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# REVIEW

*A journal of  
legal theory  
and practice  
“to the end  
that human  
rights shall  
be more  
sacred than  
property  
interests.”*

—Preamble, NLG  
Constitution



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With the retirement of Justice Anthony Kennedy, the Supreme Court is about to further lapse into right-wing activism. It's been a reactionary court for the past 13 years, when Kennedy was the swing vote in a few divided cases. But sometimes Kennedy would swing the Court toward genuine progressive victories that frustrated his Republican colleagues. He wrote Eighth Amendment opinions, for instance, that resulted in the abolition of the juvenile death penalty<sup>1</sup> and the reform of California's tortuously overcrowded prisons.<sup>2</sup> He voted against the Bush administration in all four of the major cases<sup>3</sup> brought by Guantanamo detainees during the "Global War on Terror." These votes helped check an out-of-control executive branch and ensured that the mini gulag the U.S. maintained in Cuba could not become a completely Constitution-free zone. Towards the end of his tenure Kennedy was nearly always alone<sup>4</sup> among his Republican colleagues on the Court in his willingness to, at least once in a while, meaningfully thwart party orthodoxy.

Kennedy's three decades on the Court shouldn't be valorized into a profile in political courage. He was generally a reliable and unadventurous right-wing Republican judge, as Ronald Reagan, who appointed him, surely hoped he'd be. But he was of a fundamentally different type than the four hard-driving Republican-appointed reactionaries sitting with him on the Court when he left. Clarence Thomas, John Roberts, Samuel Alito, and Neil Gorsuch have long been darlings of an aggressively regressive legal counterculture. They've been lionized and groomed by its vanguard think tank, the Federalist Society, whose money and political power has grown exponentially over the past few decades. They're now powerful enough to tightly control Republican Party judicial ideology. Kennedy was the kind of Republican that no longer exists—considerate of Court norms and traditions, occasionally independent, and sometimes deferential even to liberal precedents. With the election of

*Continued inside the back cover*

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**Brendan T. Beery**

**HOW TO ARGUE LIBERTY CASES  
IN A POST-KENNEDY WORLD:  
IT'S NOT ABOUT INDIVIDUAL  
RIGHTS, BUT STATE POWER  
AND THE SOCIAL COMPACT**

**A new era**

Justice Anthony Kennedy has left the Supreme Court, gifting his swing-vote seat to President Donald Trump, who in turn appointed Judge Brett Kavanaugh, ensuring a five-vote right-wing majority on the Court that will last for as long as the young and healthy conservatives on the Court can stay healthy and conservative. (One assumes that Justice Clarence Thomas will also leave his seat to a socially conservative courtier of Trump's affections safely this side of the 2020 election.) It's game, set, match.

So a new day is upon us; the new Court, populated by social conservatives hostile to notions of freewheeling individual autonomy in matters relating to family, marriage, or reproductive and sexual practices,<sup>1</sup> will likely grind away at the doctrine that so far has largely protected individual liberty—the doctrine of “substantive due process”<sup>2</sup>—until there is nothing left but some Judeo-Christian ligaments on an otherwise dried-up bone. Substantive due process, which is of course a contradiction in terms (process, which is procedural, is not substantive<sup>3</sup>), is among the banes of the conservative existence, with its insistence that the word “liberty” in the Constitution is part of two promises, not one: first, that one's person or property won't be mugged or plundered by the government without some kind of notice and the chance to plead one's case before an impartial arbiter;<sup>4</sup> and second (and this is the part that bothers conservatives), that there are certain personal freedoms so fundamental to life in a free country that the government may not (substantively) meddle with those freedoms at all.<sup>5</sup> A person under the jurisdiction of a government bent on cutting one's fallopian tubes, for example, would likely not plead for some procedural nicety like a jury trial as to whether she may be sterilized by the state, but rather for a ruling that the state may not sterilize a human being *at all* in any society that holds itself out to be free and decent.<sup>6</sup>

The doctrine of substantive due process breathes life into the Ninth Amendment's promise that “[t]he enumeration in the Constitution, of certain rights,

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shall not be construed to deny or disparage others retained by the people.”<sup>7</sup> Since both of the Constitution’s due-process provisions use the word *liberty*,<sup>8</sup> courts have regarded those clauses as the textual homes for the unenumerated (retained) rights whose existence was memorialized in the Ninth Amendment. For a jurist who takes a dogmatic view of how other people should live their lives,<sup>9</sup> and sees a robust role for the state in imposing that view,<sup>10</sup> little could be more dangerous than this kind of Pandora’s box: a constitutional principle with no rigid boundaries, ensuring the freedom and jurisdiction of the individual over a broad swath of citizen life.

Conservatives like the late Justice Antonin Scalia have long derided this doctrine, even putting it in proverbial air quotes, as when Justice Scalia wrote, “Our opinions applying the doctrine known as ‘substantive due process’ hold that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest.”<sup>11</sup> With a durable majority on the Supreme Court installed, the new Court (now in accord with Justice Scalia’s worldview—and his hostility toward the whole business of unenumerated rights) will have no patience for a doctrine it never credited with any sway to begin with.<sup>12</sup> Facing this new reality, progressive lawyers must change the way they approach the government-citizen relationship in legal argumentation. The substantive-rights component of the Fifth and Fourteenth Amendments is likely to shrivel up and atrophy, leaving states largely free to steamroll the moral choices of unpopular minorities (or women) unless some new analytical framework emerges that might protect those groups and their choices—a framework more appealing, of course, to the conservative mind.

### **Progressive issue-framing malpractice**

We arrive at a time of great anxiety for progressive legal thinkers (and I should like to count myself among them), but also a time of intriguing possibilities, and potentially a chance to correct a strategic mistake made many decades ago. Progressive jurists have, for now, lost a long ideological war. They lost, in part, by winning the early battles the way they did (think *Griswold v. Connecticut*<sup>13</sup> and its progeny). They won those early battles with a species of argument that was always shrill and grating to the conservative ear: arguments about the autonomy and privacy and dignity of the individual human citizen that should result also, according to progressive judges, in the jurisdiction of every competent individual over his or her own personal choices. In a society where dogmatists along the whole spectrum of religiosity—from “humanitarians” like Mother Theresa to conservative evangelicals like Jerry Falwell—have little use for individualism, this focus on the rights of the individual rather than the proper jurisdiction of government has been, well, injudicious.

This would only be so, of course, if progressive jurists should have *wanted* to appeal to believers, be those would-be Samaritans who see any individual as a prop in a paradigm where every poor sufferer presents the means to salvation for every caretaker,<sup>14</sup> or evangelicals who see every individual as merely a mark for proselytizing and conversion—and ultimately submission to the will of a God who will reward the evangelizer as handsomely as the pliant proselyte. And there has been a tendency on the left to talk past this lot just as surely as there's been a tendency on the right to demonize every non-adherent as an elitist, effete, granola-noshing, less-than-“real” American. That's been a mistake on both sides, but especially on the left (at least for purposes of our discussion here), where thought leaders grossly overvalued both the rhetorical force of their arguments and the size of their receptive audience.

Judicially speaking, in the battle of the pagans against the Good-Bookers, the question was always which side would draw the other onto its own battlefield with a deadly legal weapon called *framing the issue*. I doubt that liberal justices on the Supreme Court even noticed when conservatives pulled them far across a philosophical fault line; those liberals beat their way miles into enemy territory only to turn back on June 28, 2018 (the day after Kennedy's retirement announcement<sup>15</sup>) and find themselves cut off from reinforcements after a political earthquake, and on the wrong side of the fissure—the side populated by the former underdogs.

While beating a slow retreat, conservatives had progressives where they wanted them: arguing about contraceptives<sup>16</sup> and abortions<sup>17</sup> and sodomy<sup>18</sup> and “the homosexual agenda.”<sup>19</sup> As noble and laudable as the intentions of left-leaning justices might have been (at least as to these hot-button social issues), their reliance on the liberty clauses of the Fifth and Fourteenth Amendments, and the resulting decades of focus on the body parts and bodily functions that make a prudish population cringe, was a grave blunder.

To have any stab at progress in the coming new era, a generation of conservative jurisprudence likely to narrow and dissolve the scope of unenumerated “individual rights” under the Constitution, progressives will have to find a new way of arguing or see their gains collapse under the weight of orthodox Judeo-Christian illiberalism.

### **It's not about the individual**

When one studies the structure and language of the Constitution, it becomes clear that rights, like those enumerated in the first eight amendments to the U.S. Constitution, are not about the individual people whom they protect. The Constitution is not addressed to us as individuals and seems agnostic as to whether we exercise any of those rights—like speech or religious exercise.<sup>20</sup> The audience for the Constitution is the government; the Constitution creates

our system of government, empowers it, and also limits its reach and jurisdiction. That is where rights come in: a right is not a license created by the Constitution that should be slopped up by the masses at a common trough; it's a *limit* on the power of the *government*.<sup>21</sup> The First Amendment does not say that you should speak; it says (although not in so many words) that if you have something to say on a matter of public concern (a right you had even before the Constitution was drafted, by the way), then *the government may not stop you*.<sup>22</sup> Constitutional rights aren't there to be exercised; they are there to restrain governmental intrusions into their exercise (or, in the case of positive rights like the right to a jury trial<sup>23</sup> or the right to counsel,<sup>24</sup> to require the government to interact with its subjects in ways that are not arbitrary and capricious).

On social issues involving the human body and its various uses, the Court derailed itself early on by conceptualizing rights as being about the individual rather than the government. Instead of asking whether the government has jurisdiction over the choice of a citizen to use a condom or contraceptive sponge, for example, liberal justices asked whether there exists in the Constitution a fundamental right inhering in the individual to access and use contraception.<sup>25</sup> In taking this tack as to this and many other personal-privacy issues, the Court strayed into a minefield of bogeymen conjured in the fever dreams of the conservative amygdala: abortionists who relish the slaughter of unborn babes; newly empowered minorities flipping the social order upside-down; and marauding homosexuals coming for our children—and the grandchildren we'll never have if they succeed.

It was utterly unnecessary for the Court to have ignited these various conflagrations, if only it had stuck to the real issue: regardless whether abortion or sodomy or any same-sex arrangement is some kind of individual right, the *constitutional* question is whether the government is empowered (or even competent) to regulate in these areas. That is a wholly different question—and one that might douse the flames of religious anxiety at the same time it might yield results decidedly more favorable to progressives.

Consider this question: Do I have a constitutional right to shave in the morning? Under any interpretive model, it's preposterous. The question answers itself, and the answer is no (if we're going to stay out of left field, anyway). Since the answer to that question is no, it must be that the state *may* regulate as to my morning shave, which, after all, isn't a protected right. Right?

Well let's see what happens when we flip the question: Were governments instituted among men and women to decide whether a person should shave in the morning? Is that something that any government is competent to regulate? Is that something that any government has the authority to regulate? Is that

something that requires collective decision-making for the public good?<sup>26</sup> Under any interpretive model, this too is preposterous, and again, the question answers itself: the answer is no. Since the answer to that question is no, it must be that the state *may not* regulate as to my morning shave; after all, the state has no such authority. Right? Right.

Progressives often play the game conservatives want them to play: in my hypothetical shaving case, instead of asking whether the government has the authority to regulate shaving, a left-leaning Court would ask whether shaving is a fundamental constitutional right. By asking the question at all (after being goaded into it by conservatives, of course<sup>27</sup>), the Court would diminish itself; by answering yes, it would make itself the butt of a joke—a joke that right-wingers might tell to the political center as well as their own base, to much laughter and ridicule in either case.

### A new focus

Conservatives, and especially religious conservatives under the sway of the Book of Leviticus, are overtly and dogmatically opposed to reproductive choice or non-reproductive sexual conduct of any kind, and particularly abortion and homosexuality.<sup>28</sup> They have rigid beliefs about the structure of the family, male and female roles, and the centrality in one's personal life of a relationship with a supervising and interceding God.<sup>29</sup> There is no way that an audience like that would be receptive, never mind persuaded, by arguments about the human body, sexuality, sexual orientation or identity, or autonomous decisions around family arrangements and lifestyles that center on anything other than a personal relationship with God.

But conservatives tend also to be suspicious of government,<sup>30</sup> and that is a suspicion that progressives have failed to exploit with their incessant focus on the jurisdiction of the individual rather than the state. Many conservatives are also originalists, meaning that they tend to defer to whatever philosophical and social norms were prevailing at the time whatever provision of the Constitution we're applying was drafted (and more specifically what an average and informed reader would have thought the words of the Constitution meant when those words were drafted<sup>31</sup>).

On both counts (their concern about the proper place of government in an ostensibly free society and their stated devotion to originalism), an appeal to John Locke might be in order. John Locke was a leading political thinker of his time, and there is no doubt as a historical matter that his philosophy undergirds some (but not all) of the words in our basic charter.<sup>32</sup> So there can also be no doubt, to any good originalist, that some words of the Constitution were understood by any lettered reader at the time of the Constitution's inception to mean what John Locke meant by them.<sup>33</sup> This is



especially so of the word *retained* in the Ninth Amendment and the word *reserved* in the Tenth.<sup>34</sup>

### John Locke on the limited jurisdiction of the state

Hot-button social issues usually involve state legislative power;<sup>35</sup> it is generally state legislatures that have trespassed into the *personal* lives of citizens, enjoining the reign of the autonomous soul over its own self.<sup>36</sup> State legislatures, when left unbounded by any supervising check, make of themselves a ubiquitous morals police—a veritable Ministry of State Scruples. In the United States, of course, this invariably involves the application of hidebound Judeo-Christian dogmas against both the willing and the unwilling. Jurisdiction over matters such as sex, marriage, family, contraception, and the choice whether to abort a pregnancy drifts from the individual to the master state. So Locke's writing on the nature of a free society is most helpful where it relates to legislative power: in his *Second Treatise on Government*, Locke said,

The great end of men's entering into society being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society, the first and fundamental positive law of all commonwealths is the establishing of the legislative power . . . [for] the preservation of the society and (as far as will consist with the public good) of every person in it.<sup>37</sup>

One sees here Locke's emphasis on peace and safety. This emphasis runs through all of Locke's thinking and teachings: the individual, in a state of nature, is autonomous and sovereign over himself or herself, and does not form a government over himself or herself except to secure peace and prosperity—not to cede dominion over matters that require no collective decision-making or projects that don't need some communal lift or surge. In other words, governments exist, as Locke said, for the *public good*—not the individual's subjugation (or, as theocrats would no doubt have it, "salvation").

Locke also wrote,

Though the legislative, whether placed in one or more, whether it be always in being or only by intervals, though it be the supreme power in every commonwealth, yet, first, it is not, nor can possibly be, absolutely arbitrary over the lives and fortunes of the people. For it being but the joint power of every member of the society given up to that person or assembly which is legislator, it can be no more than those persons had in a state of Nature before they entered into society, and gave it up to the community. For nobody can transfer to another more power than he has in himself, and nobody has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another. A man, as has been proved, cannot subject himself to the arbitrary power of another; and having, in the state of Nature, no arbitrary power over the life, liberty,



or possession of another, but only so much as the law of Nature gave him for the preservation of himself and the rest of mankind, this is all he doth, or can give up to the commonwealth, and by it to the legislative power, so that the legislative can have no more than this. Their power in the utmost bounds of it is *limited to the public good* of the society.<sup>38</sup>

Right. The state may not possess power that must necessarily have been ceded to it by its subjects, the people, if that power did not belong to any person to begin with. In a state of nature, I might have the right to defend myself, secure my property, and enjoy my life peacefully and without nuisance or bother put upon me by others, but I have no jurisdiction of your property or your peaceful enjoyment of your own life and your own personal affairs. So although I may cede to the government the authority to defend me from others, secure my property rights, and protect me from unwanted intrusions, I cannot have ceded to the government—and neither can you have ceded to it—any authority or jurisdiction over the peaceful and private lives of fellow citizens.

As I mentioned above, there is no need for collective governance, for example, as to whether I shave in the morning. Since no person in a state of nature had any power over my decision in that regard, no person can have given that power to the government. As Professor Michael W. McConnell noted in his article about John Locke and his influence on our Constitution, “During the Bill of Rights debates, reference was made to the right to wear a hat and to go to bed when one pleases.”<sup>39</sup> The framers of the Bill of Rights understood that a sphere of life exists about which there is no public concern implicated—with regard to which no government, no legislature, has any business. In other words, they understood John Locke.

We enter into the social compact—that is to say, submit to the authority of government—not so that it may limit our freedom, but so that it might help us to preserve it. Locke explained,

If man in the state of Nature be so free as has been said, if he be absolute lord of his own person and possessions, equal to the greatest and subject to nobody, why will he part with his freedom, this empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of Nature he hath such a right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others; for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit this condition which, however free, is full of fears and continual dangers; and it is not without reason that he seeks out and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties and estates, which I call by the general name—property.<sup>40</sup>

So we do not, merely by existing in society and availing ourselves of its protections, thereby expose ourselves to the arbitrary whims of the majority—and certainly not those arbitrary whims born of dubious mythologies and superstitions. Rather, we join together under one government, Locke said, “*only* with an intention in every one the better to *preserve* himself, his liberty and property (for no rational creature can be supposed to change his condition with an intention to be worse) . . .”<sup>41</sup> That is why “the power of the society or legislative constituted by them can *never be supposed to extend farther than the common good* . . .”<sup>42</sup>

To repeat, then: the state, through its legislative power, may generally only regulate as to the public good, which would seem only to include those matters that either require common decision-making or require a collective undertaking. As to collective decision-making, no person should, for example, be a judge in his or her own case<sup>43</sup> against another in matters involving contracts or property or civil wrongs; we must have common rules for resolving such disputes, and we must appoint neutral magistrates to resolve them, not in the name of the magistrates, but in the name of us all. As to projects that require a collective undertaking, we should not, for example, be expected to individually pave the parts of the roadway abutting our own properties or individually fight off an invading army. We join together to do things like build infrastructure and fight against common enemies.

