2015 DRB 4111, 2016 WL 2755848 (D.C. Super. Ct. Mar. 18, 2016).

¹⁵⁴ *Id.* at *1.

¹⁵⁵ *Id.* at *1–2.

¹⁵⁶ *Id.* at *9.

¹⁵⁷ *Id.* at *3.

¹⁵⁸ *Id.* at *4.

¹⁵⁹ *Id.* at *6.

¹⁶⁰ *Id.*

¹⁶¹ See *id.* at *7.

marry after three decades together.¹⁶² Recognizing that the law now allows for same-sex marriage, the court found it illogical to keep this couple in a legal paradigm that inaccurately reflected their relationship when a more appropriate legal relationship was available.¹⁶³

B. Delaware: *In re the Adoption of C.A.H.W.*¹⁶⁴

Strikingly similar to the facts of *Buchanan*,¹⁶⁵ H.M.A. adopted her partner, C.A.H.W, to secure significant financial benefits and legally formalize their romantic relationship.¹⁶⁶ The adoption was granted by the Family Court of Delaware on July 17, 1995.¹⁶⁷ By 2013, the parties had been together for thirty-three years.¹⁶⁸

On October 16, 2012, H.M.A. motioned to vacate the couple's adoption in order to enter into a civil union.¹⁶⁹ H.M.A. and C.A.H.W. both consented to the adoption annulment.¹⁷⁰ They contended that a civil union would be "a more appropriate way to recognize the strong emotional bond between the parties."¹⁷¹ Such a legal option, however, was not available to the couple at the time of their 1995 adoption.¹⁷² Thus, H.M.A. sought to annul the adoption under Family Court Civil Rule 60(b)(5), arguing that the adoption was no longer equitable, and under Family Court Civil Rule 60(b)(6), arguing that it was in the interest of justice to annul the adoption.¹⁷³

In determining that the adoption was no longer equitable *and* that an adoption annulment was in the interest of justice, the court focused on the scarce legal options available to the couple in 1995.¹⁷⁴ "At that time in Delaware, adult adoption was essentially the parties' only available legal option to formalize their close relationship and their financial rights and responsibilities toward

¹⁶² *Id.*

¹⁶³ *Id.* ("Fortunately, the law no longer prevents Mr. Buchanan and Mr. Ainora from legally marrying and they, and other same sex couples, no longer have to resort to actions such as an adoption to gain a few basic legal rights accorded to married couples.").

¹⁶⁴ *In re the Adoption of C.A.H.W.*, No. 95-05-03-A, 2013 WL 1748618 (Fam. Ct. Del. Mar. 28, 2013).

¹⁶⁵ *See supra* notes 154–155 and accompanying text.

¹⁶⁶ *Adoption of C.A.H.W.*, at *1.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* ("On March 22, 2011, the Delaware legislature passed a bill allowing same-sex couples to enter into civil unions with all the rights and responsibilities of marriage under Delaware law.").

¹⁷³ *Id.*

¹⁷⁴ *Id.* at *2.

one another.”¹⁷⁵ Yet, now, the law has changed and provides more appropriate legal avenues for same-sex couples through the civil union statute.¹⁷⁶ But, as the court recognized, by virtue of their adoption, H.M.A. and C.A.H.W. might be ineligible to enter into a civil union since they were legally parent and child.¹⁷⁷ Thus, since the law in Delaware now allowed same-sex couples to enter civil unions and reap the same benefits as married couples, the court found that it was in the interest of justice to vacate the adoption and allow H.M.A and C.A.H.W the opportunity to seek a civil union.¹⁷⁸

C. Pennsylvania: *In re Adoption of R.A.B., Jr.*¹⁷⁹

Mirroring the facts of both *Buchanan* and *In re the Adoption of C.A.H.W.*, N.M.E (Mr. Nino Esposito) adopted his same-sex partner R.A.B., Jr. (Mr. Drew Bosee) on April 20, 2012.¹⁸⁰ The adoption stemmed from the couple’s desire to become a cognizable family unit and secure inheritance and financial benefits.¹⁸¹ By 2015, the couple had been together for over forty years.¹⁸²

With the legalization of same-sex marriage in Pennsylvania in 2014 and nationwide in 2015, the couple fervently desired to marry.¹⁸³ However, given their existing parent-child relationship, marriage was prohibited.¹⁸⁴ Thus, on March 23, 2015, the couple filed a petition with the Orphan’s Court to annul their adoption.¹⁸⁵ The petition included an affidavit of Mr. Bosee’s consent to the adoption annulment.¹⁸⁶ Yet, even with both parties consent to the adoption revocation, the petition was denied.¹⁸⁷ The lower court reasoned that state law barred the adoption revocation.¹⁸⁸ On appeal, Mr. Esposito focused on two issues: (1) whether the denial of their adoption revocation petition violated the Fourteenth Amendment of the

