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Drug Legalization: Rescuing Central America from the Claws of Crime

Ivan Cachanosky,¹ Vannia J. Zelaya² and Walter E. Block³

I. Introduction

It is undeniable that the drug trade has taken a hold of Central American nations, subjecting its people to the destructiveness of organized crime.⁴ Mexico, the nation which was once the main artery of the drug trade flow toward the United States, made an effort to discourage this illegal business under President Felipe Calderón's term in office. However, tougher policies were unable to eliminate demand, and thus, this drug trade has only spread to the institutionally-weak Central American region. As a result, five out of the seven nations that constitute Central America are now on the United States' list of the 20 'major illicit drug transit or major illicit drug producing countries.'⁵ The unwavering and escalating crime rates brought about by the drug laws are leading to unprecedented violence in this region, with cases such as Honduras that now has the highest murder rate in the world⁶. Given that the illegality of the drug trade proves to be exacerbating crime and problems in the helpless nations of Central America, it is thus necessary to legalize this trade to effectively tackle the social ills battering the region.

In section II we discuss the drug trade and crime rates in Central America. Section III demonstrates the pervasiveness of the drug trade in Central America. Section IV is given over to demonstrating that where there is demand, there will be supply. In section V we maintain that the war against drugs is useless. The burden of section VI is to address an objection to legalization: that it would *increase* crime. In section VII we discuss the ethical implications of these policies. The topic of section VIII is moral values and legalization. We conclude in section IX with the claim that legalization will bring about more benefits than downsides.

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⁴ We would like to thank Guillermo Yeatts for help in making suggestions regarding an earlier draft of this article. All errors of commission and omission lie with the present authors, of course.

⁵ See, eg, Archibold, Randal C. and Damien Cave. March 24, 2011. "Drug wars push deeper into central america." New York Times. Retrieved from <http://ezproxy.loyno.edu/login?url=http://search.proquest.com/docview/858309146?accountid=12168> (accessed March 18, 2013).

⁶ See, The Economist. 2013. "Central America: Out of control." The Economist: The Americas. March 9; <http://www.economist.com/news/americas/21573108-first-two-reports-threat-rampant-violence-central-americas-small> (accessed April 14, 2013).

II. Drug Trade and Crime Rates in Central America

There is an evident correlation between drug trade⁷ and crime in Central American nations. Ever since the drug trade has risen in the region, crime has increased accordingly—and to unprecedented levels. Drug mafias have been driven to Central America due at least in part to stricter policies in Mexico, and they have set up mainly in Honduras⁸. This is posing a major problem for Central American nations because, ‘Whatever the weaknesses of the Mexican state, it is a Leviathan compared with the likes of Guatemala or Honduras.’⁹

It has been precisely this increase in the drug trade that has led to an unprecedented rise in crime. Because this commerce has to be conducted illegally, the costs of producing and delivering product to consumers involves further illegal steps that result in crime. For instance, take the path of a bag of cocaine coming from a laboratory in South America. This bag would likely pass through what has come to be known as the Northern Triangle, namely El Salvador, Guatemala and Honduras, to eventually reach consumers in northern countries such as the United States and Canada. Through its journey, it must be concealed at all costs, regardless of how many people are murdered, assaulted, or led to other illegal activities in the process of getting the drug delivered safely to its destination.¹⁰

What this means for the nations involved in this illegal trade is an increase in crime. Mexico had a murder rate of only 12 per 100,000 people in 2011, and this improvement is in part attributable to the decrease in drug trade-related crime in that country.¹¹ In contrast, since the drug trade has been increasing in Central America, Honduras’ murder

⁷ In our view, the drug trade, per se, is unobjectionable. In terms of boosting crime, it does not do any such thing. What causes murders is not the trade, but its prohibition. Given that marijuana, cocaine, heroin, etc. are prohibited by law, *then* trade in these substances boosts crime.

⁸ See especially, Archibold, Randal C. and Damien Cave. March 24, 2011. “Drug wars push deeper into central america.” New York Times. Retrieved from <http://search.proquest.com/docview/858309146> (accessed March 18, 2013).

⁹ See, eg, Marien, Michael. 2011. “The Drug War Hits Central America.” World Future Review 3, no. 1: 177. Academic Search Complete, EBSCOhost (accessed March 18, 2013).