If governments had the authority to do more than this—more than to require our submission to rules that exist to preserve property and peace and liberty; and require our participation in common projects like public highways and the provision of public services and benefits—then we would have quitted our dominion over our own affairs with, as Locke put it, “an intention to [make our own condition] worse.” What rational creature would enter into such a compact?

This thinking marked much of the dialogue in the United States around the adoption of the Constitution, and especially the Bill of Rights. A famous Constitution-era commentator who wrote as “Brutus” put it this way:

The common good, therefore, is the end of civil government, and common consent, the foundation on which it is established. To effect this end, it was necessary that a certain portion of natural liberty should be surrendered, in order, that what remained should be preserved: how great a proportion of natural freedom is necessary to be yielded by individuals, when they submit to government, I shall not now enquire. So much, however, must be given up, as will be sufficient to enable those, to whom the administration of the government is committed, to establish laws for the promoting [sic] the happiness of the community, and to carry those laws into effect. But it is not necessary, for this purpose, that individuals should relinquish all their

natural rights. Some are of such a nature that they cannot be surrendered. Of this kind are the rights of conscience, the right of enjoying and defending life, etc. Others are not necessary to be resigned, in order to attain the end for which government is instituted, these therefore ought not to be given up. To surrender them, would counteract the very end of government, to wit, the common good. From these observations it appears, that in forming a government on its true principles, the foundation should be laid in the manner I before stated, by expressly reserving to the people such of their essential natural rights, as are *not necessary to be parted with*.<sup>44</sup>

### A Thought Experiment

Let's apply this Lockean principle with an illustration. Suppose that Smith is one day talking to his neighbor Jones over the hedge line. In the course of the conversation, which comes to include some Donald-Trump-and-Billy-Bush style "locker-room talk,"<sup>45</sup> Smith, who regales Jones with titillating descriptions of the rhythm method for contraceptive-free birth control, discovers that Jones and Jones's wife sometime engage in what we'll just call non-procreative sexual practices. Suppose also that Smith adheres to the sexual mores bequeathed to civilization from the least literate part of the planet in a jumbled collection of erratic writs some 2,000 years ago.<sup>46</sup>

Who would disagree that Smith's superstitions and hang-ups are his business and his alone? And who would disagree that the same goes for Jones—that his sexual predilections are his business and his alone? One assumes—and hopes—that if one were to ask even a social conservative, *How much power do you have, as a neighbor, over the sexual practices of Jones?*, the answer would come easily: none. I might think Jones a sinner or a wretch, but surely neither I nor Smith nor any other single citizen has jurisdiction over Jones's sexual practices, at least insofar as they involve a consensual adult arrangement.

Now suppose that Smith talks to another neighbor, Murphy, and finds that Murphy too is put off by the story of Jones and Jones's wife and their happy frolicking. Now that Smith has been joined by Murphy in his objections, do the two of them together have jurisdiction to control the Joneses' sex life? Of course not. If neither Smith nor Murphy himself has power over the Joneses' sex life, then what is their power when the two are joined?

What about when a third neighbor also is put off? And a fourth and fifth, and then a tenth and then a twentieth? If the whole block finds Jones's sexual practices with his wife distasteful, have the morals police swelled in number such that *now* they have jurisdiction over Jones's sex life? Of course not. If no single one of Jones's neighbors individually has any power over Jones's personal life, then their joint opprobrium is of no more moment than Smith's alone, or any combination of neighbors one might conjure.

Those who argue that the neighbors magically acquire jurisdiction over Jones's private sex life once they number 50 percent plus one of the body politic are left holding an empty sack, and this is Locke's point: the government only has that power which the people (a collection of persons) may give it, and they may not give what they do not have. It makes no difference that 50 percent plus one of the body politic condemns poor Jones; there is no power in their legislature to bind him up if no person within the body politic had that power to give the legislature to begin with. It's a funny thing about zero: no matter how many times you add it to itself, you still get zero. So in a community of 100, even when 51 people decide on the sexual practices they'd prefer for Jones and his wife, they still have no jurisdiction—zero—to impose their will.

It is a strange proposition indeed that something that is not the business of anyone is nonetheless the business of everyone.

Jones's sex life is not a public project and does not call out for collective decision-making. It is not a matter of public concern, and it has nothing to do with the public good. No government, therefore, has authority over it, at least in any commonwealth that holds out any pretense of being a society of free citizens.

### **The Ninth and the Tenth Amendments**

So the people who drafted the Bill of Rights were well versed in Lockean political theory, and they used Locke's language in debating whether a Bill of Rights should be drafted—and then in drafting it.<sup>47</sup>

Some of the framers feared that drafting a "Bill of Rights" and appending it to the Constitution in the form of a *list* bore serious risks. There is a Latin axiom that governs the construction of lists in legal documents: *expressio unius est exclusio alterius*.<sup>48</sup> That means, in plain language, that if it's not on the list, it's not on the list. This concept was familiar to Alexander Hamilton, who thought a list unnecessary and unwise for this very reason,<sup>49</sup> and James Madison, who warned that we would wade into perilous territory with such a list,<sup>50</sup> as the oppressors of the future would point to it as exhaustive while extinguishing any right not listed.

With this in mind, the drafters of the Bill of Rights (the first Congress<sup>51</sup>) included the Ninth Amendment, ostensibly to foreclose this mischief: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>52</sup> Notice the word *retained*. This has John Locke written all over it: the government only has the power ceded to it by the people; all the remainder—a huge chunk of jurisdiction over the lives and affairs of the people—must be presumed to have been

retained, for there would have been no reason for any rational person to give up more than might be necessary for the public good. The Ninth Amendment explicitly neuters the *expressio unius* rule and instructs that it not be applied in interpreting the Bill of Rights. There is a sphere of life where no government may tread, and a right need not be enumerated in the Constitution for the government to lack any jurisdiction over it. Indeed, it would be a fool's errand to list every component of a citizen's daily life where the government has no jurisdiction; we needn't indulge lofty musings about which "rights" are "deeply rooted in our history and traditions"<sup>53</sup> or "implicit in the concept of ordered liberty"<sup>54</sup> when it's clear enough that no government at any level may decide what side of the bed one sleeps on or whether one snuggles with a cat at night or whether one takes one's coffee black.

As to the U.S. Congress, those matters over which it has authority are, like the rights in the first eight amendments, enumerated. Congress's powers are listed in Article I, Section 8 of the Constitution. But as to Congress's enumerated powers, the *expressio unius* rule does apply,<sup>55</sup> because there is nothing like the Ninth Amendment that follows the list of congressional powers to say that *expressio unius* does not apply. So Congress's jurisdiction is limited in multiple ways: by the existence of enumerated powers away from which is mustn't stray; by the enumeration of rights in the first eight amendments; and by the Ninth Amendment, which tells Congress to stay away from whatever parts of citizen life have no bearing on the public good, and which are therefore none of Congress's business.

The news is no better for meddling states under the thumb of busy-body legislators bent on wielding state power not for the public good but to conform citizens' private choices to those moral and sexual and lifestyle and family-structure strictures favored by the majority. First of all, courts have held that the Bill of Rights, even though it seems on its face only to apply to the federal government ("Congress shall make no law . . ."<sup>56</sup>) applies to states, too (through the Fourteenth Amendment, which explicitly targets states and requires that they behave toward citizens in a way that is fundamentally fair—which, say courts, includes adhering to the Bill of Rights, with a few unremarkable exceptions<sup>57</sup>). So the Ninth Amendment is as relevant in determining the scope of state power as it is in determining the scope of federal power.

Then there is the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>58</sup> Right-leaning commentators have a habit of seeing that third comma as a period and omitting the *or* part that follows that comma—because that comma and the *or* part that follows are not helpful to people who think that *all* the power not delegated

to Congress, including the power over people's personal lives and affairs, was reserved to the *states*.<sup>59</sup>

First of all, *reserved* is much like the word *retained*: it has Locke written all over it. But power is not merely reserved to states. As would be expected in an amendment that has Locke running through it, power is also—and more importantly—reserved to the people. So states occupy a sort of nether-region where Congress has no power and the people have ceded theirs—for, and only for, the public good. Courts call this the police power, which properly has been defined as a general authority to regulate with regard to the health, safety, and general welfare of the populace—in other words, the public good.<sup>60</sup> Puritans and right-wing mischief-makers, however, have often snuck the word *morals* into that equation: police power, they say, is the authority of the state over the health, safety, *morals*, and general welfare of its people.<sup>61</sup> The problem here, of course, is that if a state has jurisdiction over a person's moral choices, then the *or* part of the Tenth Amendment—the part about power reserved to the people—is a dead letter, because there is nothing left to the individual citizen after the state has greedily consumed every bit of the residual jurisdiction not claimed by Congress.

If the Tenth Amendment is to mean what it clearly says about the people and their reserved power, then, again, state legislative power may only extend to the common good. And the drafters of the Constitution seemed singularly concerned that this form of government would indeed exist in the states; Article IV of the Constitution says, “The United States shall guarantee to every State in this Union a Republican Form of Government. . . .”<sup>62</sup> Republican, in this context, means representative,<sup>63</sup> which in turn means that every state must have a structure of government that reflects the Lockean compact: the people will cede whatever power they must to the state, which will then regulate for the public good.

The text of the Constitution, then, as it would originally have been understood and as it should still be understood today, does not invite or require nonsensical fights about which parts of citizen life implicate such ethereal and profound concerns that they warrant some kind of special rank. As to personal privacy and moral autonomy, the Constitution is concerned only with whether power is reserved to the people, which is to say that it is not the business of any other person, and is therefore necessarily not the business of any government.

### **And a new frame (a new test)**

Courts today play on conservatives' home court, employing an analysis that avoids Lockean theory and all the freedom and autonomy that might break out in our land were Lockean theory properly applied. Instead, courts

quarrel over whether certain rights involving the most private (and one might say embarrassing) parts of citizen life constitute “fundamental rights,” meaning that they are rights protected as liberty interests under the due-process clauses even if they are not enumerated.<sup>64</sup> With regard to such rights, “strict scrutiny” applies to any governmental meddling.<sup>65</sup> But as to any rights that are not “fundamental,” mere rational-basis review applies: laws torching those rights survive if they bear any rational relationship to any conceivably legitimate interest.<sup>66</sup>

Oddly enough, conservative justices, even those like Justice Scalia, who routinely maligned the whole idea of unenumerated liberty interests, nonetheless find little trouble declaring the traditional unitary family or traditional opposite-sex marriage to be just such interests.<sup>67</sup> They balk, of course, only when whatever private matter is at issue does not comport with their own dogmas and personal (often religious) agendas: when a woman wants to abort a pregnancy, a gay person wants to enjoy a full and pleasurable sex life, or unmarried adults want to use contraceptives. The whole frame is bogus, and Justice Kennedy, of all people, came closest to ending this charade by declaring (implicitly, at least) that a majoritarian moral objection to certain conduct is not, in and of itself, a legitimate state interest as required even on rational-basis review.<sup>68</sup> Justice Kennedy’s opinion in *Lawrence v Texas* invalidating a Texas anti-homosexual-sodomy law might be the closest the Court has come to honoring the plain meaning of the Constitution’s reservation of jurisdiction over citizen-life to the people rather than the state.

It’s a pity the Court wasn’t explicit about that, but in any event, Justice Kennedy, of course, is no longer calling the shots. So advocates in future cases will have to propose a new test in liberty (“individual rights”) cases that has nothing to do with individual rights, because we are dealing now with a Supreme Court that sees the individual as a fallen sinner in need of moral correction. The only hope, then, is to change the frame: to focus the Court on the original meaning of our founding charter and appeal to justices’ stated fealty to the ideas of limited government and the free enjoyment of property and citizen life. Progressive advocates should characterize this approach as *conservative*—a decidedly narrow take on what parts of citizen life are properly regarded as having been ceded by the people to any supervising secular overlord. It might be too much to expect intellectual consistency from a socially conservative bench, but it’s a safer bet than arguing to this Court about the merits of anal sodomy or fellatio or reproductive choice.

Indeed, after so many years of the fallacious judicial focus on the individual rather than the government, it will be hard to get *anyone* focused properly on the government rather than the individual. The reader will have noticed my



heavy reliance on Professor McConnell's article about John Locke and the Ninth Amendment throughout this article. But even Professor McConnell, as you will see if you read his very astute article, after he properly elucidated the meaning of the Ninth and Tenth Amendments in light of Lockean theory, then proceeded to get it all wrong with his focus on discrete and narrowly described rights. As he himself explained, rights are just one side of a coin—the other side being governmental power.<sup>69</sup> But when he flipped that coin to decide where to focus, it landed rights-side-up, and he went down the rabbit hole chasing that elusive distinction between low-ranking rights and rights that might properly be regarded as fundamental and constitutional in rank.<sup>70</sup> There was no need for that tortured exercise; Locke's focus was on the government, so the focus should be the power of government—the government's jurisdiction, not the individual's.

Here is the test as it should be: When a government regulates in an area that is claimed to be a component of citizen life rather than a matter of public concern, a court should ask (1) whether the matter at issue requires collective decision-making, and (2) whether it involves a public project that requires, in all fairness, that anyone who benefits from it should also shoulder some of its cost or inconvenience. If the answer to either question is yes, then any rational law should stand. If the answer to both questions is no, then rigid scrutiny should be applied to smoke out any improper legislative purpose—especially any purpose to choke out the free will of the individual in a smog of majoritarian dogmatism. In analyzing such cases, courts should consider whether the law or policy at issue involves the exercise of arbitrary control over people's lives where no one person would have had any natural right to meddle by himself.

Do I have a constitutional right to wear a hat or decide when to go to bed at night? Of course not. Were those choices nonetheless reserved by the people as outside the reach and competence of the government? Of course. The question is not whether such decisions are important or compelling or foundational, but whether they constitute a public project or require collective decision-making. At the risk of being repetitive (which might be in order), since the Constitution explicitly addresses itself to governments rather than the individual, it is the scope of the government's jurisdiction that is the issue, not the scope of the individual's jurisdiction. The individual should not be asked to explain how it is so that he *has* jurisdiction over shaving or hat-wearing or bedtime when the government so obviously *lacks* jurisdiction in those areas. If the government is incompetent to regulate in these areas, areas about which no person could or would have ceded authority to society, then what difference does it make whether the "right" at issue is the right

to free thought or the right to go to bed? In either case, it's a "right" against which the state may not trespass—regarding which a person has the "right to be let alone."<sup>71</sup>

So this really comes down to an interesting point: when an American says, "It's none of your business," he is making a constitutional statement, because if some matter in his life is not any other person's business, then it can't be the government's, either. With regard to any matter where a reasonable citizen would say to a neighbor, "Mind your own business," the state has no jurisdiction to act, because nothing can be everyone's business when it's not anyone's business. It's a simple test. It would make this country truly the land of the free; it would avoid messy fights about religion and private matters; and it would honor the original understanding of the words used in our founding charter.

There is room here for changing norms, which will probably make conservatives jittery: what constitutes nobody's business is certainly something that will evolve with time and culture; that doesn't change the original meaning of the words; it merely honors their original meaning as they apply to modern life.

What remains to be discussed is the role of the judiciary in all this, and particularly the unelected, lifetime-appointed, can't-have-their-compensation-reduced judges<sup>72</sup> of the federal courts. It is not uncommon for judges and scholars to suggest that courts may not interfere in political processes to police the will of the majority, and that the power ceded to the legislature of any state is a matter of what the majority has decided to cede. Professor McConnell himself summarizes this approach, suggesting a limited role for courts in policing the legislature, and even suggesting that Locke himself saw rebellion as the more appropriate answer to legislative overreach.<sup>73</sup>

Even if Professor McConnell is right about Locke's view, it flies in the face of the most famous precedent in all of U.S. jurisprudential history: *Marbury v. Madison*.<sup>74</sup> It is the quintessence of judicial power that courts interpret the law; it is for courts, therefore, to discern what is meant by words like *retained* and *reserved* and to apply them in any case where they are at issue. (I would note here also that although John Locke is the philosopher whose writing is clearly on point in interpreting the meaning of words like *retained* and *reserved*, one ought not rely on Locke to explain every component of constitutional structure—particularly with regard to such matters as judicial review and separation of powers, where the founders incorporated ideas about which Locke's writings had not much to say or did not carry the day.)

The argument that legislatures should be checked largely by their own self-restraint<sup>75</sup> also ignores completely the most critical point in Locke's

theory—the theory adopted by and expressed in the United States Constitution itself: no government may have the power that no person may have given to it. It will not do, therefore, to say that if the people have given the state the power over the most personal, intimate, and even secret lives of fellow citizens, then the state has such power over such matters as these, in its own discretion. That can't be so when no person, nor the people collectively, had such power to give in their natural state, which was built around liberty and the equal dignity of every man and woman.

If judges may not cabin state power, then there is no limit at all on state power, and the Tenth Amendment's language about power reserved to the people is a nullity, mere surplusage. And we must stop pretending, if a state must be the only check on itself (in a country where it is axiomatic that an individual may not be a judge in his own case<sup>76</sup>), that we live in a free society. We live, rather, as the mob will have us live, and there is no choice that an individual may make in his or her own life that is not the business of all.

## Conclusion

Progressive legal advocates must anticipate the coming right turn on the Supreme Court and tailor arguments to a new jurisprudence, one that will be decidedly unconcerned with the dignity or autonomy or rights of the individual. Cases representing progressive victories like *Roe v Wade*<sup>77</sup> and *Obergefell v Hodges*<sup>78</sup> (the case requiring that states license same-sex marriages) will be overruled or bent and twisted beyond recognition.

One way to preserve past gains is a shift in focus and issue-framing. If we're not going to concern ourselves with the liberty of the individual, we might still concern ourselves with the proper role of the government, for if that is not a constitutional issue, then there is no such thing as a constitutional issue.

To that end, advocates should argue that heightened scrutiny applies to any governmental program that purports to regulate citizen life rather than the public good. Special attention should be paid to the question whether the conduct or activity regulated is conduct or activity over which any individual person has jurisdiction as applied to the life of a neighbor. If no individual person would have such jurisdiction, then neither may the state have it, for the state has only what the people may give it.