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Under Delaware law, “[a] civil union is prohibited and void between a person and his or her ancestor, descendant, brother, sister, half-brother, half-sister, uncle, aunt, niece, nephew[,] or first cousin.” *Id.* Thus, H.M.A. and C.A.H.W., legally considered ancestors and descendants, were not eligible to enter into a civil union. *See id.*

¹⁷⁸ *Id.*

¹⁷⁹ *In re Adoption of R.A.B.*, 153 A.3d 332, 333 (Pa. Super Ct. 2016).

¹⁸⁰ *See id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 333, 335.

¹⁸⁴ *Id.* at 333.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* (“There is no specific statute in Pennsylvania relating to the revocation of decrees of adoption nor does our present adoption statute contain any provisions therefor.”) (internal citation omitted); *see also* Schapiro, *supra* note *, 17 WEST’S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017) (stating that adoption revocation in Pennsylvania has historically only been permitted in rare circumstances).

United States Constitution, and (2) whether the Orphan's Court abused its discretion by failing to consider the best interest of the adoptee, Mr. Bosee.¹⁸⁹

The Superior Court reversed and remanded.¹⁹⁰ In coming to its determination, the Superior Court recognized that at the time “adult adoption was [the couple’s] only option to become a family, as they were prohibited from marrying by an unconstitutional statute.”¹⁹¹ However, times have changed.¹⁹² The court referenced *Whitewood*,¹⁹³ which legalized same-sex marriage in Pennsylvania, and *Obergefell*,¹⁹⁴ which not only legalized same-sex marriage on a national level but also held that state laws are “invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”¹⁹⁵ In light of this precedent, the court reasoned that denying the adoption annulment “frustrated the couple’s ability to marry,” which was in directly conflicted with *Whitewood*’s and *Obergefell*’s holdings.¹⁹⁶ Thus, the court expressly gave the Orphan’s Court the authority to annul same-sex adult adoptions, allowing same-sex partners to exercise their constitutional right to marry.¹⁹⁷

D. The Problem: Sifting through a Sea of Court-Issued Adoption Revocations

Since all of the aforementioned cases eventually permitted the annulment of same-sex adult adoptions, it may be argued that no true problem exists. Same-sex couples, often in their mid-sixties, should wait for a court’s case-by-case determination. While this is a possible option, the issue comes down to efficiency. The courts that have revoked same-sex adult adoptions did not provide guidelines for courts or couples to effectively address same-sex adult adoption revocation and merely stated that courts have the *authority* to revoke these adoptions. Thus, without clear statutory guidelines, these couples have waited and will continue to wait in this legal limbo-land for far too long.¹⁹⁸

¹⁸⁹ *Adoption of R.A.B.*, 153 A.3d at 333.

¹⁹⁰ *Id.* at 336.

¹⁹¹ *Id.* at 334.

¹⁹² *Id.* at 335.

¹⁹³ *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014).

¹⁹⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹⁹⁵ *Id.* at 2605.

¹⁹⁶ *Adoption of R.A.B.*, 153 A.3d at 336.

¹⁹⁷ *Id.*

¹⁹⁸ See Buchanan, No. 2015 DRB 4111, 2016 WL 2755848 (D.C. Super. Ct. Mar. 18, 2016) (taking over a year to terminate parental rights); *In re the Adoption of C.A.H.W.*, No. 95-05-03-A, 2013 WL 1748618 (Fam. Ct. Del. Mar. 28, 2013) (requiring over a year to annul the adoption and enter a civil union); *Adoption of R.A.B.*, 153 A.3d at 332 (failing to secure adoption revocation after multiple years).

However, all of the aforementioned cases touch on a vital component of the solution: Consent. In each of the aforementioned cases, both parties—the adopter and the adoptee—consented to the adoption annulment. This commonality is significant because it harkens back to the purpose of adoption—protecting the adoptee.¹⁹⁹ Thus, a comprehensive solution must both streamline the adoption revocation process and ensure that consent is duly given, especially by the adoptee.