¹⁰ See generally, Bolton, Gene. October 16, 2012. “Drug Legalization in Latin America: Could it be the Answer?” Council on Hemispheric Affairs. <http://www.coha.org/drug-legalization-in-latin-america-could-it-be-the-answer/> (accessed March 18, 2013).

¹¹ See especially, Archibold, Randal C. and Damien Cave. March 24, 2011. “Drug wars push deeper into central america.” New York Times. Retrieved from <http://ezproxy.loyno.edu/login?url=http://search.proquest.com/docview/858309146?accountid=12168> (accessed March 18, 2013).

rate has escalated to 66.8 per 100,000 people as of 2011, giving it the highest level in the region. Every single nation in Central America has seen a sharp increase in crime rates, which have grown alongside the drug trade.¹² It is therefore evident that this activity is a major contributor to the unprecedented crime rates in the region.

Drowning helplessly in crime, people in Central America have taken their safety into their own hands. As in the rest of the region, Honduran citizens are beginning to form neighborhoods enclosed by high perimeter walls, with security guards and entry-phone systems. However, only those belonging to the working-class or higher can afford such security, which leaves the poor districts at the mercy of criminals.¹³

III. The Undeniable Pervasiveness Of The Drug Trade in Central America

Given that this trade is illegal, it has to be conducted behind closed doors, making the business much more costly, dangerous and therefore profitable.¹⁴ The most affected are those nations with vulnerable institutions and high rates of poverty, given that their leaders can be easily corrupted and residents easily lured into the profitable drug trade. This trade has infiltrated to such an extent in Central America that the region is no longer only a transit point for drugs, but it has also become a selling point. This is due to the fact that drug cartels are paying people with drugs that they cannot only resell, but also consume. Thus, there is the creation of a local market by drug dealers. In Honduras, they use the empty jungle as a landing point for 40 percent of the cocaine that is set to be delivered to the U.S., and they also pay their local helpers in the form of drugs. This, in turn, increases the overall demand in this region.

This method not only leads to an increase in the consumption of drugs, but also to addiction. Following addiction has come a boost in the demand for rehabilitation centers, leaving the few centers available completely full and unable to offer good quality service that actually rehabilitates patients and reintegrates them into society. This means many addicts are left without the possibility of obtaining treatment at all. The inability of Central American institutions to adequately address addiction is a hindrance to economic progress and the illegality of the drug trade is only worsening the situation by encouraging untreated addiction.

¹² See, eg, Marien, Michael. 2011. "The Drug War Hits Central America." *World Future Review* 3, no. 1: 177. Academic Search Complete, EBSCOhost (accessed March 18, 2013).

¹³ See, Archibold, Randal C. and Damien Cave. March 24, 2011. "Drug wars push deeper into central america." *New York Times*. Retrieved from <http://ezproxy.loyno.edu/login?url=http://search.proquest.com/docview/858309146?accountid=12168> (accessed March 18, 2013).

¹⁴ It serves as an entry restriction. Relatively few people have the necessary skills and risk-taking characteristics. It is the same with alcohol. During its prohibition, profits were gigantic. Before and afterward, there is no reason to think they would be higher than in any other "ordinary" industry.

At the current rate, addiction will only become an issue of greater magnitude. Between 250 and 350 tons of cocaine was trafficked through Guatemala in 2008, which was three times greater than the amount trafficked through both Mexico and the Caribbean combined¹⁵. This is a stark contrast to 10 years prior, when the entire Central America combined trafficked less cocaine than both Mexico and the Caribbean. What is worse, the drug trade has only risen in the region since then. Due to this drastic jump, Guatemala now faces an increase in corruption within its prisons and its government, which have both been infiltrated by the drug trade mafia. Socioeconomic ills as such are also faced by the rest of Central American countries.

The plague of institutional corruption feeds on the very illegality of the drug trade. As drug dealers are threatened because their business is illegal, they vie to avoid the obstacles of the trade. This drives them to develop corrupt ties in their societies to avoid getting caught. As crime increases in Central America, more government officials are being lured into the drug trade because it is more profitable than fulfilling their duties, and this is especially true of policemen given their relatively low salaries.¹⁶ This is only inhibiting legitimate law enforcement from occurring, as in Honduras where few crimes are investigated or punished even though the murder rate has doubled in recent years. In fact, the high profits from drugs, which increase as this business becomes more difficult, are luring officers into leaving their positions.¹⁷