As to any decision that requires collective decision-making or the participation and submission of all for the public good, states may regulate—and courts should defer to state regulation in these areas.

The result would be a government that exists to protect and assist citizens in the enjoyment of their property, liberty, and lives—not a government that

exists to oppress and injure those subjects whose lives and choices fall outside the rigid dogmas of the majority.

NOTES

1. See generally Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415 (2005) (explaining the socially conservative approaches to marriage, family, gender roles, and economic policy).
2. See generally *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).
3. We wouldn't need such a silly name for a doctrine if the Supreme Court had not abrogated the more natural home of substantive rights as applied against state legislatures: the Fourteenth Amendment's Privileges and Immunities Clause. See generally *The Slaughter-House Cases*, 83 U.S. 36 (1873).
4. This is usually called "procedural due process." See generally *Matthews v. Eldridge*, 424 U.S. 319 (1976).
5. See generally *Moore*, 431 U.S. 494; see also *Loving v. Virginia*, 388 U.S. 1 (1967) (stating that traditional marriage is a fundamental constitutional right); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that adults have a right to use contraceptives); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (recognizing a right to refuse unwanted medical treatment); *Troxell v. Granville*, 530 U.S. 57 (2000) (recognizing the right of a competent parent to direct the care, custody, and control of his or her child or children).
6. See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (noting "[t]he attack is not upon the procedure, but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon the existing grounds.").
7. U.S. CONST. amend. IX.
8. U.S. CONST. amend. V; U.S. CONST. amend. XIV.
9. See Cossman, *supra* note 1, at 481-86.
10. See *id.*
11. *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) (emphasis in original).
12. See Gregory C. Cook, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853 (1991) (noting Justice Scalia's attempt to limit the doctrine at a time when it seemed impractical to wish for its wholesale abandonment—the author does not address the normative validity of the doctrine but posits that Justice Scalia had found a way to narrow its application).

As to Judge Kavanaugh's views on unenumerated rights (and specifically abortion rights), he said the following during a speech to the American Enterprise Institute (discussing the views of Chief Justice William Rehnquist, approvingly):

[Chief Justice] Rehnquist's dissenting opinion did not suggest that the Constitution protected no rights other than those enumerated in the text of the Bill of Rights. But he stated that under the Court's precedents, any such unenumerated right had to be rooted in the traditions in conscience of our people. Given the prevalence of abortion regulations both historically and at the time, Rehnquist said he could not reach such a conclusion about abortion. He explained that a law prohibiting an abortion, even where the mother's life was in jeopardy, would violate the Constitution, but otherwise he stated the states had the power to legislate with regard to this matter.

In later cases, Rehnquist reiterated his view that unenumerated rights could be recognized by the courts only if the asserted right was rooted in the nation's history and tradition. The 1997 case of *Washington vs. Glucksberg* involved an asserted right to assisted suicide. For a five-to-four majority this time, Rehnquist wrote the opinion for the Court saying that the rights and liberties protected by the due process clause are those rights that are deeply rooted in the nation's history and tradition. And he rejected the claim that assisted suicide qualified as such a fundamental right.

Of course, even a first-year law student could tell you that *Glucksberg's* approach to unenumerated rights was not consistent with the approach of the abortion cases such as *Roe vs. Wade* in 1973, as well as the 1992 decision reaffirming *Roe*, known as *Planned Parenthood vs. Casey*.

What to make of that? In this context, it's fair to say that Justice Rehnquist was not successful in convincing a majority of the justices in the context of abortion either on *Roe* itself or in the later cases such as *Casey*, in the latter case perhaps because of *stare decisis*. But he was successful in stemming the general tide of free willing judicial creation of unenumerated rights that were not rooted in the nation's history and tradition. The *Glucksberg* case stands to this day as an important precedent, limiting the Court's role in the realm of social policy and helping to ensure that the Court operates more as a court of law and less as an institution of social policy.

Dylan Matthews, *Brett Kavanaugh Likely Gives the Supreme Court the Votes to Overturn Roe. Here's How They'd Do It.*, Vox (July 10, 2018, 1:50 PM), <https://www.vox.com/policy-and-politics/2018/7/10/17551644/brett-kavanaugh-roe-wade-abortion-trump>.

13. 381 U.S. 479 (1964) (holding that contraception for married couple implicated a fundamental unenumerated constitutional right).
14. See generally CHRISTOPHER HITCHENS, *THE MISSIONARY POSITION: MOTHER THERESA IN THEORY AND PRACTICE* (1995).
15. See Ariane de Vogue, *Justice Kennedy to Retire from Supreme Court*, CNN (June 27, 2018, 5:30 PM), <https://www.cnn.com/2018/06/27/politics/anthony-kennedy-retires/index.html>.
16. See *Griswold*, 381 U.S. 479.
17. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Whole Woman's Health v. Hellerstedt*, 579 U.S. \_\_\_ (2016).
18. See *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Lawrence v. Texas*, 539 U.S. 558 (2003).
19. *Lawrence*, 539 U.S. at 593 (Scalia, J., dissenting).
20. See U.S. CONST. amend. I.
21. See Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?* (September 10, 2010), 5 N.Y.U. J.L. & LIBERTY 1, 12 (2010), available at [http://www.law.nyu.edu/sites/default/files/ECM\\_PRO\\_065899.pdf](http://www.law.nyu.edu/sites/default/files/ECM_PRO_065899.pdf).
22. See U.S. CONST. amend. I.
23. See U.S. CONST. amend. V.
24. See U.S. CONST. amend. VI.
25. See generally *Griswold*, 381 U.S. 479; *Eisenstadt*, 405 U.S. 438.
26. I pause here to make this clear straight away: this article is not a libertarian screed and should not be taken as fodder for any libertarian argument involving governmental power. By discussing the public good here and throughout the article, I hope to suggest what should be obvious—that the government surely is competent to regulate in such

areas as public education, infrastructure, critical services, access to health care, and public welfare. Libertarians, as I understand them, concern themselves with none of these things, but rather prefer an Ayn-Rand, Darwinian free-for-all that is utterly at odds, in my view, with the public good.

27. See Michael H. v. Gerald D., 491 U.S. 110, 127 (1989) (Scalia, J. explaining that “[w]e refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”).
28. See Sean Illing, *Why Christian Conservatives Supported Trump—and Why They Might Regret it*, Vox (Feb. 2, 2018, 7:46 AM), <https://www.vox.com/2017/10/4/16346800/donald-trump-christian-right-conservative-clinton> (quoting Stephen Mansfield, the author of CHOOSING DONALD TRUMP).
29. See Valerie Tarico, *Speaking Evangelese: Tips for Politicians*, HUFF. POST (Mar. 18, 2010, 5:12 AM), [https://www.huffingtonpost.com/valerie-tarico/speaking-evangelese-tips\\_b\\_322999.html](https://www.huffingtonpost.com/valerie-tarico/speaking-evangelese-tips_b_322999.html).
30. See Jim Talent, *Conservatism and the National Defense*, NATIONAL REVIEW (Nov. 11, 2015 (8:24 PM)), <https://www.nationalreview.com/corner/fox-business-debate-rand-paul-redefines-conservatism/?target=author&tid=900928> (stating “[c]onservatives believe that human beings—while capable of great things if sufficiently steeped in the values of an enlightened society—are by their nature weak and corruptible. That’s the reason conservatives are suspicious of government; government represents the harnessing of state power to the weaknesses of human nature. For the equal but opposite reason, conservatives also believe that government is necessary as a restraint on the worst tendencies of human beings. Government must therefore exercise a police power, properly checked and balanced to prevent abuse.”).
31. See ANTONIN SCALIA, *Common-Law Courts in Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 37-38 (Amy Gutmann ed., 1997) (explaining originalists should look for “the original meaning of the text, not what original draftsmen intended”).
32. See generally McConnell, *supra* note 21.
33. See *id.*
34. See *id.* at 11-12.
35. See, e.g., *State-by-State History of Banning and Legalizing Gay Marriage, 1994-2015*, PROCON.ORG, <https://gaymarriage.procon.org/view.resource.php?resourceID=004857> (last updated Feb. 16, 2016); *An Overview of Abortion Laws*, GUTTMACHER INSTITUTE, <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> (last visited July 8, 2018).
36. Congress occasionally does too, as when it enacted a ban on the abortion procedure known as dilation and extraction, one assumes, as a regulation of interstate commerce. Since the Supreme Court did not address the constitutional basis for such a congressional act when the case was litigated, we don’t know what basis exists. See *Gonzales v. Carhart*, 550 U.S. 124 (2007).
37. JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 134 (1690).
38. *Id.* at § 135.
39. McConnell, *supra* note 21, at 19 (citing 1 ANNALS OF CONGRESS 732 (Joseph Gales ed., 1834) (1789)).
40. LOCKE, *supra* note 37, at § 123.
41. *Id.* at § 131 (emphases added).

42. *Id.* (emphasis added).
43. This idea is widely attributed to Sir Edward Coke. See D.E.C. Yale, *Judex in Propria Causa: An Historical Excursus*, 33 CAMBRIDGE L.J. 80 (1974).
44. McConnell, *supra* note 21, at 11-12 (quoting BRUTUS, ESSAY OF BRUTUS II (1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 372-77 (Herbert J. Storing ed., 1981)) (emphasis added).
45. See David A. Farenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), [https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4\\_story.html?utm\\_term=.83192d32a907](https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html?utm_term=.83192d32a907).
46. As the late, great Christopher Hitchens put it,  

Let's say that the consensus is that our species, being the higher primates, *Homo sapiens*, has been on the planet for at least 100,000 years, maybe more. Francis Collins says maybe 100,000. Richard Dawkins thinks maybe a quarter-of-a-million. I'll take 100,000. In order to be a Christian, you have to believe that for 98,000 years, our species suffered and died, most of its children dying in childbirth, most other people having a life expectancy of about 25 years, dying of their teeth. Famine, struggle, bitterness, war, suffering, misery, all of that for 98,000 years. Heaven watches this with complete indifference. And then 2000 years ago, thinks "That's enough of that. It's time to intervene," and the best way to do this would be by condemning someone to a human sacrifice somewhere in the less literate parts of the Middle East. Don't let's appeal to the Chinese, for example, where people can read and study evidence and have a civilization. Let's go to the desert and have another revelation there. This is nonsense. It can't be believed by a thinking person.

*Homo Sapiens Quotes*, GOODREADS, <https://www.goodreads.com/quotes/tag/homo-sapiens> (last visited Apr. 29, 2018).
47. See McConnell, *supra* note 21, at 11-12.
48. See *id.* at 10.
49. See *id.* at 7 (citing THE FEDERALIST NO. 84 (Alexander Hamilton)).
50. See *id.* at 14.
51. See *Congress Creates the Bill of Rights*, CENTER FOR LEGISLATIVE ARCHIVES, [https://www.archives.gov/files/legislative/resources/bill-of-rights/CCBR\\_IIA.pdf](https://www.archives.gov/files/legislative/resources/bill-of-rights/CCBR_IIA.pdf) (last visited July 11, 2018).
52. U.S. CONST. amend. IX.
53. *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting).
54. *Id.*
55. See David Strauss, *The Supreme Court 2014 Term, Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 45-46 (2015).
56. U.S. CONST. amend. I.
57. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963).
58. U.S. CONST. amend. X.
59. Indeed, conservatives have argued for the preposterous proposition that both the Ninth and Tenth Amendments have nothing to do with individual rights, but rather reserve power only to the states. See Seth Rokosky, *Denied and Disparaged: Applying the "Federalist" Ninth Amendment*, 159 U. PA. L. REV. 275, 282-83, 286-88 (2010).
60. See *Police Powers*, LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/police\\_powers](https://www.law.cornell.edu/wex/police_powers) (last visited July 6, 2018).



61. See Nathaniel Frank, *Scalia the Mullah*, SLATE (June 25, 2013, 3:07 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/06/scalia\\_and\\_gay\\_marriage\\_how\\_the\\_justice\\_misunderstands\\_morality.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/scalia_and_gay_marriage_how_the_justice_misunderstands_morality.html).
62. U.S. CONST. art. IV, § 4.
63. See Edward A. Fallon, *A Republican Form of Government*, MARQ. U. L. SCH. FACULTY BLOG (Sept. 20, 2009), <https://law.marquette.edu/facultyblog/2009/09/20/a-republican-form-of-government/comment-page-1/> (explaining that the term ‘republican’ as used in Article IV likely permits either a representative form of government at the state level or “direct democracy” of the sort exercised in ballot-initiative elections, but that in any event the Guarantee Clause “prohibits the people of any state in the Union from amending their state constitution in order to adopt a monarchy or an aristocracy”).
64. See, e.g., *Moore*, 431 U.S. 494; *Loving*, 388 U.S. 1; *Eisenstadt*, 405 U.S. 438; *Cruzan*, 497 U.S. 261; *Troxell*, 530 U.S. 57.
65. *Id.*
66. See generally *Williamson v. Lee Optical*, 348 U.S. 483 (1955).
67. See, e.g., *Michael H.*, 491 U.S. 110.
68. See *Lawrence*, 539 U.S. at 599 (claiming of Kennedy’s majority opinion, in which the Court rejected Texas’s claim that regulating morals, absent any other interest, constituted a legitimate state interest, “[t]his effectively decrees the end of all morals legislation . . .”).
69. See McConnell, *supra* note 21, at 14.
70. *Id.* at 20.
71. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (stating “[t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights, and the right most valued by civilized men.”).
72. U.S. CONST. art. III.
73. See McConnell, *supra* note 21, at 20-21.
74. 5 U.S. 137 (1803).
75. See McConnell, *supra* note 21, at 20-21.
76. See Yale, *supra* note 43.
77. 410 U.S. 113 (1973).
78. 576 U.S. \_\_\_\_ (2015).



**Henry Rose**

## **HOW THE SUPREME COURT DIMINISHED THE RIGHT TO VOTE AND WHAT CONGRESS CAN DO ABOUT IT**

### **Introduction**

The right to vote in the United States has always been steeped in discrimination. For most of United States history, it was a right that African Americans, Asian Americans, American Indians, and women were denied. The United States Supreme Court in the 1960s and 1970s developed legal doctrine that required state-created restrictions on the right to vote to be reviewed by courts with strict scrutiny under the equal protection clause of the Fourteenth Amendment of the Constitution. In 2008, the Supreme Court inexplicably reduced the level of judicial scrutiny used to review new state voting restrictions in *Crawford v. Marion County Election Bd.*<sup>1</sup>

This article traces the history of Supreme Court review of state restrictions on the right to vote and highlights the significant diminution of judicial review of such restrictions that *Crawford* represents. After *Crawford*, many States enacted laws requiring registered voters to present identification documentation at the polling place, creating new impediments for some Americans to vote. In some states, federal courts have determined that these voter identification laws were purposely enacted to make it more difficult for African Americans to vote in violation of their constitutional rights under the Fourteenth and Fifteenth Amendments. Congress has the authority under these Amendments to enact legislation that seeks to prevent and remedy state restrictions on voting that violate the Constitution.

### **Provisions in the Constitution involving the right to vote**

The initial U.S. Constitution that was ratified in 1788 did not explicitly identify who had the right to vote. The initial Constitution provided that members of the House of Representatives in the Congress of the United States would be chosen by the people of the states and the qualifications for electing them would be the same as for electing representatives of the most numerous branch of each state legislature.<sup>2</sup> The Seventeenth Amendment ratified in 1913 adopted the same criterion for electing members of the Senate of the United States.<sup>3</sup> The initial Constitution also provided that each state's

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legislature would determine a method for appointing their electors of the President of the United States of America.<sup>4</sup> As a result of these provisions in the U.S. Constitution, the states determine the qualifications for voting in federal and state elections.<sup>5</sup>

### **History of discrimination in voting in the United States**

After the initial Constitution was ratified, only white male property owners could vote in eleven of the original thirteen States.<sup>6</sup> Women were not granted the right to vote in federal and state elections until the Nineteenth Amendment was ratified in 1920.<sup>7</sup> American Indians born in the United States were not granted U.S. citizenship until the enactment of the Indian Citizenship Act of 1924, but many States continued to not allow them to register to vote.<sup>8</sup> Many citizens were also prohibited from voting based on national origin. For example, California's second Constitution, ratified in 1879, provided that "no native of China" shall ever be allowed to vote in California.<sup>9</sup>

The right of African Americans to vote has a uniquely sordid history. As slaves, they had no right to vote.<sup>10</sup> After the Civil War, slavery was abolished by the Thirteenth Amendment<sup>11</sup>, the newly freed slaves were granted citizenship by the Fourteenth Amendment<sup>12</sup> and the right to vote by the Fifteenth Amendment.<sup>13</sup> However, in the late nineteenth century and early twentieth century many southern States adopted constitutional provisions, statutes and voter registration practices that denied African Americans the right to vote.<sup>14</sup> As a result of these laws and practices, voter registration among African Americans in many southern States was very low.<sup>15</sup> For example, in Mississippi where African American adults outnumbered white adults in 1890, less than 9,000 of 147,000 adult African Americans were registered.<sup>16</sup> By 1965, only 6.7 percent of eligible African Americans in Mississippi were registered to vote.<sup>17</sup> As a result of this type of low voter registration of African Americans, the Congress enacted the Voting Rights Act of 1965.<sup>18</sup>

### **Constitutional limitations on state authority to set qualifications to vote**

When state residents believe that states have unfairly restricted qualifications for voting, the residents can challenge the restrictions under the Fourteenth and Fifteenth Amendments of the U.S. Constitution. In *Guinn v. United States*,<sup>19</sup> the U.S. Supreme Court held that an amendment to the Oklahoma constitution that required a person seeking to register to vote to pass a literacy test unless the person was eligible to vote on January 1, 1866 or was a descendant of a person who was eligible to vote on that date violated the Fifteenth Amendment because it discriminated on the basis of race.<sup>20</sup> In *Nixon v. Herndon*,<sup>21</sup> the U.S. Supreme Court held that a Texas statute that barred African Americans from voting in the Democratic Party primary violated their equal protection rights under the Fourteenth Amendment.<sup>22</sup>