IV. THE SOLUTION: AMENDING CURRENT ADULT ADOPTION CODES

Not recognized at common law, adoption, including adult adoption, is the product of state-specific statutory provisions.²⁰⁰ Although created by statute, a great number of states have no statutory provisions addressing adult adoption revocations.²⁰¹ Since adoption was created by statute, any solution to the legal limbo-land trapping Mr. Esposito, Mr. Bosee, and other same-sex couples must be statutory in nature. Thus, states are urged to amend their adoption codes by enacting statutory language that requires the consent of both parties and allows for the swift annulment of same-sex adult adoptions.

This Part compares current state adoption codes, breaking states into three distinct groups based on their respective statutory language. Further, it advocates for all states to model California's Family Code when creating a statutory adult adoption revocation process. Moreover, this Part also discusses how California's statutory language can be improved to allow for the swift annulment of same-sex adult adoptions.

A. States and Same-Sex Couples need Statutory Guidance to Efficiently Annul Adoptions

States need to provide comprehensive statutory requirements to streamline same-sex adult adoption revocation. Currently, both same-sex couples and lower courts have no statutory guidance to effectuate adult adoption revocation.²⁰² Same-sex couples, like Mr. Esposito and Mr. Bosee, have no clear guidance when seeking an adoption revocation because the majority of states lack a statutory revocation process. These couples can only file a petition, sign an affidavit, and say a prayer.

¹⁹⁹ McCabe, *supra* note 13, at 304.

²⁰⁰ *Id.* at 302.

²⁰¹ See 17 WEST'S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017); *but see* CAL. FAM. CODE § 9340 (1993).

²⁰² The one exception to this is California's Family Code, which provides fairly comprehensive revocation requirements. See CAL. FAM. CODE § 9340 (1993).

1. Outline of Current Statutory Language

Currently, most states' adoption codes do not address adoption revocation, but instead only highlight the absolute permanency of adult adoption. Some states even uphold the finality of adult adoption despite the presence of fraud.²⁰³ In fact, only twenty states have statutory language addressing adult adoption revocation.²⁰⁴ Of these states, most only provide a limited timeframe, such as six months or a year, to seek adult adoption revocation²⁰⁵ and only *one* state fully addresses adult adoption revocation by providing statutory guidelines for the revocation process.²⁰⁶ This section analyzes the current statutory language concerning adult adoption revocation starting with the states discussed in Part III. It then analyzes the remaining states' statutory language, breaking the states into three distinct groups.

a. Analysis of the District of Columbia's, Delaware's, and Pennsylvania's Respective Adoption Codes

The states²⁰⁷ discussed in Part III, the District of Columbia, Delaware, and Pennsylvania, all lack comprehensive statutory guidelines for adult adoption revocation. In fact, of the three, the District of Columbia is the only one to provide any statutory revocation period. Each of the three states' adoption codes are discussed in turn.

The District of Columbia's code states, "An attempt to invalidate a final decree of adoption by reason of a jurisdictional or procedural defect may not be received by any court of the District, unless regularly filed with the court within one year following the date the final decree became effective."²⁰⁸ By providing such limited grounds for revocation (only jurisdictional or procedural defect) within such a small timeframe (only one year), the District of Columbia's Code indirectly highlights the irrevocability of adoption. Beyond the narrow situation set forth in the statute, the adopter and the adoptee's legal relationship is set in stone.

Delaware's statutory language, which expressly allows for adult adoption, directly illustrates the permanency of

²⁰³ ARK. CODE ANN. § 9-9-216 (2018).

²⁰⁴ *See, e.g.*, CAL. FAM. CODE § 9340 (1993); ARK. CODE ANN. § 9-9-216 (2018); IND. CODE § 31-19-14-2; D.C. CODE § 16-309 (2010).

²⁰⁵ *See, e.g.*, N.H. REV. STAT. § 170-B:21 (2018).

²⁰⁶ *See* CAL. FAM. CODE § 9340 (1993).

²⁰⁷ As previously noted, for the purposes of this Article, unless otherwise indicated, "states" includes all fifty states and the District of Columbia.

²⁰⁸ D.C. CODE § 16-309 (2010).

adoption—perhaps even more forcefully than the District of Columbia. Delaware’s Code declares:

Upon the issuance of the decree of adoption and *forever* thereafter, all the duties, rights, privileges and obligations recognized by law between parent and child shall exist between the petitioner or petitioners and the person or persons adopted, as fully and to all intents and purposes as if such person or persons were the lawful and natural offspring or issue of the petitioner or petitioners.²⁰⁹

Thus, Delaware’s statutory language spells out the conundrum that same-sex couples seeking adoption revocation face—in the eyes of the law they are *forever* legally recognized as parent and child.