Many of those who have not quit the force have decided to compliment their monthly wages by demanding a “war tax” from citizens with little political power, such as small business owners or taxi drivers. Overall, this ultimately discourages the progress of society and further increases the rate of crime. Without institutions that adequately enforce the law, there is virtually no one left to protect these defenseless citizens from both organized and non-organized crime, luring even more locals to participate in the drug trade and encouraging more dealers and consumers to establish themselves in the region. Prohibition is causing a “regional spiral” because ‘drugs and money in Central America have become hard to resist.’¹⁸

¹⁵ See especially, Marien, Michael. 2011. "The Drug War Hits Central America." *World Future Review* 3, no. 1: 177. Academic Search Complete, EBSCOhost (accessed March 18, 2013).

¹⁶ The monthly wages of officers are approximately of \$400 USD. This is not sufficient to supply their needs, which is why they resort to charging citizens the “war tax,” known locally as “impuesto de guerra.”

¹⁷ See, eg, The Economist. 2013. “Central America: Out of control.” *The Economist: The Americas*. March 9; <http://www.economist.com/news/americas/21573108-first-two-reports-threat-rampant-violence-central-americas-small> (accessed April 14, 2013).

¹⁸ See, Archibold, Randal C. and Damien Cave. March 24, 2011. “Drug wars push deeper into central america.” *New York Times*. Retrieved from <http://ezproxy.loyno.edu/login?url=http://search.proquest.com/docview/858309146?accountid=12168> (accessed March 18, 2013).

IV. Where There Is Demand, There Will Be Supply

Due to the increasing traffic of drugs through Central America, the trade is spreading like a virus and attaching itself to legitimate institutions and businesses in the region. Drug trade organizations, also known as DTOs, are exploring ways to expand their business to avoid getting caught by law enforcement agencies and to continue to supply the vast demand that exists around the world. To do this, DTOs are seeking new ties to increase their profits so that they can use the power provided by their vast funds to further their illegal pursuits.¹⁹

One example of additional business ventures that DTOs engage in is kidnap-ransoming. It is estimated that this can earn DTOs up to \$500 million annually.²⁰ Such crimes lead people to live in fear, and they encourage Central Americans to seek progress and respect of their human rights in other countries such as the U.S., often leading them to become undocumented migrants. DTOs are profiting from this, too, having installed a lucrative business of smuggling migrants illegally past the U.S. border. According to the Guatemalan Human Rights Commission, prior to the organized crime led by DTOs, only individuals provided this service and they could smuggle up to 20 people at a time. Now that DTOs have monopolized the migrant smuggling business, far more migrants are being smuggled and those who choose not to cross the border with DTOs are killed in their attempts to cross by other means. Today, the U.N. report on crime globalization estimates that this industry earns approximately \$6.6 billion, awarding more power to DTOs.²¹

DTOs are not only engaging in further illegal businesses²² as such to increase their profits and power in the Central American region. These organizations are also infiltrating legitimate businesses by offering greater profits to owners. The deal is that if the business owners and officials help DTOs hide their merchandise to be able to deliver it safely to its destination, they will receive great financial or commercial benefits for their help. That is the carrot. But there is also the stick: everyone from police officers to taxi

¹⁹ Bolton (2012) uses the example of PEMEX, the Mexican state-owned oil company. It is reported that this firm's local committee has lost nearly 40 percent of its production, which is equivalent to \$750 million USD, due to its oil being stolen by drug cartels that control the territory.

²⁰ Bolton estimates that kidnap ransoming is valued between \$200 million and \$500 million USD annually.

²¹ Bolton, *op. cit.*

²² It is sometimes argued that it is futile to legalize drugs; the criminals who now run this business will merely switch to other lucrative illegal practices, such as kidnap-ransoming, murder incorporated, smuggling migrants, car-jacking, etc. But these acts are *now* occurring, under prohibition. The causation is likely much the other way around. Instead of legalization shifting criminals to other illegal pursuits, it is the drug war, with its truly gargantuan profits, that enables this element to expand its base of operations.

drivers who refuse to cooperate are being killed.²³ As explained by Costa Rica's drug czar Mauricio Boraschi, DTOs are buying many assets -- farms, means of production, transportation -- to be able to deliver their drugs to their final destination without the interference of law enforcement.²⁴

Not only is corruption infiltrating businesses and law enforcement institutions, but it is also doing so with regard to the media, which is supposed to be the "watchdog" reporting these instances. Central America has seen an increase in targeted assassinations of journalists, with Honduras as the most salient case. In that country alone, at least 25 journalists have been killed between 2009 and 2012, and although unclear, their deaths are often linked to corruption and drug trafficking. Without a voice or means of defense, it is evident that the region cannot put up a fight against the drug lords, and thus, the only effective solution that remains is to legalize drugs.