In famous footnote four to *United States v. Carolene Products Co.*<sup>23</sup> the U.S. Supreme Court presaged the different levels of judicial scrutiny of state action that would eventually develop in equal protection jurisprudence.<sup>24</sup> The *Carolene Products* Court suggested in footnote four that legislation that restricts the right to vote should receive “more exacting judicial scrutiny” under equal protection because it involves legislation that restricts the “political processes which can ordinarily be expected to bring about repeal of undesirable legislation.”<sup>25</sup> In *Harper v. Virginia State Board of Elections*,<sup>26</sup> which held that a provision of the Virginia Constitution that made payment of a poll tax a precondition to voting violated equal protection under the Fourteenth Amendment,<sup>27</sup> the U.S. Supreme Court noted that governmental restrictions on the right to vote should be “closely scrutinized and carefully confined.”<sup>28</sup>

The type of judicial scrutiny that courts should apply to State restrictions on the right to vote under equal protection was firmly established in *Kramer v. Union Free School District*.<sup>29</sup> In *Kramer*, a New York state statute limited voting in school district elections to residents who own or lease taxable real property in the district or who have children enrolled in the district’s schools.<sup>30</sup> Mr. Kramer, a childless bachelor who lived in his parents’ home and neither owned nor leased taxable real property, challenged the denial of his application to vote in a local school board election on equal protection grounds.<sup>31</sup> The U.S. Supreme Court held that in considering Mr. Kramer’s equal protection claim “the Court must determine whether the exclusions are necessary to promote a compelling state interest.”<sup>32</sup> The Court stated that the New York state statute that prevented Mr. Kramer from voting in school board elections must be given “close and exacting examination” because the right to vote:

is preservative of other basic civil and political rights; constitutes the foundation of our representative society; and determines who may participate in political affairs or in the selection of public officials and any unlawful discrimination in voting undermines the legitimacy of representative government.<sup>33</sup>

For these reasons, the Court in *Kramer* found that State restrictions on the right to vote are not entitled to the presumption of constitutionality that is generally afforded State statutes.<sup>34</sup> The Court concluded that the New York statute in question was not sufficiently tailored to limit the right to vote to those “primarily interested” in school affairs and, therefore, it violated equal protection to deny Mr. Kramer the right to vote in local school board elections.<sup>35</sup>

In *Dunn v. Blumstein*,<sup>36</sup> the U.S. Supreme Court invalidated on equal protection grounds a provision of the Tennessee Constitution that limited voting to residents who had lived in Tennessee for twelve months and in their county of residence for three months.<sup>37</sup> In reviewing the constitutionality of Tennessee’s

durational residence requirements, the *Dunn* Court recognized that the strict scrutiny test announced in *Kramer* applied to equal protection challenges to State laws that restrict the right to vote.<sup>38</sup> The *Dunn* Court also emphasized that a State law that restricts the right to vote is presumed to be unconstitutional unless the State meets a “heavy burden of justification” demonstrating that the law is necessary to promote a compelling governmental interest.<sup>39</sup>

It was settled after *Kramer* and *Dunn* that courts should apply strict scrutiny review to equal protection challenges to State laws that restrict the right to vote.<sup>40</sup> Constitutional scholars also acknowledge that “laws infringing on the right to vote must meet strict scrutiny.”<sup>41</sup>

### **Voter identification laws**

In the twentieth century, several states requested that voters present some form of identification at the polling place but provisions existed for voters in these states to be able to cast a ballot even if they did not have the requested ID.<sup>42</sup> By 2000, fourteen states requested that voters present an identification document at the polling place.<sup>43</sup>

### ***Crawford v. Marion County Election Board***

In 2005, Indiana enacted a statute (hereafter referred to as “SEA 483”) requiring its citizens who appear in person to vote to present a government-issued photo identification.<sup>44</sup> Under SEA 483, if a prospective voter fails to present such identification, (s)he may file a provisional ballot that will be counted only if (s)he presents the required government-issued photo identification to the circuit court clerk’s office within 10 days.<sup>45</sup>

The Indiana Democratic Party and several other plaintiffs sued Todd Rokita, the Indiana Secretary of State, the Marion County Election Board and several other government defendants in federal district court in Indiana challenging the constitutionality of SEA 483.<sup>46</sup> The district court judge found that an estimated 43,000 Indiana residents, or 0.9 percent of Indiana’s voting aging population, lacked a state-issued photo identification.<sup>47</sup> In considering plaintiffs’ equal protection challenge to SEA 483, the district judge decided that strict scrutiny did not apply because the plaintiffs failed to prove that any voters would be adversely impacted by SEA 483 and instead cited the following test for reviewing the plaintiff’s equal protection challenge to SEA 483:

A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”<sup>48</sup>

The district court cited the following U.S. Supreme Court cases as the source of this test: *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), quoting from *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983).<sup>49</sup> Applying this test, the district court concluded that Indiana's important interest in preventing voter fraud justified the restrictions on voting imposed by SEA 483.<sup>50</sup> Thus, the District court concluded that SEA 483's requirement that voters present a government-issued photo identification at the polling place is a permissible regulation of elections by the State of Indiana<sup>51</sup> and rejected the plaintiffs' equal protection challenge to the statute.<sup>52</sup>

The plaintiffs appealed the district judge's decision to the Seventh Circuit Court of Appeals and the majority there also rejected reviewing SEA 483 with strict scrutiny, relying on the Supreme Court's decisions in *Anderson* and *Burdick*.<sup>53</sup> The Seventh Circuit majority affirmed the district court's decision finding SEA 483 to be a constitutional exercise of Indiana's authority under Article I, section 4 of the U.S. Constitution to impose reasonable regulations on the electoral process in Indiana.<sup>54</sup> One member of the Seventh Circuit panel dissented identifying the obvious purpose of SEA 483 to be to discourage turnout among Democratic voters.<sup>55</sup> The dissenting judge urged that "strict scrutiny light" under *Burdick* be applied to SEA 483 resulting in its invalidation as an undue burden on the fundamental right to vote of a segment of Indiana's eligible voters.<sup>56</sup>

The Seventh Circuit's decision that SEA 483 is constitutional was appealed to the U. S. Supreme Court and the Supreme Court affirmed without a majority opinion.<sup>57</sup> Justice Stevens, writing the lead opinion for three justices, also applied *Anderson* and *Burdick* and concluded that the evidence presented to the district court was not sufficient to support a facial attack on SEA 483 in its entirety, necessitating an affirmance.<sup>58</sup> Justice Stevens found that Indiana voters who possess government-issued photo identification are not unconstitutionally burdened by the requirement of presenting it before voting.<sup>59</sup> Justice Stevens recognized that some persons in Indiana who are eligible to vote but who do not possess a current photo identification may be unconstitutionally burdened by SEA 483 but concluded that the evidence in the record made it impossible to assess the burden on them.<sup>60</sup> Accordingly, Justice Stevens found that the plaintiffs' facial attack on SEA 483 failed because the statute's effect on the vast majority of Indiana voters is justified by the State's interest in protecting the integrity and reliability of the electoral process.<sup>61</sup>

Justice Scalia, who also wrote for three justices, applied the *Anderson* and *Burdick* precedents and affirmed the district court's holding that SEA 483 is constitutional.<sup>62</sup> However, Justice Scalia took issue with Justice Stevens' suggestion that SEA 483 may be unconstitutional as applied to some eligible

voters in Indiana.<sup>63</sup> Justice Scalia found that a generally applicable voter law, like SEA 483, should be constitutionally reviewed based on its burden on most voters and not on how it might burden discreet sub-classes of the eligible voter population and the burden that SEA 483 imposes on most Indiana voters is reasonable, satisfying equal protection.<sup>64</sup>

Justice Souter, writing for two justices, dissented.<sup>65</sup> Justice Souter asserted that Justice Stevens in the lead opinion underestimated the serious burdens that SEA 483 places on those eligible Indiana voters who do not possess a government-issued photo identification.<sup>66</sup> Further, Justice Souter found that Indiana's principal interest in preventing voter fraud is discounted by the fact that Indiana admitted that it cannot document a single instance of voter fraud in the State's history.<sup>67</sup> Justice Souter concluded, applying the standards created in *Anderson* and *Burdick*, that SEA 483 is unconstitutional because the State's interests fail to justify the burdens on the right to vote that it imposes, especially on the old and the poor who may have difficulty obtaining the required voter identification documentation.<sup>68</sup> Justice Breyer dissented separately and also concluded that SEA 483 is unconstitutional because it imposes a burden on eligible voters who lack a government-issued identification that is disproportionate to the State's interests in the statute.<sup>69</sup>

### **Critique of the Supreme Court's decision in *Crawford***

The principal critique of the Supreme Court's decision in *Crawford* is that it ignored legal precedent in *Kramer* and *Dunn* that applied to State laws that restrict the right to vote, like SEA 483, and instead applied precedent in *Anderson* and *Burdick* that is tangential to that right. *Crawford* involved an equal protection challenge to SEA 483. Prior to the enactment of SEA 483, a registered voter seeking to vote in person in Indiana had to simply sign a poll book and if the signature matched the signature in the voting registration records, the voter could cast a ballot.<sup>70</sup> After enactment of SEA 483, Indiana voters seeking to vote in person were also required to present a government-issued photo identification in order to vote.<sup>71</sup> Thus, SEA 483 created a new restriction on the right of registered voters in Indiana to cast a ballot.

*Kramer* and *Dunn* both involved constitutional challenges to State laws that prevented otherwise eligible voters from casting ballots. In *Kramer* and *Dunn*, the Supreme Court was emphatic that when State-law created restrictions on the right to vote are challenged on equal protection grounds the Courts should apply strict scrutiny and only uphold such restrictions if they are necessary to promote a compelling state interest.

*Anderson* and *Burdick*, on the other hand, did not involve restrictions on the ability of any person to vote. *Anderson* was a constitutional challenge to an Ohio statute that required independent candidates for President to file



their candidacy documents in March in order to appear on the general election ballot the following November.<sup>72</sup> *Burdick* was a constitutional challenge to Hawaii's prohibition on write-in voting.<sup>73</sup> The provisions of the Ohio and Hawaii State laws that were challenged in *Anderson* and *Burdick* respectively did not prevent any eligible voter in these States from casting a ballot.

Prof. Erwin Chemerinsky, a constitutional law scholar, filed an *Amicus Curiae* brief in the Supreme Court in *Crawford* urging the Court to clarify the doctrinal confusion that has arisen in lower courts, including in the lower courts in *Crawford*, in cases involving constitutional challenges to State laws that directly deny citizens their right to vote.<sup>74</sup> Professor Chemerinsky drew a distinction between two types of election law cases that had been decided by the Supreme Court. In the first line of cases (including *Kramer* and *Dunn*), the Supreme Court applied "close scrutiny" to State laws that directly deny the right to vote and required the laws to be "necessary to promote a compelling state interest."<sup>75</sup> The other line of cases (including *Anderson* and *Burdick*) involved State statutes that indirectly or derivatively impose a burden on the right to vote and the Supreme Court has held that constitutional challenges to these laws will be decided based a balancing of the burden on the voters' rights resulting from the laws and the State's interests that are promoted by them.<sup>76</sup> Professor Chemerinsky urged the Supreme Court to apply the *Kramer-Dunn* precedents in deciding *Crawford* and determine whether SEA 483 is narrowly tailored to serve a compelling State interest.<sup>77</sup> Unfortunately, the Supreme Court did not adopt Professor Chemerinsky's suggestion and eight of the nine justices adopted the *Anderson-Burdick* balancing test to guide their opinions in *Crawford*.<sup>78</sup> No Supreme Court justice distinguished or even referred to the *Kramer-Dunn* precedents in their opinions in *Crawford*.

The *Kramer-Dunn* precedents should have been applied to the plaintiffs' equal protection challenge in *Crawford* because SEA 483 imposed a new restriction on voting that prevented some otherwise eligible Indiana voters from casting a ballot. The profound interests that Americans have in voting that were so aptly described in *Kramer* were frustrated for those registered Indiana voters who could not cast a ballot because of SEA 483.

Had the Supreme Court properly applied the *Kramer-Dunn* precedents, the governmental defendants in *Crawford* would have had the burden to establish that SEA 483 was necessary to satisfy a compelling State interest in combatting voter fraud.<sup>79</sup> It is difficult to comprehend how the defendants in *Crawford* could have met this burden when Indiana failed to present any evidence that in person voter fraud had ever occurred in State history.<sup>80</sup>

By not applying the *Kramer-Dunn* precedents to decide *Crawford*, the Supreme Court diminished significantly the constitutional protection of

the right of Americans to vote. The *Anderson-Burdick* line of cases simply require a balancing of the interests of voters against the interests of the State in the electoral process. The *Kramer-Dunn* line of cases, on the other hand, requires States that pass laws that restrict the right to vote to justify such laws as necessary to promote a compelling government interest. The right of Americans to vote deserves the strongest protections that the Constitution affords<sup>81</sup> and the U.S. Supreme Court should have applied the *Kramer-Dunn* precedents in *Crawford*.

### **Constitutional challenges to state photo ID laws after *Crawford***

Constitutional challenges to State photo identification laws did not abate but rather increased after *Crawford* was decided by the Supreme Court. Since a majority of the justices in *Crawford* recognized that some eligible Indiana voters might have their constitutional right to vote violated by the operation of SEA 483,<sup>82</sup> constitutional challenges to state voter identification laws have been brought after *Crawford* by individuals and members of discreet groups who are burdened by such laws.<sup>83</sup>

After *Crawford* was decided by the Supreme Court, implementation of voter identification laws have been found to violate the constitutional rights of: African Americans in North Carolina;<sup>84</sup> voters in Wisconsin who are entitled to free IDs which will enable them to vote;<sup>85</sup> and eligible American Indian voters who lack statutorily-required voter identification in North Dakota.<sup>86</sup> The Fifth Circuit, sitting in en banc, held that a Texas photo identification law had a discriminatory effect on minorities' voting rights in violation of Section 2 of the federal Voting Rights Act.<sup>87</sup> A state court judge in Pennsylvania also held that the Commonwealth of Pennsylvania's photo ID law violated the state constitution in that it burdens the fundamental right to vote.<sup>88</sup> These cases indicate that several state voter identification laws that were enacted after *Crawford* have been implemented in ways that violate the constitutional rights of individuals or members of groups who simply seek to vote in state and federal elections.

Professor Richard L. Hasen, an election law expert, has surveyed the efficacy of litigation that has challenged state voter identification laws in the wake of *Crawford*.<sup>89</sup> Professor Hasen recognizes that this litigation is important because it seeks to enfranchise voters who face special burdens obtaining acceptable voter identification credentials.<sup>90</sup> However, he asserts that the litigation challenging voter identification laws imposes substantial burdens and costs on voters, voter advocacy groups, courts, government entities and their agencies.<sup>91</sup> He also asserts that voter identification laws contribute to voter confusion and discouragement and that administrative errors in their implementation further disenfranchise voters.<sup>92</sup> He contends

that what is often lost in the intense focus on addressing the myriad problems created by voter identification laws is that the “evidence that such laws prevent impersonation fraud or instill voter confidence is essentially non-existent.”<sup>93</sup> Professor Hasen concludes that states should be required by courts to provide actual evidence that they have good reasons for burdening voters with these identification requirements and that the means used are closely connected to these reasons.<sup>94</sup> Of course, strict scrutiny review by the courts of voter identification laws would require states to provide the type of justification for these laws that Professor Hasen seeks.

### **Congress’s authority to address state voter identification laws**

Although a majority of the Supreme Court justices in *Crawford* declined to find Indiana’s voter identification law to be facially unconstitutional, subsequent lower federal court decisions have found state-created voter identification laws to be unconstitutional as applied to members of discreet groups, including racial minorities. The United States Congress has the authority under the Fourteenth and Fifteenth Amendments to enact legislation to prevent and remedy violations of the substantive provisions of these Amendments.<sup>95</sup> Congressional action in response to another discriminatory electoral practice, literacy tests, illustrates the type of legislation that Congress could enact to prevent or remedy the unconstitutional violations that state voter identification laws have spawned.

In the late nineteenth and early twentieth centuries, many states enacted literacy tests that required prospective voters to establish their proficiency in reading and/or writing English as a requirement for voting. The Supreme Court held in 1959 that literacy tests are constitutional, absent proof of racial discrimination in their application.<sup>96</sup> However, Congress later determined that literacy tests were used, especially in southern states, to prevent African Americans from voting and as a result their use in these states was suspended for five years by the Voting Rights Act of 1965.<sup>97</sup> South Carolina, one of the states whose literacy test was suspended, challenged Congress’s authority to suspend its literacy test.<sup>98</sup> The Supreme Court held that the suspension of South Carolina’s literacy test was a proper exercise of Congress’s authority under Section 2 of the Fifteenth Amendment because Congress had determined that South Carolina’s literacy test had been instituted and administered to prevent African Americans from voting.<sup>99</sup> In the Voting Rights Act of 1965, Congress also provided that certain persons of Puerto Rican descent could not be denied the right to vote due to an inability to read or write English<sup>100</sup> and the Supreme Court upheld Congress’s authority to enact this provision under section 5 of the Fourteenth Amendment in *Katzenback v. Morgan*.<sup>101</sup> In 1970, Congress amended the Voting Rights Act of 1965 to suspend literacy tests in all federal, state and local elections for a period of five years.<sup>102</sup> Oregon and

several other states challenged Congress' authority to suspend the use of all literacy tests but the Supreme Court unanimously agreed that Congress had the authority under the Fourteenth and Fifteenth Amendments to suspend them in all jurisdictions because they had been used to discriminate against voters on the basis of race.<sup>103</sup>

As with state literacy tests, Congress can enact laws that seek to prevent or remedy the unconstitutional applications of state voter identification laws. This power extends to suspending their use in federal and state elections because they have been applied in a racially discriminatory manner. Congress could prohibit states from requiring voters to present identification documentation as a qualification for casting a ballot. Such a prohibition would prevent states from enacting voter identification laws, which suppress voter turnout,<sup>104</sup> without evidence that in-person voter fraud is a widespread problem in American elections. Congress should act to make it easier for Americans to vote, not more difficult.