Lastly, as evidenced in *In re Adoption of R.A.B.*,²¹⁰ Pennsylvania does not contain any statutory language addressing adult adoption revocation or even discussing the finality of adult adoption. Pennsylvania’s statutory language merely states: “Any individual may be adopted, regardless of his age or residence.”²¹¹ However, case law precedent implies that Pennsylvania, like the District of Columbia and Delaware, also views adult adoptions as irrevocable.²¹² Pennsylvania only grants adoption revocation in rare circumstances, such as when there is clear and convincing evidence of fraud.²¹³

Thus, there is no statutory framework to revoke an adult adoption under the laws of any of these three states. Of the three, the District of Columbia at least provides a one-year grace period when it comes to procedural and jurisdictional claims, whereas, Pennsylvania does not even contain a statutory provision about the permanency or revocability of adult adoption.²¹⁴ Such a complete lack of statutory guidance creates problems for same-sex couples seeking adoption revocation *and* challenges for courts attempting to justify adoption revocations.

b. Analysis of the Remaining States’ Adoption Codes

After analyzing the adult adoption statutes of all the states,²¹⁵ three groups emerge: (1) states that outline the extreme finality of adult adoption and fail to mention adult adoption revocation, (2) states that provide a very narrow revocation window,

²⁰⁹ 13 DEL. CODE § 954 (1953) (emphasis added).

²¹⁰ 153 A.3d 332, 333 (Pa. Super Ct. 2016).

²¹¹ PA. STAT. § 2311 (1981).

²¹² See 17 WEST’S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017).

²¹³ *Id.*

²¹⁴ Delaware may also include a six-month window for adoption revocation. See 13 DEL. CODE § 918 (2001). However, it is not clear if this window extends to the adoption of adults or just the adoption of children. *Id.*

²¹⁵ (Or lack thereof.)

and (3) states that provide a comprehensive statutory adult adoption revocation process.

States in group one stress the irrevocable nature of adult adoption.²¹⁶ For example, Delaware’s adoption code states that adoption establishes an *eternal* parent-child relationship.²¹⁷ Similarly, Alaska’s adoption code declares that adoption terminates “all legal relationships between the adopted person and the natural parents and other relatives of the adopted person, so that the adopted person *thereafter is a stranger to the former relatives for all purposes . . .*”²¹⁸ Florida’s adoption code parallels Alaska’s code and also labels the adoptee a “stranger” to his or her natural relatives.²¹⁹ Further, Arizona’s statutory language states that upon the entry of the adoption decree, the adoptee’s relationship with his or her natural parents “is *completely severed* and all legal rights, privileges, duties, and obligations and other legal consequences of the relationship cease to exist . . .”²²⁰ Such language emphasizes the absolute finality of adoption. In fact, all of the states in group one exclude any statutory window for adult adoption revocation, therefore leaving adopted same-sex couples eternally cemented in their parent-child relationship.

States in group two include those that provide a narrow timeframe for adult adoption revocation.²²¹ For example, the District of Columbia’s Code, discussed above, only provides a one-year period to challenge an adoption decree.²²² And such a challenge must be based on a procedural or jurisdictional defect.²²³ Further, Arkansas’ adoption code provides a limited

²¹⁶ The states in group one include: Alaska, Arizona, Delaware, Florida, Hawaii, Illinois, Kansas, and Mississippi, Montana, New York, Tennessee, and Texas. *See, e.g.*, ALASKA STAT. § 25.23.130 (1974); ARIZ. REV. STAT. § 8-117 (1970); 13 DEL. CODE § 945 (1953); FLA. STAT. ANN. § 63.172 (West 2002); MISS. CODE ANN. § 93-17-17 (1955); MON. CODE ANN. § 42-1-109 (2017); N.Y. CODE ANN. § 117 (2002); TENN. CODE ANN. § 36-1-122 (2014); VERNON’S TEX. STAT. & CODES ANN. FAM. CODE § 162.507 (Sept. 1, 2005). Note, Alabama, Idaho, Ohio, South Carolina, Utah, Wyoming, and Virginia were not included in this Article because the aforementioned states either do not allow for adult adoption (Idaho, Wyoming, and South Carolina) or have such specific adult adoption criteria that same-sex adult adoption is essentially prohibited (Alabama, Ohio, Utah, and Virginia). *See* CHILD WELFARE INFORMATION GATEWAY, *supra* note 34.