V. The Useless War Against Drugs

One of the most basic arguments to the contrary is that the drug war has not failed; it is not time to back down. Supporters do not realize that drug consumption has actually decreased since the drug war started in the 1970s. This change in consumption is attributed to effective measures against drugs (Walters, 2012).^{25 26}

However, Walters' argument is not only unsound because there has been an increase in the use of certain drugs (crack cocaine and methamphetamine). It also does not take into account that prohibition makes it difficult, no, virtually impossible, to attain accurate information.²⁷

²³ The Economist (2013) estimated 60 taxi drivers were killed in 2012 after extortion attempts, as were 70 police officers. The latter face extortion as well, which has resulted in cases such as the teenage son of a former police chief being shot and killed.

²⁴ Ibid

²⁵ See, eg, Walters, John P. 2012. "Legalized Drugs: Dumber Than You May Think. The Weekly Standard. http://www.weeklystandard.com/articles/legalized-drugs-dumber-you-may-think_642178.html (accessed April 22, 2013).

²⁶ Walters was the drug czar for the George W. Bush administration. He explains Americans use drugs at lower rates today since systematic measurement began in 1979. According to him, Marijuana use has decreased the most, having lowered by almost half since its peak in the 70s.

²⁷ And it is also important to remember that the "consumer" is not the same as an "addict". It is one thing to consume a small amount of drugs on one occasion; it is an entirely different thing to be an actual addict. What should be considered the greater social problem: the increase of consumers (who may indulge only because it was forbidden), or the increase of addicts? Of course, the latter. In the United States there were 20 million people who tried drugs once in their lives in 1989, but only 25 percent who engaged in this practice in the previous month. And of those 25 percent, only 10 percent are considered drug addicts (Ostrowski, 1989). This distinction is important because resources must be focused on the by far more serious problems.

Judging from the high rates of drug traffic and its related crime in Central America, there must still be a considerable demand that all the supply passing through the region is aiming to reach, and by no means do all of the consumers participate in surveys. In consideration of these difficulties, it is hardly convincing to claim that the war against drugs is effective in reducing the size of this market. Given the alarming rates of crime in Central America, it is clear that prohibition has in fact been a complete failure instead. Every time that 'a successful interdiction occurs, drug prices and profits rise, and this only strengthens the drug gangs'.²⁸ The war against this trade ultimately only serves to encourage greater profits, strengthening DTOs and further encouraging trade itself. The Mexican experience is also one of the best examples of why drug criminalization is not working. In 2006 murders related to drug trafficking were only 62. This number grew to 16,700 in 2011. This is an increase of 26,835 percent with an average annual growth of 4,389 percent. And the number of crimes will likely continue growing if prohibition remains. The government spends billions of dollars to fight against this war, but crime and death increase along with the expenditure; so no efficient result can be seen. It is not only true that the opportunity cost of using those resources in other ways is enormous.²⁹ It is also the case that the funds spent on drug prohibition make a negative contribution to our society and economy.

VI. Crime from Legalization

Those who oppose legalization also believe that crime would ensue from such a legislative act. They argue that users would commit crimes by being under the influence of drugs. They add that consumers could not only be dangerous in interactions with others but even more so in operating cars and other vehicles.³⁰ Prohibition supporters argue that an "enormous increase in traffic fatalities"³¹ would surpass the amount of lives that would be saved from the decrease in crime after the legalization of drugs. However, if drugs were to be legalized, they would be regulated by highway authorities just as alcohol is now, a substance that can also cause similar impairment. Just as motorists cannot legally drive under a significant level of alcohol intoxication, the same would apply in this case. With such policies in place, the instances of operating vehicles under

²⁸ See, Block, Walter. January 18, 2007B. "Objections to drug legalization unfounded" The Maroon. <http://www.loyolamaroon.com/2.8031/objections-to-drug-legalizations-unfounded-1.1125956#.UWnA7iv5lOE> (accessed April 13, 2013).