## **Conclusion**

The right to vote in America is a precious right. Americans have fought and died to expand and protect it. The U.S. Supreme Court's decision in *Crawford* constitutes a substantial diminution of the constitutional protection of the right of Americans to vote. Congress should enact legislation that prohibits state-created restrictions on voting, such as voter identification laws. Only then will the right of Americans to vote be protected commensurate to its importance in our democratic and republican form of government.

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## NOTES

1. 553 U.S. 181 (2008).
2. U.S. CONST. art. I, §§ 1, 2.
3. U.S. CONST. amend. XVII
4. U.S. CONST. art. II, § 1.
5. *Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247, 2257–58 (2013).
6. ARI BERMAN, *GIVE US THE BALLOT* 11 (2015).
7. U.S. CONST. amend. XIX.
8. VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION, *VOTING RIGHTS IN INDIAN COUNTRY* 5 (2009), available at <https://www.aclu.org/files/pdfs/votingrights/indiancountryreport.pdf>.
9. CAL. CONST. art. II, § 1 (1879).
10. Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association In Maui, Hawaii 3 (May 6, 1987), available at <http://thurgoodmarshall.com/the-bicentennial-speech/>.
11. U.S. CONST. amend. XIII.
12. U.S. CONST. amend. XIV.
13. U.S. CONST. amend. XV.

14. MICHAEL WALDMAN, *THE FIGHT TO VOTE* 82–86 (2016).
15. *Id.* at 86, 88.
16. *Id.* at 84, 88.
17. *Id.* at 88.
18. 52 U.S.C. § 10301 *et. seq.*
19. 238 U.S. 347 (1915).
20. *Id.* at 362–65.
21. 273 U.S. 536 (1927).
22. *Id.* at 539–41.
23. 304 U.S. 144 (1938).
24. *Id.* at 152–53 n.4.
25. *Id.*
26. 383 U.S. 663 (1966).
27. *Id.* at 664–66.
28. *Id.* at 670.
29. 395 U.S. 621 (1969).
30. *Id.* at 622.
31. *Id.* at 622–25.
32. *Id.* at 626–27.
33. *Id.* at 626 (internal citations omitted).
34. *Id.* at 627–28.
35. *Id.* at 622, 633.
36. 405 U.S. 330 (1972).
37. *Id.* at 331–35, 360.
38. *Id.* at 337, 342 (internal citations omitted).
39. *Id.* at 342–43 (internal citations omitted).
40. *See* Cipriano v. City of Houma, 395 U.S. 701, 704, 706 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204, 205, 208–09 (1970); Hill v. Stone, 421 U.S. 289, 295, 297, 300–301 (1975).
41. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 909 (5th ed. 2015).
42. *Voter ID History*, National Conference of State Legislatures (May 31, 2017), <http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx>.
43. *Id.*
44. Indiana Senate Enrolled Act No. 483, Pub. L. No. 109-2005.
45. *Id.*
46. Indiana Democratic Party v. Rokita, 458 F. Supp.2d 775, 782–84 (S.D. Ind. 2006).
47. *Id.* at 807.
48. *Id.* at 820–22.
49. *Id.*
50. *Id.* at 826.
51. *Id.* at 830.
52. *Id.* at 845.
53. Crawford v. Marion County Election Bd., 472 F. 3d 949, 952 (7th Cir. 2007).

54. *Id.* at 954.
55. *Id.*
56. *Id.* at 954, 956–57. The Supreme Court majority in *Burdick* recognized that strict scrutiny would apply if a state election law imposed a severe burden on the First and Fourteenth Amendment—rights that are implicated in the right to vote. 504 U.S. 428, 434 (1992).
57. *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).
58. *Id.* at 188–89, 202–04.
59. *Id.* at 197–98.
60. *Id.* at 199–202.
61. *Id.* at 204.
62. *Id.* at 209.
63. *Id.* at 207–08.
64. *Id.*
65. *Id.* at 209.
66. *Id.* at 218, 223.
67. *Id.* at 225–26.
68. *Id.* at 210–11, 237.
69. *Id.* at 237, 241.
70. *Indiana Democratic Party v. Rosita*, 485 F.Supp.2d 775, 788 (S.D. Ind. 2006).
71. *Id.* at 989.
72. *Anderson v. Celebrezze*, 460 U.S. 780, 782–83 (1983).
73. *Burdick v. Takushi*, 504 U.S. 428, 430 (1992).
74. Brief of Professor Erwin Chemerinsky as Amicus Curiae Supporting Neither Party at 1, *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (Nos. 07-21, 07-25).
75. *Id.* at 3–6.
76. *Id.* at 6–9.
77. *Id.* at 12–16.
78. *Crawford*, 553 U.S. at 189–191, 204–07, 209–11. Justice Breyer’s dissenting opinion did not adopt the reasoning of either line of cases that Professor Chemerinsky described in his amicus curiae brief.
79. *See Dunn v. Blumstein*, 405 U.S. 330, 342–43 (1972).
80. *Crawford*, 553 U.S. at 194.
81. Writing for the majority in *City of Boerne v. Flores*, Justice Kennedy described the compelling interest test as “the most demanding test known to constitutional law.” 521 U.S. 507, 534 (1997).
82. *Id.* at 199–202.
83. Richard L. Hasen, *Softening Voter ID Laws Through Litigation: Is It Enough?*, 2016 WIS. L. REV. 100, 103–17 (2016).
84. *NC State Conference of NAACP v. McCrory*, 831 F.3d 204, 219 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).
85. *One Wisconsin Institute, Inc. v. Thomsen*, 198 F. Supp. 3d 896, 949 (W.D. Wis. 2016).
86. *Brakebill v. Jaeger*, No. 16-CV-8, 2016 WL 7118548, \*10 (N.D. Aug. 1, 2016).

87. *Veasey v. Abbott*, 830 F.3d 216, 265 (5th Cir. 2016) (en banc) (dismissing the plaintiff's equal protection claims because judicial relief for such a violation would be the same as a Voting Rights Act violation).
88. *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2014 WL 184988, Appx. B, 9 (Pa. Jan. 17, 2014). Pennsylvania did not appeal the *Applewhite* decision.
89. *See* Hasen, *supra*, note 83.
90. *Id.* at 101.
91. *Id.* at 111.
92. *Id.*
93. *Id.* at 119.
94. *Id.* at 120.
95. *Nevada Dep't. of Human Resources v. Hibbs*, 538 U.S. 721, 727–35 (2003) (citing U.S. CONST. amend. XIV); *City of Rome v. United States*, 446 U.S. 156, 173–78 (1980) (citing U.S. CONST. amend. XV).
96. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51–54 (1959).
97. Voting Rights Act § 4(a) (1965), 52 U.S.C. § 10303(a).
98. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).
99. *Id.* at 308, 333–34.
100. *See* Voting Rights Act § 4(e) (1965), 52 U.S.C. § 10303(e).
101. 384 U.S. 641, 646 (1966).
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103. *Oregon v. Mitchell*, 400 U.S. 112, 118, 131–34 (1970).
104. The United States Government Accountability Office's analysis of voter data indicated that voter turnout decreased between the 2008 and 2012 general elections in Kansas and Tennessee because these states changed their respective voter identification requirements. *See* UNITED STATES GOVERNMENTAL ACCOUNTABILITY OFFICE, ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 48 (2014), *available at* <https://www.gao.gov/assets/670/665966.pdf>. Both Kansas and Tennessee enacted laws between the 2008 and 2012 general elections that required their voters to present photo identification as a prerequisite for voting. *See* ERIC A. FISCHER ET AL., STATE VOTER IDENTIFICATION REQUIREMENTS: ANALYSIS, LEGAL ISSUES, AND POLICY CONSIDERATIONS 26, 29 tbl.A-1 (2016), *available at* <https://fas.org/sgp/crs/misc/R42806.pdf>.





**TRUMP'S DISMANTLING OF  
THE NATIONAL MONUMENTS:  
SACRIFICING NATIVE  
AMERICAN INTERESTS ON  
THE ALTAR OF BUSINESS**

In December of 2017, President Trump demolished the Bears Ears National Monument, shrinking it by 85 percent. That same day, President Trump also cut the Grand Staircase-Escalante National Monument by 46 percent. The Trump Administration was urged by energy companies to shrink the National Monuments so they could take advantage of the natural resource deposits located within the National Monument areas. In February of 2018, the lands stripped from the National Monuments became open to claims and leases by energy companies. In his brief presidency, President Trump has demonstrated an utter disregard for the preservation of the land and for the recognition of tribal interests; he has proven that when those interests compete with private business interests, he will always protect the businessman, to the detriment of tribal people across the nation.

**Tribal proposal to President Obama**

When considering the impact of President Trump's actions, it is important to consider the long road endured to create the Bears Ears National Monument. On October 15, 2015, the Bears Ears Inter-Tribal Coalition, which includes the Navajo Nation, the Hopi Tribe, the Ute Mountain Ute Tribe, Uintah and Ouray Ute Indian Tribe and the Pueblo of Zuni, submitted their Proposal to Barack Obama for the Creation of the Bears Ears National Monument.<sup>1</sup> The proposal was the result of *six years* of intensive work, and proposed a monument area encompassing 1.9 million acres.<sup>2</sup> The proposal came after years of desecration of the area, including the routine destruction of petroglyphs, ancestral dwellings and burial sites.<sup>3</sup>

For example, in 2016, immediately prior to the site designation, the area suffered from numerous vandals. In one instance, thieves attempted to steal a petroglyph of a dancer, they first used a rock saw, and then a chisel, neither of these methods worked and left the petroglyph "mauled."<sup>4</sup> In another, a person did donuts in an ATV in a 1,200-year-old archaeological site.<sup>5</sup> In 2015, grave robbers looted multiple sites, and tossed aside human

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bones to steal ceramics that were buried in the graves.<sup>6</sup> The Proposal suggested a way to end the desecration of the area: through the formation of a National Monument.

### **President Obama establishes Bears Ears National Monument**

On December 28, 2016, in a presidential proclamation, President Obama established the Bears Ears National Monument, a 1.35-million-acre area.<sup>7</sup> The proclamation is poetic. It begins:

Rising from the center of the southeastern Utah landscape and visible from every direction are twin buttes so distinctive that in each of the native languages of the region their name is the same: Hoon'Naqvut, Shash Jáa, Kwiyagatu Nukavachi, Ansh An Lashokdiwe, or "Bears Ears." For hundreds of generations, native peoples lived in the surrounding deep sandstone canyons, desert mesas, and meadow mountaintops, which constitute one of the densest and most significant cultural landscapes in the United States. Abundant rock art, ancient cliff dwellings, ceremonial sites, and countless other artifacts provide an extraordinary archaeological and cultural record that is important to us all, but most notably the land is profoundly sacred to many Native American tribes, including the Ute Mountain Ute Tribe, Navajo Nation, Ute Indian Tribe of the Uintah Ouray, Hopi Nation, and Zuni Tribe. . . .<sup>8</sup>

From earth to sky, the region is unsurpassed in wonders. The star-filled nights and natural quiet of the Bears Ears area transport visitors to an earlier eon. Against an absolutely black night sky, our galaxy and others more distant leap into view. As one of the most intact and least roaded areas in the contiguous United States, Bears Ears has that rare and arresting quality of deafening silence.<sup>9</sup>

The presidential proclamation goes on to recognize the rich history of the area, noting the "Clovis people hunted among the cliffs and canyons of Cedar Mesa as early as 13,000 years ago" and that "hunters and gatherers continued to live in this region in the Archaic Period, with sites dating as far back as 8,500 years ago."<sup>10</sup> It also notes that the "area's cultural importance to Native American tribes continues to this day. As they have for generations, these tribes and their members come here for ceremonies and to visit sacred sites." The proclamation continues:

Traditions of hunting, fishing, gathering, and wood cutting are still practiced by tribal members, as is collection of medicinal and ceremonial plants, edible herbs, and materials for crafting items like baskets and footwear. The traditional ecological knowledge amassed by the Native Americans whose ancestors inhabited this region, passed down from generation to generation, offers critical insight into the historic and scientific significance of the area. Such knowledge is, itself, a resource to be protected and used in understanding and managing this landscape sustainably for generations to come.<sup>11</sup>

The presidential proclamation concludes that the “Protection of the Bears Ears area will preserve its cultural, prehistoric, and historic legacy and maintain its diverse array of natural and scientific resources, ensuring that the prehistoric, historic, and scientific values of this area remain for the benefit of all Americans.”<sup>12</sup>

In the proclamation, President Obama also established the Bears Ears Commission, made up of officers from the tribes in the Bears Ears Inter-Tribal Coalition. The Bears Ears Commission was established “[i]n recognition of the importance of tribal participation to the care and management of the objects identified above, and to ensure that management decisions affecting the monument reflect tribal expertise and traditional and historical knowledge.”<sup>13</sup>

Overall, President Obama’s dedication of the Bears Ears National Monument was a beautiful declaration to the tribal people, noting both the historic and current importance of the site to the tribes, the beauty of the natural area and the importance of preserving cultural, natural and historic resources. Its respect for the area and for the tribes that call the area home is clear. But, the artful and expressive deference demonstrated in President Obama’s proclamation stands in stark contrast to President Trump’s actions towards the Bears Ears area.

### **President Trump orders review of national monument designations**

On April 26, 2017, President Trump issued Executive Order 13792 on the Review of Designations Under the Antiquities Act.<sup>14</sup> The executive order directed the secretary of the interior to “conduct a review of all presidential designations or expansions of designations under the Antiquities Act made since January 1, 1996.”<sup>15</sup> The secretary’s review was required to include monuments “where the designation covers more than 100,000 acres, where the designation after expansion covers more than 100,000 acres, or where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders.”<sup>16</sup> The executive order ordered the review of 27 of the 57 national monuments designated under the Antiquities Act since January 1, 1996, including Bears Ears National Monument. However, Bears Ears National Monument is the only monument specifically listed in President Trump’s executive order.

Under the executive order, the secretary was required to determine whether the designations were “made in accordance with the requirements and original objectives of the [Antiquities] Act.”<sup>17</sup> In making this determination, the secretary was directed to consider the following factors:

- (i) the requirements and original objectives of the Act, including the Act’s requirement that reservations of land not exceed “the smallest area compatible with the proper care and management of the objects to be protected”;

- (ii) whether designated lands are appropriately classified under the Act as “historic landmarks, historic and prehistoric structures, [or] other objects of historic or scientific interest”;
- (iii) the effects of a designation on the available uses of designated Federal lands, including consideration of the multiple-use policy of section 102(a) (7) of the Federal Land Policy and Management Act (43 U.S.C. 1701(a) (7)), as well as the effects on the available uses of Federal lands beyond the monument boundaries;
- (iv) the effects of a designation on the use and enjoyment of non-Federal lands within or beyond monument boundaries;
- (v) concerns of state, tribal, and local governments affected by a designation, including the economic development and fiscal condition of affected states, tribes, and localities;
- (vi) the availability of federal resources to properly manage designated areas; and
- (vii) such other factors as the Secretary deems appropriate.<sup>18</sup>

The executive order required the secretary to provide an interim report within 45 days and summarize the his findings specifically on the Bears Ears National Monument and any “such other designations as the Secretary determines to be appropriate for inclusion in the interim report.”<sup>19</sup> The secretary was also required to provide “recommendations for such Presidential actions, legislative proposals, or other actions consistent with law.”<sup>20</sup> Following the interim report, the secretary was required to give, within 120 days, a final report to the president that summarized the his findings on all designations and contained recommendations for actions.<sup>21</sup>

In conducting his review, the secretary was required to “consult and coordinate with the governors of states affected by monument designations or other relevant officials of affected state, tribal, and local governments.”<sup>22</sup>

### **Secretary submits an interim report**

On June 10, 2017, the secretary submitted his interim report.<sup>23</sup> It recommended that:

- (1) the existing boundary of the BENM be modified to be consistent with the intent of the Act; (2) Congress authorize tribal co-management of designated cultural areas; (3) Congress designate selected areas within the existing BENM as national recreation areas or national conservation areas, as defined by law; and (4) Congress clarify the intent of the management practices of wilderness or WSAs within a monument.<sup>24</sup>

While the secretary claimed that he consulted with local tribes, even stating that the tribes were “very happy” and “desire[d] co-management” of Bears Ears, tribal representatives stated that this was false.<sup>25</sup> They claimed

that, in fact, Zinke ignored months of requests from tribal representatives, but finally capitulated to a short one-hour meeting.<sup>26</sup> U.S. Sen. Tom Udall, the vice-chair of the Senate Committee on Indian Affairs, stated that it is clear that “Zinke did not properly consult with tribes . . . He never adequately engaged the tribes, or the public.”<sup>27</sup>

### **President Trump shrinks national monuments**

On December 4, 2017, President Trump issued a presidential proclamation modifying the Bears Ears National Monument.<sup>28</sup> The presidential proclamation shrank the Bears Ears National Monument by 85 percent, to 201,876 acres.<sup>29</sup> The same day, President Trump also issued a presidential proclamation modifying the Grand Staircase-Escalante National Monument,<sup>30</sup> cutting it by 46 percent, to 1,003,863 acres.<sup>31</sup>

### **Secretary submits a final report**

On December 5, 2017, a day after the President’s proclamations were issued, the Secretary submitted his final report.<sup>32</sup> In the report, the secretary recommended modifying the boundaries of four national monuments: the Bears Ears, Grand Staircase, Cascade-Siskiyou, and Gold Butte National Monuments. This recommendation indicates that President Trump’s cuts on the Bears Ears National Monument and Grand Staircase-Escalante National Monument is likely just the beginning of the Trump Administration’s decimation of the national monuments.