²¹⁷ 13 DEL. CODE § 945 (1953).

²¹⁸ ALASKA STAT. § 25.23.130 (1974) (emphasis added).

²¹⁹ FLA. STAT. ANN. § 63.172 (West 2002).

²²⁰ ARIZ. REV. STAT. § 8-117 (1970) (emphasis added).

²²¹ The states in group two are Arkansas, Colorado, the District of Columbia, Georgia, Indiana, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Vermont, Washington, and West Virginia. *See, e.g.*, D.C. CODE § 16-309 (2010); ARK. CODE ANN. § 9-9-216 (1977); N.H. REV. STAT. § 170-B:21 (2018); N.D. CENT. CODE ANN. § 14-15-15 (2003); 52 MINN. STAT. ANN. § 47.02 (2007).

²²² D.C. CODE § 16-309 (2010).

²²³ *Id.*

timeframe for adult adoption revocation and also highlights the utter finality of adoption. It states that “upon the expiration of one (1) year after an adoption decree is issued, the decree cannot be questioned by any person including the petitioner [the individual that sought the adoption], in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter”²²⁴ Arkansas’ statutory language spells out the serious problem facing some same-sex couples—that even in the presence of fraud or a complete lack of notice, the legal relationship of parent-child remains. Similarly, Oklahoma’s adoption code states that “[n]o adoption may be challenged on any ground either by a direct or collateral attack more than three (3) months after the entry of the final adoption decree regardless of whether the decree is void or voidable”²²⁵ Thus, similar to Arkansas’ statutory language, Oklahoma’s statutory language allows the parent-child relationship to remain *even if* the decree is void.²²⁶ Other states, like Colorado²²⁷ and Minnesota,²²⁸ also provide a limited timeframe to challenge and revoke adult adoptions.

Still included in group two are states that provide a unique, yet limited, window for adult adoption revocation. For example, North Carolina provides a very specific window for adult adoption revocation. Its statutory language states that “[a] parent or guardian whose consent or relinquishment was obtained by fraud or duress may, within six months of the time the fraud or duress is or ought reasonably to have been discovered, move to have the decree of adoption set aside and the consent declared void.”²²⁹ Similarly, Indiana’s adoption only allows a natural parent to challenge an adoption decree within six months after entry of the adoption decree or within one year after the adoptive parent’s obtain custody.²³⁰

²²⁴ ARK. CODE ANN. § 9-9-216 (1977); *see also* N.H. REV. STAT. § 170-B:21 (2018) (containing the exact same statutory language as Arkansas); N.D. CENT. CODE ANN. § 14-15-15 (2003) (containing the exact same statutory language as Arkansas).

²²⁵ OKLA. STAT. ANN. § 7505-7.2 (1998).

²²⁶ *Id.*

²²⁷ COLO. REV. STAT. ANN. § 19-5-214 (2012) (allowing for procedural or jurisdictional attacks within ninety-one days after entry of the adoption decree and allowing adoption revocation *at anytime* if there is clear and convincing evidence that such revocation is in the best interest of the adoptee).

²²⁸ 52 MINN. STAT. ANN. § 47.02 (2007) (allowing an adoption to be revoked within ninety days after entry of the adoption decree upon a showing of “(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; (3) fraud (whether denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; or (5) any other reason justifying relief from the operation of the order”).

²²⁹ N.C. GEN. STAT. ANN. § 48-2-607 (2000).

²³⁰ IND. CODE § 31-19-14-2 (1997).

Unlike most of the other states in group two, North Carolina and Indiana not only limit the revocation timeframe but also limit the individual allowed to revoke the adoption.

Maine, another state in group two, provides a much broader scope for revocation. Maine's adoption code allows a judge "on petition of [two] or more persons and after notice and hearing, [to] reverse and annul a decree of the Probate Court" if the judge finds the adoption was "obtained as a result of fraud, duress or illegal procedures," or if there is good cause to reverse the adoption.²³¹ Maine's broad statutory language provides for fairly expansive adult adoption revocation. In fact, theoretically, courts in Maine would be able to annul same-sex adult adoptions because there is "good cause" (i.e., constitutional grounds) to revoke the adoptions and allow these couples to marry.²³² However, Maine's statutory language still has a significant flaw—it fails to outline a clear revocation *process*.

Conversely, California, the only state in group three, provides a clear statutory framework for the adult adoption revocation process. California's Family Code even includes a section dedicated to adult adoption revocation.²³³ California's statutory guidelines highlight the significant flaw in all other statutory provisions—the utter lack of a comprehensive procedure to revoke adult adoptions.²³⁴ Unlike other states where adult adoption revocation may not be possible even in the presence of fraud, California provides clear procedures to efficiently revoke same-sex adult adoption.²³⁵

2. California's Adoption Provisions—Providing a Clear and Comprehensive Adult Adoption Revocation Process

California's Family Code states:

- (a) Any person who has been adopted under this part [i.e., the adult adoptee] may, upon written notice to the adoptive parent, file a petition to terminate the relationship of parent and child. The petition shall state the name and address of the petitioner, the name and

²³¹ ME. REV. STAT. ANN. § 9-315 (1997).

²³² *Id.*

²³³ See generally CAL. FAM. CODE § 9340 (1993). Within California's Family Code, Division 13 "Adoption" includes Part 3 "Adoption of Adults and married Minors" which includes Chapter 3 "Procedure for Terminating Adult Adoption." See *id.*

²³⁴ California not only allows for the revocation of adult adoption but details what an adoptee must include in his or her petition to terminate (i.e., the name and address of the petitioner, the name and address of the adoptive parent, the date and place of the adoption, and the circumstances upon which the petition is based). *Id.* Further, if the adopter consents to the termination then the court may immediately terminate the parent-child relationship. *Id.*

²³⁵ As outlined below, California even includes a procedure if the adopter does not consent to the adoption revocation. See *id.*

address of the adoptive parent, the date and place of the adoption, and the circumstances upon which the petition is based.

(b) If the adoptive parent consents in writing to the termination, an order terminating the relationship of parent and child may be issued by the court without further notice.

(c) If the adoptive parent does not consent in writing to the termination, a written response shall be filed within 30 days of the date of mailing of the notice, and the matter shall be set for hearing. The court may require an investigation by the county probation officer or the department.²³⁶

Instead of limiting adult adoption revocation to a narrow and specific timeframe,²³⁷ California allows for expansive revocation and efficiently allows adult adoptees to terminate the legal parent-child relationship. The beauty and efficiency of California's process is evident in subsections (a) and (b). Subsection (a) removes any mystery concerning the requirements for adult adoption revocation because it simply lists what is needed. Furthermore, subsection (b) highlights the efficiency of the procedure—namely, once both parties consent to the revocation the court may terminate the adoption “without further notice.”²³⁸ Upon applying such statutory language to Mr. Esposito and Mr. Bosee's situation, the couple's adoption would likely have been terminated years earlier.²³⁹ Moreover, California's statutory language even provides guidelines when the adoptive parent refuses to consent.²⁴⁰

Not only does subsection (b) facilitate efficient revocation, its emphasis on consent provides a vital aspect of the adoption revocation process. Specifically, requiring the consent of *both* parties assuages concerns about the adoptee's vulnerability.²⁴¹ Instead of allowing the adopter to leave the adoptee high and dry

²³⁶ *Id.*

²³⁷ *See, e.g.*, 52 MINN. STAT. ANN. § 47.02 (2007) (allowing revocation within ninety days); ARK. CODE ANN. § 9-9-216 (2018) (providing a one-year revocation period).

²³⁸ CAL. FAM. CODE § 9340(b) (1993).

²³⁹ However, note that the adopter, Mr. Esposito, instead of the adoptee, initiated the termination proceedings, and the adoptee, Mr. Bosee, instead of the adopter, submitted an affidavit consenting to the revocation. *In re* Adoption of R.A.B., 153 A.3d 332, 333 (Pa. Super Ct. 2016).

²⁴⁰ *See* CAL. FAM. CODE § 9340(c) (1993). Arguably, the situation described in subsection (c) will likely not arise in the context of same-sex adult adoption since both partners likely desire, and will consent to, the revocation. For confirmation, see generally the couples in *In re* the Adoption of C.A.H.W., No. 95-05-03-A, 2013 WL 1748618 (Fam. Ct. Del. Mar. 28, 2013), *Adoption of R.A.B.*, 153 A.3d at 333, and *Buchanan*, No. 2015 DRB 4111, 2016 WL 2755848 (D.C. Super. Ct. Mar. 18, 2016). In each case, *both* partners desired to revoke the adoption to either marry or enter a civil union. *Adoption of C.A.H.W.*, 2013 WL 1748618; *Adoption of R.A.B.*, 153 A.3d at 333; *Buchanan*, 2016 WL 2755848.