After the report was issued, representatives from local tribes, Carleton Bowekaty, a councilman of the Pueblo of Zuni and co-chair of the Bears Ears Inter-Tribal Coalition and David Filfred, a council delegate for the Navajo Nation Council, highlighted the lack of consultation, stating:

It is time to set the record straight. The President, Interior Secretary Ryan Zinke, the Utah congressional delegation and Utah’s governor did not consult with us in making their decision to shrink Bears Ears. This is the work of powerful politicians playing the same old game, and attempting to bring the swamp to southern Utah.

They did not work with us, despite their claims that they heard the voices of tribes. The voice of the Navajo Nation, the Hopi Tribe, the Ute Indian Tribe, the Ute Mountain Ute Tribe and the Pueblo of Zuni has been uniform, consistent and loud: Protect our homelands, histories and cultures by preserving the Bears Ears National Monument.<sup>33</sup>

They stated that it “is simply not enough to hear our voices and ignore them outright” and noted that the “failure to consult with our elected leaders on gutting Bears Ears also abdicates the trust duty the United States has to our nations.”<sup>34</sup> They concluded, “The lack of understanding and regard that

this administration has shown for Native Nations has been abhorrent, and this attempted dismantling of Bears Ears follows what is becoming a long line of attacks.”<sup>35</sup>

### **Parties file litigation challenging the presidential proclamation**

On December 4, 2017, the Hopi Tribe, Navajo Nation, Ute Indian Tribe, Ute Mountain Ute Tribe, and Zuni Tribe filed a “Complaint for Injunctive and Declaratory Relief” in the United States District Court for the District of Columbia, alleging claims against the President, the Secretary, the Director of the Bureau of Land Management, the Secretary of Agriculture, and the Chief of the U.S. Forest Service.<sup>36</sup>

A variety of other lawsuits have been filed challenging the Presidential Proclamation on Bears Ears, including: (1) a lawsuit by a coalition of different interest groups, including Utah Dine Bikeyah, Patagonia Works, Friends of Cedar Mesa, Archaeology Southwest, Conservation Lands Foundation, Access Fund, Society for Vertebrate Paleontology, National Trust for Historic Preservation; and (2) a lawsuit by eleven environmental groups, including the Wilderness Society, National Parks Conservation Association, Sierra Club, Grand Canyon Trust, Defenders of Wildlife, Great Old Broads for Wilderness, Western Watersheds Project, WildEarth Guardians, Center for Biological Diversity, Natural Resources Defense Council, Southern Utah Wilderness Alliance.<sup>37</sup>

Further, lawsuits have been filed challenging the Grand Staircase-Escalante Proclamation, including: (1) a lawsuit by ten environmental groups, including the Wilderness Society, Defenders of Wildlife, Natural Resources Defense Council, Southern Utah Wilderness Alliance, Grand Canyon Trust, Great Old Broads for Wilderness, Western Watersheds Project, WildEarth Guardians, Sierra Club, Center for Biological Diversity; and (2) a lawsuit by the Grand Staircase Escalante Partners, Society of Vertebrate Paleontology, Conservation Lands Foundation.

In other words, the proclamations are being challenged by a wide variety of groups, including tribes, environmental organizations, paleontology organizations, and private companies. The sheer amount of support and variety of opponents is staggering.

### **Bears Ears and the Antiquities Act**

The complaint by the tribes alleges that the presidential proclamation shrinking Bears Ears National Monument “violated the Antiquities Act, seized an authority that the Constitution vests in Congress, exceeded the power delegated to the President by Congress, and should be declared unlawful and enjoined to prevent its implementation.”<sup>38</sup> Accordingly,

the litigation over the Bears Ears National Monument will focus on the Antiquities Act.

As provided in the Property Clause of the Constitution, Congress holds the authority to dispose of, regulate, and protect public lands. In the Antiquities Act, Congress delegated to the executive the power to protect “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” that are on federal lands and reserve, and withdraw lands into federal ownership “confined to the smallest area compatible with proper care and management of the objects to be protected.”<sup>39</sup> In other words, the Antiquities Act allows the president to invoke Congress’ authority to designate federal public lands.

Congress still possesses the authority to alter any presidential designation. In the past, “Congress has expanded and reduced the size of proclaimed monuments and abolished eleven. . . . While presidents have also expanded boundaries, and even diminished boundaries 18 times with congressional acquiescence, no president has rescinded a proclaimed monument.”<sup>40</sup> In examining the Antiquities Act, “[m]any legal scholars point out that Congress retained its constitutional authority to diminish or revoke a monument because the Act only grants a president the authority to create national monuments; others argue there is implicit presidential authority to rescind.”<sup>41</sup>

Therefore, the primary issue in determining whether President Trump’s presidential proclamation shrinking Bears Ears National Monument exceeded his authority under the Antiquities Act is whether the Antiquities Act provides presidents with an implied authority to rescind monuments. The Complaint by the Tribes affirmatively states that the Antiquities Act does not provide any implied authority to rescind, stating:

The Antiquities Act authorizes Presidents to designate federal public lands, such as Bears Ears, as national monuments to safeguard and preserve landmarks, structures, and objects of historic or scientific importance. The Antiquities Act, however, does not authorize presidents to rescind or modify national monuments created by their predecessors, and certainly not to revoke and replace them with smaller ones as has been done here. That power is reserved to Congress alone.<sup>42</sup>

This issue has not been litigated previously. Accordingly, President Trump “seeks to exercise untested discretion under the Act [to] rescind the Bears Ears National Monument designation. This level of uncertainty provides an opportunity for litigation of issues of first impression.”<sup>43</sup>

Overall, while the Antiquities Act clearly provides presidents with the authority to protect historic landmarks by withdrawing the land into federal ownership, the reverse is not true. It seems an impermissible extension of



presidential authority to assume that the power to protect lands also includes an implied authority to rescind those protections, especially when Congress expressly retained those powers.

### **Shash Jaa National Monument and Indian Creek National Monument Act**

In an apparent effort to solidify President Trump's changes to the Bears Ears National Monument, regardless of the outcome of the previously discussed litigation, Rep. John Curtis introduced the "Shash Jaa National Monument and Indian Creek National Monument Act." This would reduce the Bears Ears National Monument by 85 percent. Mr. Curtis has purported that the Act would "create the first Tribally managed national monument."<sup>44</sup> While it is true that the Act would require the establishment of a management council, including four Native Americans, it allows the president to select the members, without any input from tribal representatives. Further, the management council would include two members of the San Juan County Board of Commissioners, but only include representatives from two of the five tribes of the Bears Ears Inter-Tribal Coalition. Russell Begaye, president of the Navajo Nation stated, "Far from empowering tribes, it would put local politicians and 'handpicked' Native Americans in charge."<sup>45</sup> Mr. Begaye declared that the "management in this bill is tribal in name only."<sup>46</sup>

Representatives from the Bears Ears Inter-Tribal Coalition have also stated that the Act will "eviscerate the important collaborative government-to-government management role for tribes recognized and honored in the Obama proclamation."<sup>47</sup> The Coalition noted,

In fact, this bill completely undermines the ability of our tribes to protect the resources President Obama sought to preserve for us indefinitely. It does so by filtering our voice through the very individuals who fought most vociferously against our tribes having a voice in the management of our historic, religious, and cultural patrimony at Bears Ears.<sup>48</sup>

The Coalition also pointed out that "[i]n characteristic Utah congressional fashion, Congressman Curtis developed this 'pro-tribal' bill without ever consulting with our tribes, or any of the tribes of the five tribes coalition."<sup>49</sup>

### **Natural resources in the National Monument areas**

Public discourse has been quick to point out that the areas removed from the National Monuments are rich in oil, gas, coal, and uranium.<sup>50</sup> The Bureau of Land Management has designated parts of the Bears Ears area as areas with high-to-moderate oil and gas development potential.<sup>51</sup> Further, a U.S. Geological Survey estimated that 62 billion tons of coal are in a plateau that sits within the Grand Staircase-Escalante, in other words "Utah's biggest coal field" where there are currently no mining leases.<sup>52</sup>

While President Trump has justified the reduction of Bears Ears by arguing that public land must be available for “public uses” he has not admitted that he was motivated by the potential to exploit the land.<sup>53</sup> However, the *Washington Post* obtained documents pointing to a concerted effort by energy companies that “urged the Trump administration to limit the monument to the smallest size needed to protect key objects and areas, such as archeological sites, to make it easier to access the radioactive ore.”<sup>54</sup> In a letter the Department of the Interior, the Colorado-based Energy Fuels Resources advocated altering Bears Ears in ways that would protect the company’s assets, located just outside the Bears Ears National Monument.<sup>55</sup> These assets included the United States’ last operating uranium mill.<sup>56</sup> The company’s chief operating officer wrote that “[r]educing our reliance on foreign sources of uranium requires a facility that can process the abundant uranium resources that are located in the region near the White Mesa mill.”<sup>57</sup> The issue of uranium mining is particularly important to the Navajo Nation, as many uranium mines—which have been designated as superfund sites—remain near Navajo lands, resulting in contamination of the tribe’s water sources.<sup>58</sup>

Meanwhile, the *New York Times* obtained internal agency documents demonstrating that “[e]ven before President Trump officially opened his high-profile review last spring of federal lands protected as national monuments, the Department of Interior was focused on the potential for oil and gas exploration at a protected Utah site.”<sup>59</sup> The documents contains maps depicting boundary changes that would “resolve all known mineral conflicts,” referring to the oil and gas sites on the land.<sup>60</sup> The *New York Times* sued to obtain access to the documents<sup>61</sup> and maintained that:

The internal Interior Department emails and memos also show the central role that concerns over gaining access to coal reserves played in the decision by the Trump administration to shrink the size of the Grand Staircase-Escalante National Monument by about 47 percent, to just over 1 million acres.

Mr. Zinke’s staff developed a series of estimates on the value of coal that could potentially be mined from a section of Grand Staircase called the Kaiparowits plateau. As a result of Mr. Trump’s action, major parts of the area are no longer a part of the national monument.<sup>62</sup>

Overall, the *New York Times* noted that “[f]rom the start of the Interior Department review process, agency officials directed staff to figure out how much coal, oil and natural gas . . . had been put essentially off limits, or made harder to access, by the decision to designate the areas as national monuments.”<sup>63</sup> Accordingly, the federal government’s own records reveal President Trump’s motivation behind shrinking of the national monuments.

### **Trump Administration's sacrifice of tribal ancestral land**

The reduction of the Bears Ears National Monument is only President Trump's most recent demonstration of his dedication to sacrificing tribal ancestral homes to business interests. Earlier in 2017, President Trump signed a memorandum to the Secretary of the Army directing the Secretary to expedite review of the Dakota Access Pipeline, noting that "I believe that construction and operation of lawfully permitted pipeline infrastructure serve the national interest."<sup>64</sup> Immediately after signing the memorandum, President Trump ignored questions about the pipeline's impact on Standing Rock Sioux Tribe.<sup>65</sup>

As most are aware, the Dakota Access Pipeline was the subject of a massive collaborative protest by many Native American tribes, in what many recognized as one of the largest gatherings of Native American protestors in modern times. The tribes and groups opposing the pipeline were primarily concerned with the proximity to the Standing Rock Sioux's only source of drinking water. The tribes' fears were well founded. By January 2018, the Dakota Access Pipeline had suffered from five spills, with commenters noting "[t]he series of spills in the pipelines' first months of operation underlines a fact that regulators and industry insiders know well: Pipelines leak."<sup>66</sup>

Further, in April 2017, President Trump issued a permit to TransCanada Keystone Pipeline, L.P., authorizing Keystone to construct, connect, operate and maintain the Keystone Pipeline<sup>67</sup> across the territories of numerous tribes. The tribes also opposed the Keystone Pipeline, noting that federal government "failed to adequately consult and negotiate the matter with them, despite the direct effect the pipeline's route would have on their lands."<sup>68</sup> Tribes were "concerned about a range of environmental problems like pollution, accelerated climate effects and potential danger to the tribes' water supply."<sup>69</sup> Recently, the Keystone Pipeline suffered a large oil leak, spilling over 795,000 liters of oil, only 64 kilometers west of the Sisseton Wahpeton Oyate of the Lake Traverse Reservation, concerning tribal leaders.<sup>70</sup> President Trump's disregard for the issues important to the Native American people is clear.

President Trump's policies are a natural outgrowth of his personal, dismissive and disrespectful attitude towards Native American culture. For example, at an event meant to honor Native Americans, while President Trump was hosting three Navajo Code Talkers, he used the event as an opportunity to insult Senator Elizabeth Warren, calling her "Pocahontas."<sup>71</sup> These comments were made beneath a portrait of Andrew Jackson, the architect of the Trail of Tears, which forced 17,000 Native Americans from their ancestral homes.<sup>72</sup> Whether these insults are merely the mistake of an uninformed individual or a purposeful slight, the visual image, and the disrespect inherent in both

of those gestures, will remain intertwined with Native American perception of President Trump.

Overall, President Trump's policies prioritize the promotion of business interests over preservation of the land. President Trump's sacrifice of tribal interests, values and places—in exchange for profits and the lining of businessmen's pockets—will be a defining characteristic of the Trump Administration, at least to the Native American people whose lives he has impacted. The utter lack of respect for tribal ancestral grounds and the cultural, historic and natural resources contained within those lands, is appalling. Trump's actions will have repercussions for generations to come.

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NOTES

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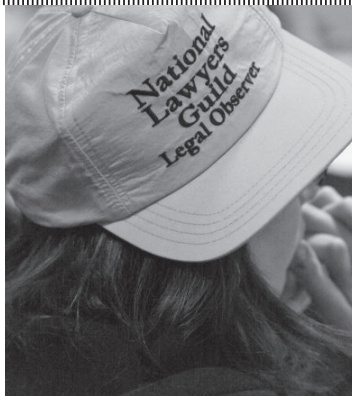
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**Zachary Wolfe &  
Heidi Boghosian**

**BRIEF OF NATIONAL LAWYERS  
GUILD, *ET AL.* AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONER IN  
*ULBRICHT V. UNITED STATES***

**Statement of Interest<sup>1</sup>**

*Amici* are organizations and a former judge committed to defending the constitutional protections afforded by both the Fourth and Sixth Amendments and include the National Lawyers Guild, American Conservative Union Foundation Center for Criminal Justice Reform, Freedom Project, Judge Nancy Gertner (Ret.), the Human Rights Defense Center, National Coalition to Protect Civil Freedoms, the Partnership for Civil Justice Fund, People's Law Office. Many of these organizations have appeared previously as *amicus curiae* before this Court. Their individual organizational statements are contained in the Appendix following this brief.

**Summary of Argument**

This Court should accept *certiorari* because of the important concerns related to privacy and judicial fact-finding in a context that suggests bias and hostility to constitutionally protected viewpoints.

First, this case squarely presents the question of privacy interests in Internet browsing history. Whether or not the government may obtain this information without a showing of probable cause is a question of tremendous importance for individual freedom and political activity.

Second, this case raises important questions of what factors may be legitimately considered by judges at the sentencing phase. Petitioner's sentence was based on judicial fact-finding that the defendant commissioned murders, even though he was never charged with any form of homicide or planning homicide and there were no relevant jury findings. The judge also expressed hostility to Petitioner's philosophy and political views. This Court should not permit punishment based on lower burdens of proof for any crime, much less one as serious as murder-for-hire, and should clarify that punishments may not be enhanced because of ideology.

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## Argument

### I. This court should resolve the question of the privacy interest in online activity

This society is grappling with the question of what privacy protections should attend modern communications in a free society. “[B]oth empirical research and public opinion polls suggest that the public has higher expectations of privacy than those recognized by the courts in most Fourth Amendment jurisprudence.”<sup>1</sup>

This Court has taken notice, providing important guidance by revising decades-old principles in light of new technology in *Riley v. California*,<sup>2</sup> and confronting further questions of when modern technology fundamentally changes the nature of an intrusion into one that is unreasonable in *Carpenter v. United States*.<sup>3</sup>

In working through these questions, this Court would benefit from considering a fuller array of the types of intrusions made possible when the third-party doctrine, as developed in *Smith v. Maryland*,<sup>5</sup> is applied to types of activity that could not have been envisioned by courts in decades past.

The court below held that government collection of information regarding the specific IP addresses that a person visits is “precisely analogous to the capture of telephone numbers at issue in *Smith*.”<sup>6</sup> But this is far from self-evident and has been a subject of debate and concern at this Court, in lower courts, and among the general public.

In this Court, *Riley*, 134 S. Ct. at 2490, specified that one reason a warrant was required for searches of mobile telephones, even in a search incident to arrest, was because “[a]n Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual’s private interests or concerns.”<sup>7</sup> This echoes prior concerns and still-open questions about the extent of legal protection for Internet activity that, to many, appears extremely private.<sup>8</sup>

The Eleventh Circuit’s concern and internal disagreement in *United States v. Davis*,<sup>9</sup> regarding the applicability of *Smith* to web browsing history is instructive. In dissent, Chief Judge Martin was concerned that “blunt application of the third-party doctrine threatens to allow the government access to a staggering amount of information that surely must be protected under the Fourth Amendment” including, specifically, “what websites you access.”<sup>10</sup> The majority acknowledged these concerns, but held that it could not respond to them absent instruction from this Court.<sup>11</sup>

Notably, studies reveal that actual expectations of privacy in Internet histories are quite high. “Approximately 85% of respondents felt that law

enforcement should never have access or at least require a level commensurate with probable cause to obtain information about online search, purchase, website visitation histories.”<sup>12</sup>

Accordingly, this case presents an opportunity for the Court to address a type of modern activity—web browsing—that has weighed heavily in recent thinking about privacy concerns but has not been resolved. Moreover, as discussed below, the ability to access the Internet without being monitored by the government, absent probable cause, is essential to a modern free society.

### **A. Online activity has extraordinary social importance and requires constitutional protection.**

In addition to Fourth Amendment concerns, a free and open Internet is essential to the marketplace of ideas,<sup>13</sup> and the government’s and lower court’s notion that there are no privacy interests to be protected in web browsing history has alarming First Amendment implications. Although the right to receive information is typically discussed in the context of censorship,<sup>14</sup> it is a principle of which this Court should be mindful when evaluating the importance of privacy rights in Internet histories. “We are all familiar with the thought that democracy requires a flourishing ‘public life.’ Less familiar, but equally essential, is the idea that a self-governing people requires a flourishing personal life.”<sup>15</sup>

It will be self-evident to many that what can be determined from examining only Internet histories is profoundly “private” information. As discussed above, examinations of online activity have been highlighted as the type of intrusion into private matters that is of concern when other types of government searches are being considered by this and lower courts. *Amici* believe that the Court will find that the same interests implicated in searches of a mobile phone also require a warrant based on probable cause before the government may monitor an individual’s web history.<sup>16</sup>

However, the court below mechanically applied nearly forty-year-old precedent, believing that cases considering pen traps of the telephone number dialed was akin to government knowledge of what websites a person visits.<sup>17</sup> Something as socially, politically, and personally important as website browsing history requires updated consideration of privacy rights by this Court before the government is given license to search it without probable cause.

By granting *cert.* in this case, the Court would benefit from full and precise briefing on this specific issue and could clarify important rights for the public as well as provide much-needed guidance for the lower courts.<sup>18</sup>

## **II. To ensure that judges do not unfairly punish a defendant in violation of the sixth amendment to the U.S. Constitution, sentences must be based on facts proven at trial**

Judges, when poised to render sentencing, should not engage in fact-finding. This Court held in *Apprendi v. New Jersey* that the Sixth Amendment right to a jury trial—a “constitutional protection[] of surpassing importance”—prohibits judges from enhancing criminal sentences beyond statutory maximums based on facts other than those decided by the jury beyond a reasonable doubt or fact of prior conviction.<sup>19</sup> Antipathy to entrusting the government with sentencing has existed since the nation’s founding, preferring the “unanimous vote of 12 of [their] fellow citizens.”<sup>20</sup>

The extraordinary harshness of the sentence in this case, based on especially problematic judicial fact-finding, calls for careful scrutiny. Thirty-one-year-old Ross William Ulbricht, a first-time offender, received a much harsher sentence than prosecutors sought based not on charges presented to the jury, but rather on judicially-found “facts”—namely that he ordered several murders-for-hire.<sup>21</sup> Although Mr. Ulbricht’s case was not death-penalty eligible, his sanction of life without possibility of parole, also referred to as “death-in-prison,” is close on the punishment spectrum, and is “severe and degrading, arbitrarily imposed, and ha[s] been condemned by members of the international community.”<sup>22</sup>

It is worth noting that other Silk Road-related defendants received significantly lighter sentences, ranging from ten years to 16 days, in disregard of the sentencing consideration to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.<sup>23</sup>

The case of Blake Benthall, alleged owner and operator of Silk Road 2.0—one of many dark net markets that proliferated after Ulbricht’s sentencing<sup>24</sup>—illustrates the gross disparity. In its press release after Benthall’s arrest on November 5, 2014, the FBI noted:

Silk Road 2.0 was virtually identical to the original Silk Road website in the way it appeared and functioned. In particular, like its predecessor, Silk Road 2.0 operated exclusively on the “Tor” network and required all transactions to be paid for in Bitcoins in order to preserve its users’ anonymity and evade detection by law enforcement.<sup>25</sup>

U.S. Attorney Preet Bharara also acknowledged Benthall was running “a nearly identical criminal enterprise” to Silk Road.<sup>26</sup> Yet, Benthall spent a mere 16 days in prison while Petitioner is serving a life sentence.<sup>27</sup>

While judicial fact-finding was historically initiated to afford judges a vehicle for lowering sentences, it has evolved to do the opposite.<sup>28</sup> It also

taints the criminal justice process as a whole in that “fact discretion not only creates leeway for the expression of judicial biases, it also undermines the appeals process and adversarial litigation. Although these mechanisms are sometimes believed to put a beneficial check on trial courts, under fact discretion they lose their effectiveness.”<sup>29</sup>

It is not problematic that the judge considered background information beyond the conviction, but it is of concern that new, uncharged offenses were brought up at sentencing and informed the ultimate sentence, in violation of the Sixth Amendment. “The challenge arises in line-drawing to permit suitable judicial discretion while cabining the ability of judges to punish uncharged and acquitted conduct.”<sup>30</sup> The Sixth Amendment jury right provides that an individual should not be punished for an uncharged offense because that person has been convicted of another crime. *United States v. Booker* interprets the Sixth Amendment as requiring that any fact used to impose a sentence longer than the longest sentence be supported by the jury finding or guilty plea must be proved to a jury or admitted by the defendant.<sup>31</sup>

### **A. Jurors’ historic role as a check against unbridled judicial power has diminished, to the detriment of the rule of law**

This case makes evident how the American jury’s role—as “populist protector” and a check against tyranny—has become but a “shadow of its former self,” with sentencing practices vesting increasing power in judges despite the constitutional mandate that the jury be central to reaching a judgment.<sup>32</sup>

This nation’s Framers and Founders feared the vagaries of judicial discretion.<sup>33</sup> They were explicit that trial by jury was necessary to thwart and obstruct judges, not merely prosecutors with weak cases. Elbridge Gerry insisted that jury trials were necessary to guard against corrupt judges.<sup>34</sup> Alexander Hamilton echoed this concern when he wrote, “The strongest argument in [trial by jury’s] favour is, that it is a security against corruption.”<sup>35</sup> John Adams said that it was a juror’s duty to “find the verdict according to his own best understanding, judgment and conscience, though in direct opposition to the direction of the court.”<sup>36</sup>

This Court has long reaffirmed the Founders’ contention that juries’ role is paramount to the execution of justice: “The jury system postulates a conscious duty of participation in the machinery of justice.... One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.”<sup>37</sup>

In the late 20th century, criminal sentencing changed in two significant ways that diminished juries’ power: (1) New statutory schemes provided for

different penalties for a single crime depending on the existence of aggravating circumstances, and (2) judges were afforded discretion to set sentences within board penalty ranges (indeterminate sentencing).<sup>38</sup>

“With respect to the second type of innovation, courts and commentators seem to have failed to recognize the potential for incursion into the jury’s traditional bailiwick.” That can be attributed to the fact that these reforms were designed to reduce, not increase, sentences, making them flexible so that offenders could be released when rehabilitated.<sup>39</sup>

With the introduction of the Sentencing Guidelines in 1986, and statutory sentencing schemes in many states, the issue that had until then been latent—judicial fact-finding in sentencing—rose to the fore.

The guidelines were designed to minimize judicial discretion—thought to be too lenient—and amounted to a retribution model replacing the former rehabilitation model of punishment. Judicial fact-finding no longer worked in favor of the defendant. In early cases, challenging judicial fact-finding under the Guidelines and state counterparts, this Court did not signal that it would find any constitutional problems with the new sentencing framework.

While there have been efforts to reform sentencing practices over the past four decades, this Court should consider the instant case in light of the values informing this nation’s founding. Judge Marvin Frankel persuasively explicated modern considerations that augment reasons the founders might have been concerned with judicial fact-finding: factors such as class, education, and race influence judges. He wrote: “The almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.”<sup>40</sup>

The right to have a sentence based on proven facts remains a central concern today, and this case presents an opportunity for the Court to clarify the limits of judicial fact-finding at sentencing.<sup>41</sup>

### **B. Sentencing must be limited to facts admitted by the defendant or supported by jury findings.**

Significantly for the instant case, this Court precluded judges from enhancing criminal sentences based on facts other than those decided by the jury or admitted by the defendant in part out of a concern that “[w]hen a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ and the judge exceeds his proper authority.”<sup>42</sup>

It is instructive to recall Justice Scalia’s words regarding Mr. Blakely’s enhanced sentence and the stakes involved:

The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the unanimous suffrage of twelve of his equals and neighbours, rather than a lone employee of the State.<sup>43</sup>

As our system has implicitly recognized for centuries, juries are simply the best actors to decide fact questions. Fact questions involved speculative judgments about unknown events. In order to allow the parties and the legal system to put disputes behind them, adjudication must result in final determinations about the matters contested by the parties. Only the jury, with its veiled, democratic decision-making structure, has the societal imprimatur to render acceptable final decisions on matters that are inherently unknowable.<sup>44</sup>

The district court judge in this case failed to set forth a reasoned basis for considering several alleged drug-related deaths as relevant facts to be considered in determining Mr. Ulbricht's sentence.<sup>45</sup> Judge Forrest based her sentence on unestablished facts that Mr. Ulbricht's actions "somehow related to" alleged drug overdose fatalities.<sup>46</sup> This was despite a report by Board-certified forensic pathologist defense expert, Mark L. Taff, M.D., that found insufficient information to attribute any of the deaths to drugs purchased from Silk Road vendors.<sup>47</sup> The government did not rebut Dr. Taff's report, and nothing in the jury verdict resolved this contested fact.

### **C. Judicial fact-finding in this context is particularly troublesome and *certiorari* presents an appropriate vehicle to address this issue.**

#### **1. Confusion and fear, related to misunderstood technology, and highly prejudicial murders-for-hire and drug-related fatalities, impermissibly tainted sentencing**

The sentence was based on judicial findings related to allegations of serious crimes that not only were never found by a jury but were not even among the charges leveled at trial. During closing argument, the U.S. attorney explicitly advised the jury: "[T]o be clear, the defendant has not been charged for these attempted murders here. You're not required to make any findings about them. And the government does not contend that those murders actually occurred."<sup>48</sup>

Thus, these "found" murders-for-hire and other harms are best understood as anxious imaginings of the darker intentions that "must" lurk behind the commonly misunderstood Silk Road technologies, namely anonymizing software, crypto-currency, and the so-called Dark Web. Despite widespread and growing use of Tor and Bitcoin, United States law enforcement's framing of surveillance and cryptography shapes how the mainstream sees it. Privacy and national security are depicted as being in conflict, with emerging communications technology an asset to privacy and a setback to security.



Encryption is portrayed as especially threatening because law enforcement techniques have not kept pace. “It is a brilliant discourse of fear: fear of crime; fear of losing our parents’ protection; even fear of the dark.”<sup>49</sup>

It is tempting to believe the sweeping generalizations that the Dark Web is solely a terrain of lawlessness, with Bitcoin and Tor serving as criminals’ saddle and spurs.<sup>50</sup> Two years after the trial, these three areas remain widely misunderstood, and shrouded in mystery and sensationalism, despite the fact that many legitimate users abound: journalists, dissidents, and the military.<sup>51</sup>

## **2. Constitutionally irrelevant victim impact statements factored into sentencing bias**

Such misunderstandings or confusion about technology were augmented by impact witness statements at sentencing by parents of alleged Silk Road consumers who suffered fatalities.<sup>52</sup> Victim impact testimony may be prejudicial in that it diverts attention away from the facts that must be scrutinized, such as the circumstances surrounding the crime and the defendant’s background and character.<sup>53</sup>

Victim impact testimony creates “the risk that a . . . sentence will be based on considerations that are ‘constitutionally impermissible or totally irrelevant to the sentencing process’” by focusing on the character of the victim and his or her experience, rather than that of the offender.<sup>54</sup>

This Court has noted that it would be difficult—if not impossible—to provide a fair opportunity to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant.<sup>55</sup> The information may be so emotion-laden that jurors and judges become more persuaded by how they feel about the testimony than by the relevant case facts. There are few more emotionally-charged and compelling witnesses than grieving parents. And no testimony is more prejudicial and irrelevant. Moreover, the testimony in this instance concerns events for which Mr. Ulbricht was not found criminally culpable.

Even the appellate court panel found certain testimony related to uncharged crimes inappropriate, with Judge Gerald Lynch concerned that testimony from parents of alleged Silk Road customers who died “put an extraordinary thumb on the scale that shouldn’t be there. . . . Does this [testimony] create an enormous emotional overload for something that’s effectively present in every heroin case?” Lynch asked. “Why does this guy get a life sentence?” He went on to call the sentence “quite a leap.”<sup>56</sup>

Judge Forrest also pointed to evidence not charged at trial that “Dread Pirate Roberts,” or “DPR,” paid to have several persons murdered. Not one murder was carried out, nor was Ulbricht charged in connection with the

alleged plots. Yet at the sentencing hearing the trial judge asserted, “I find there is ample and unambiguous evidence that [Ulbricht] commissioned . . . murders to protect his commercial enterprise.”<sup>57</sup>

In sum, a lack of understanding of the technology-related issues, coupled with uncharged crimes of murder-for-hire and emotion-laden witness impact testimony from grieving family members, were used at sentencing to turn Petitioner into a composite of everything we have to fear about the Dark Web. Failure to allow explanations of cryptocurrency, the Dark Web, and Tor virtually ensured that the judge’s own biases would go unchecked.

#### **D. Judicial expressions of hostility to Petitioner’s ideology undermines First Amendment values and public perception of fairness**

The fact that Mr. Ulbricht at one time opposed United States drug laws is not relevant to his sentence, although it appeared to weigh heavily in the judge’s thinking during sentencing. The Court should accept *cert.* in this case to clarify that sentences based on judicial dislike of ideology cannot be tolerated.

The defendant’s ideological speech was related to a five-decades-old government “war on drugs in the United States [that] has been a failure that has ruined lives, filled prisons and cost a fortune.”<sup>58</sup>

When discussing Mr. Ulbricht’s character, the trial court voiced disapproval of his political and philosophical views. Alluding to anonymous comments on the Silk Road site, the judge said, “[T]here are posts that discuss the laws as the oppressor and that each transaction is a victory over the oppressor. This is deeply troubling and terribly misguided and also very dangerous.”<sup>59</sup> Before pronouncing Mr. Ulbricht’s sentence, the district court also expressed concern that “the reasons that you started Silk Road were philosophical and I don’t know that it is a philosophy left behind.”<sup>60</sup>

The First Amendment guarantees expression of opinions on matters of public concern free from the fear of legal punishment based on the viewpoint expressed. The First Amendment reflects our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>61</sup> “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.”<sup>62</sup>

Thus, adding to the concerns discussed in the preceding section that Mr. Ulbricht was sentenced for acts that a jury did not find him responsible for, there is strong reason for concern that he was punished for the political views he held. All this, moreover, flows from intrusion into his private web browsing history without a prior showing of probable cause, as discussed

in part I. Each of these concerns, and certainly cumulatively, warrant attention from this Court.

### **E. Fact-finding should be entrusted to juries, not judges**

In *Duncan v. Louisiana*,<sup>63</sup> this Court unequivocally affirmed the crucial right to fact-finding by jury:

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.... Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

In his time-honored work, *Democracy in America*, Alexis De Tocqueville exalts the jury system as one of the most critical political institutions for democratic self-government. Jury service not only educates citizens about the legal system, it also inculcates a sense of their duties as citizens and, optimally, improves their deliberations as citizens. Thus, juries have an important structural and historical role. Jury participation in the criminal justice process is, in itself, an important civic institution. De Tocqueville said that the jury

places the real direction of society in the hands of the governed...and not the government.... He who punishes the criminal is therefore the real master of society.... All the sovereigns who have chosen to govern by their own authority, and to direct society, instead of obeying its direction, have destroyed or enfeebled the institution of the jury.<sup>64</sup>

Further, in *The American Jury*—a seminal book in the study of juries’ influence in helping the public understand and appreciate the jury as an institution—the authors’ overall observation was that “[w]hether or not one comes to admire the jury system as much as we have, it must rank as a daring effort in human arrangement to work out a solution to the tensions between law and equity and anarchy.”<sup>65</sup>

When civics was taught in American schools, teachers frequently screened the classic play and film *12 Angry Men*<sup>66</sup> to illustrate the criminal justice system. The characters, identified by their juror numbers, are often described as archetypes of human qualities working together in search of truth and justice. The process of collective deliberation and voting tempers individual bias. “[T]he wisdom and insights of *12 Angry Men* find support in empirical studies of the contemporary jury. The value of diversity in promoting vigorous and fruitful discussion and the power of jury deliberation in forcing deeper thinking are both reinforced by social science studies of decision making.”<sup>67</sup>

In the play, jurors number Eleven and Nine have a brief exchange on their collective and personal responsibility:

ELEVEN: .... We have a responsibility. This is a remarkable thing about democracy. That we are—what is the word?—ah, notified! That we are notified by mail to come down to this place—and decide on the guilt or innocence of a man; of a man we have not known before. We have nothing to gain or lose by our verdict. This is one of the reasons why we are strong. We should not make it a personal thing....

NINE: [slowly] Thank you very much.

ELEVEN: [slight surprise] Why do you thank me?

NINE: We forget. It's good to be reminded.<sup>68</sup>

## **Conclusion**

For the foregoing reasons, *amici curiae* respectfully urge this Honorable Court to grant *certiorari* in this matter and reverse the decision below.

Respectfully submitted,

Heidi Boghosian

Prof. Zachary Wolfe

The **National Lawyers Guild, Inc.** (NLG) is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary bar association. It has long advocated for fair criminal justice policies, and defended individuals who were denied their constitutional rights at trial. In the mid-twentieth century the NLG was accused by the government of espousing dangerous ideas, including in hearings conducted by the House Committee on Un-American Activities and other instances of governmental overreaching now popularly discredited. *See, e.g., Kinoy v. District of Columbia*, 400 F.2d 761 (D.C. Cir. 1968). From 1940-1975, the FBI, CIA and other government agencies spied on, infiltrated and disrupted the NLG and its members, even though no alleged or suspected criminal wrongdoing existed to justify governmental intrusion. *See National Lawyers Guild v. Attorney General of the United States*, 225 F.2d 552 (D.C. Cir. 1955). Since then, the Guild has continued to represent thousands of Americans critical of government and corporate policies, from anti-war activists during the Vietnam era to current anti-globalization, peace, environmental and animal rights activists.