²⁴¹ Historically, adoption's general irrevocability stems from a desire to protect the adoptee, often considered the fragile or vulnerable party. Here, consent provides adequate protection to the adoptee.

by unilaterally terminating the adoption,²⁴² subsection (b) ensures that both parties agree to the revocation. Furthermore, requiring the *adoptee* to instigate the termination process also guarantees that the adoptee is protected since he or she has to individually begin the termination process.

While California's statutory language is leaps and bounds beyond its sister states, improvements can be implemented to increase efficiency. First, an affidavit of the adopter's consent should be listed as an optional item to include in the initial petition. Including an affidavit of the adopter's consent in the petition will streamline the revocation process because all required documents, including the adopter's consent, will be submitted at one time. Furthermore, using the term "affidavit" provides a concrete example of acceptable written consent. Thus, same-sex couples seeking revocation will know at the onset exactly what is needed for revocation. Second, the statutory language should be modified to allow both the adoptee and the adopter to instigate the revocation proceedings if the adoptee is not mentally disabled.²⁴³ Allowing both parties to begin the revocation process increases efficiency. For example, let's look at Mr. Esposito and Mr. Bosee's situation. In that case, Mr. Esposito, the *adopter*, filed the petition to annul the adoption.²⁴⁴ He initiated (or attempted to initiate) the revocation process. However, even though Mr. Esposito's petition included an affidavit of Mr. Bosee's consent, the petition would have violated California's statutory language.²⁴⁵ Mr. Esposito and Mr. Bosee would have to begin the process again because the adopter, not the adoptee, initiated the proceedings. Such a redo would cost the couple precious time and money. Thus, instead of forcing an adopted same-sex couple to begin the process again, merely because the wrong partner commenced the process, both parties should be able to begin the revocation process.

This suggested change might be challenged by some since it arguably provides less protection to the adoptee. However, in adult adoptions, consent provides adequate protection.²⁴⁶ As courts and

²⁴² Remember, that even if the adoption is revoked the adoptee can never re-join the natural parents' bloodline for inheritances purposes. See Snodgrass, *supra* note 14, at 84.

²⁴³ However, if the adoptee is a mentally disabled individual then the court should not allow the adopter to unilaterally terminate the adoption. Rather, the court should apply the "best interests of the child" test when determining if revocation is appropriate. This ensures that the mentally disabled adoptee is sufficiently protected. See, e.g., COLO. REV. STAT. ANN. § 19-5-214 (2012).

²⁴⁴ *Adoption of R.A.B.*, 153 A.3d at 334.

²⁴⁵ See CAL. FAM. CODE § 9340 (1993) (limiting the commencement of the adoption revocation process to "[a]ny person who has been adopted under this part" (i.e., the adoptee)).

²⁴⁶ Again, the adopter and the adoptee should only have the right to individually begin the process if the adoptee is not mentally disabled. See *supra* note 243 and accompanying text.

scholars have noted the need to protect an adoptee is lessened in an adult adoption because of the participants' ages.²⁴⁷ Thus, by *still* requiring that the non-instigating party consent to the revocation, both the adopter and the adoptee are sufficiently protected.

B. Statutory—Not Equitable—Relief Provides the Needed Comprehensive Framework

Relying on judicial equitable relief is not sufficient to address same-sex adult adoption. In fact, it only masks the root of the issue: The statutes themselves.²⁴⁸ Without amending state adoption codes, courts will have to consider each adult adoption revocation on a case-by-case basis. Such an arbitrary and individual process keeps couples, like Mr. Esposito and Mr. Bosee, in a legal relationship that does not adequately reflect their true relationship for far too long. Thus, while relying on judicial equitable power provides a solution,²⁴⁹ its fatal flaw is its inefficiency. Instead, amending state adoption codes allows states to outline clear procedures for adoption revocation. Such a comprehensive statutory structure is necessary since many courts may face an increase in these types of adoption revocation petitions.²⁵⁰

Since “[a]doption was unknown at common law and is strictly statutory,” states are urged to amend the root of the problem—their respective adoption statutes.²⁵¹ States must amend their adoption codes to streamline same-sex adult adoption revocation and allow same-sex couples to exercise their constitutional right to marry. However, any statutory amendment must ensure that the adoptee and the adopter are protected. California’s statutory language, which provides a clear revocation process and ample protection for the participants, sets forth a comprehensive model that all states should follow.²⁵² However, states should not blindly mimic California’s statutory language. States, instead, should implement statutory language that allows both the adoptee and the adopter

²⁴⁷ McCabe, *supra* note 13, at 304; Buchanan, No. 2015 DRB 4111, 2016 WL 2755848 (D.C. Super. Ct. Mar. 18, 2016) (noting “Mr. Buchanan [was] not a ‘child’ who must be placed with a family, but rather [was] a sixty-seven year old” that consented to the adoption revocation).