The **American Conservative Union Foundation** (ACUF) was founded by William F. Buckley, Jr. in 1973 to educate voters, office-holders, and opinion leaders regarding conservative principles to solve complex problems facing Americans today. The **ACUF Center for Criminal Justice Reform** (CCJR) is recognized as one of the leading center-right voices that advocate for reforms

of the criminal justice system at both the federal and state levels. The ACUF Center for Criminal Justice Reform seeks to improve public safety, hold individuals as well as government organizations accountable, and advance human dignity. The ACUF Center for Criminal Justice Reform does not condone the conduct that forms the factual basis of the convictions in *United States v. Ulbricht*. However, the organization is committed to defending the protections provided to Americans by both the Fourth and Sixth Amendments.

**FreedomWorks** is a nonpartisan grassroots advocacy organization. Its mission is to build, educate, and mobilize the largest network of activists advocating the principles of smaller government, lower taxes, free markets, personal liberty, and the rule of law.

Founded in 1984 as Citizens for a Sound Economy, FreedomWorks has expanded into an organization of over six million Americans who are passionate about promoting free markets and individual liberty. For over a quarter century, it has identified, educated and actuated citizens to support free enterprise and constitutionally limited government.

The **Human Rights Defense Center** (HRDC) is a nonprofit charitable corporation headquartered in Florida that advocates in furtherance of the human rights of people held in state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons. HRDC's advocacy efforts include publishing two monthly publications, Prison Legal News, which covers national and international news and litigation concerning prisons and jails, as well as Criminal Legal News, which is focused on criminal law and procedure and policing issues. HRDC also publishes and distributes self-help reference books for prisoners, and engages in state and federal court litigation on prisoner rights issues, including wrongful death, public records, class actions, and Section 1983 civil rights litigation concerning the First Amendment rights of prisoners and their correspondents.

**Nancy Gertner** was appointed to the judiciary for the United States District Court for the District of Massachusetts in 1994. She retired in September 2011 and became part of the faculty of the Harvard Law School teaching a number of subjects including criminal law, criminal procedure, forensic science and sentencing, as well as continuing to teach and write about women's issues around the world. She has published many articles, and chapters on sentencing, discrimination, and forensic evidence, women's rights, and the jury system. Judge Gertner is a recipient of the 2008 Thurgood Marshall Award of the American Bar Association, in recognition of her contributions to advancing human rights and civil liberties, and of the 2014 Margaret Brent Women Lawyers of Achievement Award of the American Bar Association,

in recognition of Gertner's advocacy, mentoring and achievements in the legal field.

The **National Coalition to Protect Civil Freedoms** (NCPCF) is a coalition of 18 organizations (about half Muslim and half non-Muslim) dedicated to the preservation of our civil freedoms, particularly in the so-called War on Terror. NCPCF focuses on three areas in which civil rights have significantly eroded since 9/11: Prevention of discrimination and Islamophobia; prevention of abuse of prisoners; and prevention of preemptive prosecutions (defined as the use of pretext charges, unfair sting operations, and generally prosecutions based on governmental suspicion of the target's ideology).

NCPCF represents the interests of Muslims and others targeted by the government based on their religion, race, country of origin, or ideology.

The **Partnership for Civil Justice Fund** (PCJF) is a non-profit organization that works to support and defend human rights and constitutional rights as secured by law. The PCJF has litigated numerous matters involving civil liberties at the intersection of First and Fourth Amendment rights. The PCJF has a strong interest in protecting the right to read and view political materials on the internet without threat of government monitoring and seizure of that activity in the absence of a probable cause showing, as well in protecting proceedings from judicial fact finding where such determinations are a jury function.

The **People's Law Office** is a law partnership established in 1969 inspired to conduct civil rights litigation by the murders of Black Panther activists Fred Hampton and Mark Clark. Throughout its nearly 50-year history, the office has confronted police brutality, police torture, and prosecutorial misconduct; represented political activists, militants and radicals; advocated for prisoners and the LGBTQ community; fought against the death penalty; and provided legal support to Puerto Rican and other political prisoners.

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NOTES

1. Rule 37 Statement: All parties received timely notice of *amici*'s intent to file this brief and consented to its filing. No counsel for any party authored any portion of this brief, and *amici* alone funded its preparation and submission.
2. Christine Scott-Hayward *et al.*, *Does Privacy Require Secrecy? Societal Expectations of Privacy in the Digital Age*, 43 Am. J. Crim. L. 19, 49 (2015).
3. *Riley v. California*, 134 S. Ct. 2473 (2014) (warrantless search incident to arrest may not include search of digital information on the arrested person's cell phone).
4. *Carpenter v. United States*, 137 S. Ct. 2211 (2017) (granting *cert.* to resolve whether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over the course of 127 days is permitted by the Fourth Amendment).

5. *Smith v. Maryland*, 442 U.S. 735 (1979).
6. *United States v. Ulbricht*, 858 F.3d 71, 97 (2d Cir. 2017) (citing *Smith v. Maryland*, 442 U.S. 735 (1979)).
7. *Riley*, 134 S. Ct. at 2490.
8. *See, e.g.*, *United States v. Jones*, 565 U.S. 400, 417-18 (2012) (Sotomayor, J., concurring) (reasoning that simple application of the third-party doctrine “is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties” such as “the URLs that they visit” and observing that “I for one doubt that people would accept without complaint the warrantless disclosure to the government of a list of every Web site they had visited in the last week, or month, or year”).
9. *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015)
10. *Id.* at 535-36 (Martin, C.J., dissenting).
11. *Id.* at 521 (“As judges of an inferior court, we have no business in anticipating future decisions of the Supreme Court. If the third-party doctrine results in an unacceptable ‘slippery slope,’ the Supreme Court can tell us as much”).
12. *Scott-Hayward*, *supra* note 2 at 54.
13. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
14. *See, e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“right to receive information and ideas”); Editorial, *The Right to Receive Ideas*, WASH. POST, Apr. 12, 1969; *Board of Education v. Pico*, 457 U.S. 853 (1982); *ACLU v. Reno*, 521 U.S. 844, 874 (1997) (holding that the Communications Decency Act “effectively suppresses a large amount of speech that adults have a constitutional right to receive”).
15. *Jed Rubinfeld, The End of Privacy*, 61 STAN. L. REV. 101, 128 (2008); *see also* Human Rights Watch, *With Liberty to Monitor All: How Large-Scale US Surveillance is Harming Journalism, Law, and American Democracy*, July 28, 2014.
16. *Riley*, 134 S. Ct. at 2493 (reflexively relying on “pre-digital analogue[s]” risks “a significant diminution of privacy”).
17. *Ulbricht*, 858 F.3d at 97.
18. *See Davis*, 785 F.3d at 521, 537.
19. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).
20. *Id.* at 498 (Scalia, J., concurring).
21. C.A. App. 1464-1466.
22. LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY? edited by Charles J. Ogletree, Jr., Austin Sarat at 66-67 (2012). It is likely that this nation’s framers could not have anticipated the vast expansion of a life-sentenced prison population. More than 200,000 persons—one out of every seven individuals incarcerated in the United States—are serving life or “virtual life” sentences (named for the proposition that they will realistically never be released), Ashley Nellis, *Still Life America’s Increasing Use of Life and Long Term Sentences*, THE SENTENCING PROJECT, May 3, 2017, available at <https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/>.
23. 18 U.S. Code Sec. 3553. Peter Nash, Silk Road moderator, received a sentence of 17 months. *See* Nate Raymond, *Silk Road member Peter Nash avoids further US prison time*, THE SYDNEY MORNING HERALD, May 27, 2015. Jan Slomp, “biggest” Silk Road drug dealer, received a sentence of 10 years. *See* Jason Meisner, *Biggest dealer on underground Silk Road given 10 years in prison*, CHICAGO TRIBUNE, May 29, 2015. Steven Sadler, “top” Silk Road drug dealer, received a sentence of 5 years. *See* Levi Pulkkinen, *Bellevue programmer gave up \$180k salary to deal drugs on Silk Road*, SEATTLEPI.COM (March 19, 2015, 12:38PM), <http://www.seattlepi.com/seattlenews/article/Bellevue->



- programmer-gave-up-180k-salary-to-deal-6144142.php). Jason Hagen, Silk Road “global meth dealer,” received a sentence of 3 years. *See* Bryan Denson, *Global meth dealer from Vancouver gets lighter sentence because of U.S. agents’ ‘Silk Road’ corruption*, THE OREGONIAN/OREGONLIVE (Nov. 5, 2015, 3:15PM), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2015/11/global\\_silk\\_road\\_meth\\_dealer\\_f.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2015/11/global_silk_road_meth_dealer_f.html)). Brian Farrell, “key assistant” to Silk Road 2.0’s owner/operator Blake Benthall, received a sentence of 8 years. *See* Nate Raymond, *An alleged staff member of Silk Road 2.0 was sentenced to 8 years in prison*, BusinessInsider.com (Jun. 4, 2016, 4:42AM), <http://www.businessinsider.com/r-key-player-in-silk-road-successor-site-gets-eight-years-in-us-prison-2016-6>).
24. Andy Greenberg, *The Silk Road Creator’s Life Sentence Actually Boosted Dark Web Drug Sales*, (May 23, 2017, 10:00AM), <https://www.wired.com/2017/05/silk-road-creators-life-sentence-actually-boosted-dark-web-drug-sales/>.
25. Press Release, U.S. Attorney’s Office Southern District of New York, *Operator of Silk Road 2.0 Website Charged in Manhattan Federal Court*, Nov. 6, 2014 (available at <https://www.fbi.gov/contact-us/field-offices/newyork/news/press-releases/operator-of-silk-road-2.0-website-charged-in-manhattan-federal-court>).
26. *Id.*
27. Federal Bureau of Prisons, Find An Inmate [Blake Benthall, Register No. 20045-111, released Nov. 21, 2014], <https://www.bop.gov/inmateloc/>, (last visited Jan. 27, 2018).
28. Paul F. Kirgis, *Sentencing Facts After Booker*, 39 GA. L. REV. 895 (2005).
29. Nicola Gennaioli & Andrei Shleifer, *Judicial Fact Discretion*, 37 J. LEGAL STUD. 1, 4 (2008).
30. Nila Bala, *Judicial Fact-Finding in the Wake of Alleyne*, 39 N.Y.U. Rev. L. & Soc. Change 1 (2015).
31. 543 U.S. 220, 133 (2005).
32. Akhil R. Amar, *The Bill of Rights: Creation & Reconstruction* 83 (1998).
33. Roger Roots, *The Rise and Fall of the American Jury*, 8 Seton Hall Cir. Rev. 1, 3 (2011).
34. *Id.*
35. *Id.*
36. 2 John Adams’s Works, 254, 255 (1771).
37. *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922).
38. Paul F. Kirgis, *Sentencing Facts After Booker*, 39 GA. L. REV. 895 (2005).
39. *Id.* at 909.
40. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER*. New York: Hill and Wang, 1972.
41. *See gen’ly*, Robin Steinberg, *Heeding Gideon’s Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 963 (2013).
42. *Blakely v. Washington*, 542 U.S. 296, 303 (2004), *quoting* 1 J. Bishop, *Criminal Procedure* § 87, p 55 (2d ed. 1872); *see also* Stephanos Bibas, *Judicial Fact-Finding at Sentencing, Faculty Scholarship*, U. Penn. Law School, 252, (2008).
43. *Blakely*, slip op. at 313 (internal quotation marks and citation omitted).
44. Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts after Booker: What the Seventh Amendment Can Teach the Sixth*, 39 Ga. L. Rev. 897, 905 (2005).
45. *See Rita v. United States*, 551 U.S. 338, 356 (2007).
46. C.A. App. 1472-1480.
47. C.A. App. 904.

48. Trial Tr. 2159:25-2160:3, Feb. 3, 2015.
49. Phillip Rogaway, *The Moral Character of Cryptographic Work* (Dec. 2015) Department of Computer Science, University of California, Davis, essay written to accompany an invited talk (the 2015 IACR Distinguished Lecture) given at Asiacrypt 2015 on December 2, 2015, in Auckland, New Zealand, <http://web.cs.ucdavis.edu/~rogaway/papers/moral-fn.pdf> (last visited Jan. 25, 2018).
50. Law Enforcement Struggles to Police “Dark Web,” IACPCybercenter.com, <http://www.iacpcybercenter.org/news/law-enforcement-struggles-police-dark-web/> (last visited Jan. 27, 2018).
51. Lee Matthews, *What Is Tor, And Why You Should Use It To Protect Your Privacy*, FORBES.COM (Jan. 27, 2017, 2:30PM), <https://www.forbes.com/sites/-leemathews/2017/01/27/what-is-tor-and-why-do-people-use-it/#1d2614b7d752>.
52. C.A. App. 1472-1496.
53. Bryan Myers and Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy*, 10 PSYCH. PUB. POL. & L. 492 (2004).
54. *Booth v. Maryland*, 482 U.S. 496, 502 (1987) (citing *Zant v. Stephens*, 462 U.S. 862, 885 (1983)).
55. *Id.* at 506.
56. Oral Argument at 27:00-29:18, *U.S. v. Ulbricht*, 858 F.3d 71 (2d Cir. 2016), *available at* <http://www.ca2.uscourts.gov/decisions/isysquery/7fc49c36-9780-412b-9fa0-2310e6e29d90/181-190/list/>.
57. C.A. App. 1464-1465.
58. George P. Shultz & Pedro Aspedec, *The Failed War on Drugs*, NEW YORK TIMES, Op Ed, Dec. 31, 2017.
59. A 1516.
60. A 1534.
61. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
62. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).
63. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).
64. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 361, 362 (The Century Co. 1898, 1st ed.).
65. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY*, 499 (1966).
66. *12 Angry Men* (Orion-Nova 1957).
67. Valerie P. Hans, *Deliberation and Dissent: 12 Angry Men Versus the Empirical Reality of Juries*, (2007), Cornell Law Faculty Publications, Paper 307 at 589.
68. Reginald Rose, *Twelve Angry Men*, Act III, 44-45 (1955).



Donald Trump, the purge of Kennedy-style judges from every short list of potential nominees to the Court is assured.

By far the most socially significant and politically combustible division between Kennedy and his four right-wing colleagues was over the “substantive due process” doctrine. Kennedy believed that the term “liberty” in the Constitution’s due process clauses conferred an implied right to privacy that prevented governmental interference with intimate personal decisions involving sexual activity and family planning. This belief is a kind of original sin—fatal and unforgiveable—to FedSoc ideologues, to whom Trump has outsourced the judicial selection process.<sup>5</sup> Kennedy voted to affirm the “central holding”<sup>6</sup> of *Roe v. Wade*,<sup>7</sup> that women have a fundamental right to abortion before the fetus is viable, and joined his four moderate-liberal colleagues to aggressively expand protections for gays and lesbians.<sup>8</sup> More than anything else, it is this aspect of his legacy that FedSoc seeks to erase. Now they have their chance.

The Left needs to rethink its litigation strategies in light of new realities. In “How to Argue Liberty Cases in a Post-Kennedy World: It’s Not about Individual Rights, but State Power and the Social Compact” Brendan T. Beery provides a strategy for maintaining progressive gains in this area. It’s a strategy designed to appeal to the so-called “originalist” approach to legal interpretation and distrust of “big government” these ascendant right-wing jurists claim to espouse. It’s an attempt to speak to them in a language they’ll find more persuasive and to convince them to stay true to their own declared principles, even if that means tolerating certain relationships and behaviors they’d rather eliminate.

In “How the Supreme Court Diminished the Right to Vote and What Congress Can Do About It” Henry Rose places the Court’s current assault on voting rights in the context of the nation’s ancient tradition of promoting racially exclusionary election laws. The current chapter of this “uniquely sordid history,” he explains, began in earnest with the Court’s decision in *Crawford v. Marion County Election Board* in 2008, which encouraged states around the country to pass voter identification laws that served no legitimate purpose but furthered the partisan Republican goal of suppressing likely Democratic votes. Because of the Court’s ongoing willingness to uphold these voter suppression laws, Rose argues we must work toward new federal voting rights legislation.

The history of U.S. relations with Indian tribes has been one of colonization, plunder, and cultural extermination. The Trump administration, unsurprisingly, has reinvigorated some of the worst impulses underlying this history. “Trump’s Dismantling of the National Monuments: Sacrificing Native American Interests on the Alter of Business” by Amber Penn-Roco chronicles the government’s latest, blatantly illegal, assault on the dignity and sovereignty of native peoples in the U.S.

*Ulbrecht v. U.S.* was a missed opportunity for the Court—and the nation. Here the Court declined to hear a case in which the defendant had been convicted after his web browsing history was searched and seized without probable cause in clear violation of his Fourth Amendment rights. We increasingly live more of our lives online—surfing, chatting, posting, flirting, emoting, loving, and hating. Who knows where this will finally eventuate? It's hard to imagine a Fourth Amendment issue more immediate and essential than whether the government can warrantlessly examine where we go online. A number of Mr. Ulbrecht's other core constitutional rights were violated in this case as well, including his right to freedom of expression and to be punished based on facts determined by a jury. In their brief on behalf of the National Lawyers Guild, et. al., Zachary Wolfe and Heidi Boghosian explain the urgency and significance of the questions presented in this case. Though it may be unreasonable to do so given the direction the Court is taking, we can only hope that the Court will soon do its constitutional duty and act to restore the rights this case has put in jeopardy.

Nathan Goetting, *editor-in-chief*

1. See *Roper v. Simmons*, 543 U.S. 551 (2005).
2. See *Brown v. Plata*, 563 U.S. 493 (2011).
3. See *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008).
4. See, e.g., *NFIB v. Sebelius*, 567 U.S. 519 (2012). Chief Justice Robert's majority vote and majority opinion in *NFIB v. Sebelius* is the lone counter-example too obvious not to mention.
5. See Ian Millhiser, *Trump Says He Will Delegate Judicial Selection To The Conservative Federalist Society*, THINKPROGRESS (Jun. 15 2016, 7:26 PM), <https://thinkprogress.org/trump-says-he-will-delegate-judicial-selection-to-the-conservative-federalist-society-26f622b10c49/>.
6. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
7. *Roe v. Wade*, 410 U.S. 113 (1973).
8. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

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“to the end  
that human  
rights shall  
be more  
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interests.”*

—Preamble, NLG  
Constitution