²⁴⁸ *But see* Mileto, *supra* note 33, at 320–22. Note, Mileto mentions that courts should look to state adoption codes, but she does not urge states to amend those codes. *See id.* at 320–21. Instead, Mileto seems to rely only on the court’s equitable powers to revoke same-sex adult adoptions as the adequate solution. *See id.* at 321–22.

²⁴⁹ In fact, every case in this Article that has dealt with the revocation of same-sex adult adoption has found that courts have the power to annul such adoptions. *See In re the Adoption of C.A.H.W.* No. 95-05-03-A, 2013 WL 1748618 (Fam. Ct. Del. Mar. 28, 2013); *In re Adoption of R.A.B.* 153 A.3d 332, 333 (Pa. Super Ct. 2016); Buchanan, 2016 WL 2755848.

²⁵⁰ *See* 17 WEST’S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017).

²⁵¹ *Id.* § 32:1.

²⁵² *See* CAL. FAM. CODE § 9340 (1993).

to commence the revocation process, while also requiring the non-instigating party's consent to the adoption revocation. Such statutory framework ensures that same-sex couples can quickly revoke their adoption while affording adequate protection. Furthermore, consent—mandated by statute—provides adequate protection to adult adoptees who do not require a heightened level of protection like child adoptees.²⁵³

V. CONCLUSION: TRULY LIVING OUT THE TENANTS OF *OBERGEFELL*

Before the monumental case, *Obergefell v. Hodges*,²⁵⁴ same-sex couples had scarce legal options to formalize their relationship. In the face of such limited legal avenues, some same-sex couples turned to adult adoption. In fact, adult adoption was the only way to create a legal family unit, allowing couples to secure vast rights and benefits.²⁵⁵ Yet, adoption was far from a perfect legal option for same-sex couples. Instead of legally recognizing their commitment, partnership, and love, same-sex couples that adopted each other were labeled “parent and child.” In fact, before the nationwide legalization of same-sex marriage in 2015, all same-sex couples' relationships were never legally recognized or celebrated to the same extent as opposite-sex couples. But all this changed with *Obergefell*. In *Obergefell* the Supreme Court passionately declared:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. . . . It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.²⁵⁶

By recognizing same-sex couples' constitutional right to marry, *Obergefell* indirectly rendered same-sex adult adoptions obsolete. But, the Court in *Obergefell* also highlighted the intrinsic problem of adult adoption—irrevocability. Generally, adult adoption cannot be revoked. For example, even in the presence of fraud or utter invalidity, the parent-child relationship created by adoption often

²⁵³ See McCabe, *supra* note 13, at 304 (noting that “the many concerns plaguing [child adoption] are no longer prevalent once the potential adoptee is an adult”).

²⁵⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

²⁵⁵ Snodgrass, *supra* note 14, at 75–81.

²⁵⁶ *Obergefell*, 135 S. Ct. at 2608.

cannot be undone.²⁵⁷ Further, most state adoption codes lack any reference to adult adoption revocation or only provide a severely limited revocation window. Thus, faced with such permanency, some same-sex couples that adopted each other cannot participate in “one of civilization’s oldest institutions.”²⁵⁸ They cannot reap the immense financial and psychological benefits associated with marriage. But most importantly, they cannot exercise their constitutional right to marry. They are, instead, trapped in a legal paradigm that fails to reflect the true nature of their relationship.

To truly live out the constitutional tenants of *Obergefell* and ensure that all same-sex couples can marry, including those that adopted each other pre-*Obergefell*, states must amend their adoption codes. Specifically, states must amend their adoption codes, using California’s statutory language as a guide, to allow for the efficient annulment of same-sex adult adoptions. Same-sex couples like Mr. Esposito and Mr. Bosee have waited decades for the recognition of their inherent right to marry—now is the time to ensure that *all* same-sex couples can exercise that inherent right.

²⁵⁷ See ARK. CODE ANN. § 9-9-216 (2018) (noting that after the passage of one year an adoption decree cannot be questioned for any reason, including fraud); *but see* ME. REV. STAT. ANN. § 9-315 (1997) (allowing a court to annul an adoption on the basis of fraud).

²⁵⁸ *Obergefell*, 135 S. Ct. at 2608.

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