²⁹ This brings to mind, in the view of many people, expenditures that the government could make in terms of welfare payments, support for the environment, military expansion, etc. However, there is also the opportunity cost of lowering taxes, allowing people to keep more of their hard-earned money for themselves. We must never lose sight of that alternative.

³⁰ See, eg, Kane, Joseph P. 1992. "The challenge of legalizing drugs." *America* 167, no. 3: 61-63. Academic Search Complete, EBSCOhost (accessed March 18, 2013).

³¹ See, Block, 2007B, also see Block, 2009.

the influence of drugs would be discouraged, and there would not be any likely increase in the proportion of traffic fatalities.

Legalizing drugs could actually decrease other associated crimes. When alcohol was prohibited, dealers in those products would engage in similar crimes as drug dealers engage at present. Now that alcohol is legal there are legitimate companies that produce, package and sell these beverages. These businesses pay taxes, just as any other legitimate firms,³² and they follow advertising regulations to discourage use by children and abuse by anyone, along with policies to handle intoxication. With legalization, the overall crime caused by the drug trade would decrease, just as it happened when alcohol was legalized. As Kane (1992) describes, 'Illegal drugs net astronomical profits for which people are willing to kill,'³³ and thus, legalizing drugs "would virtually eliminate the crimes that terrify us" along with other social ills brought by the illegality of the trade.

VII. Ethics, Government and Drugs

Intellectuals and politicians deliberate over which system is more efficient: legalization or prohibition. But beyond efficiency, is it ethical to prohibit drug consumption? It is important to analyze the issue of morality because if a measure is efficient but unethical it cannot be a valid solution. Efficiency alone is insufficient. Of course, addictive drugs have a bad press. Nevertheless, the fact that some substance harms the body does not mean the act of consumption is improper. Each individual³⁴ should be able to decide for himself whether to have a longer, vice-free and healthy life or a shorter, more indulgent one.

It is important to point out that in a free society we will have to accept that three things may occur:

- (a) Things we like
- (b) Things we do not like that violate our individual rights
- (c) Things we do not like but that do not violate our individual rights.

³² The present authors support legalization despite this fact, not because of it.

³³ See, Kane, Joseph P. 1992. "The challenge of legalizing drugs." *America* 167, no. 3: 61-63. Academic Search Complete, EBSCOhost (accessed March 18, 2013).

³⁴ We speak here, of course, only of adults. Children should be under adult supervision. And, for a parent to allow a child access to addictive drugs would be abusive. Thus, a law prohibiting drugs to children (as with alcohol) would require a very different analysis. As for adults, treating them like children is contrary to the democratic ethos of most western cultures. For, if an adult is so stupid as to require the nanny state to prohibit him from utilization of these substances, he is not smart enough to be given the vote. And, if he is judged warranted to have access to the ballot box, it is logically inconsistent to treat him as a child with drug (or alcohol) prohibition.

Only with regard to scenario (b) can the institutions of a free society intervene in defense of an individual. There is simply no legitimate place for government in scenario (c). If a person wants to consume drugs in the privacy of his own home, and he does not violate any third party rights we must ask ourselves: Where is the crime? There is no victim. Hayek (1960) made this point very well: 'Freedom necessarily means that many things will be done which we do not like. Our faith in freedom does not rest on the foreseeable results in particular circumstances but on the belief that it will, on balance, release more forces for the good than for the bad.'³⁵

In this regard, no truer words were ever said than these: "The act of getting high does not constitute a crime since that fact shall not prejudice third parties' rights"³⁶. The human action of consuming a drug can be considered a vice but not a crime,³⁷ to the extent that it does not violate rights of other persons. And vice is not equal to crime. In the first case the individual harms only himself, in the second there is another person involved, a true victim.

Of course, an obvious question arises: What happens if an individual gets high and then commits a crime? Individuals are free to act, but every action brings responsibility. So, should the forces of law and order do something if someone gets high and then, for example, commits a crime?

We can observe two positions here: (1) A free market with the absence of government or (2) A limited government.

In the first case, the free market will probably spontaneously generate a private police or private security industry.³⁸ Because of profit and loss incentives, private solutions tend to be far more effective than public ones. If it is the case, then the free market will provide a more efficient security for preventing crimes.³⁹

³⁵ See especially, Hayek, Friedrich. 1960. *The Constitution of Liberty*. Ed. Gateway. p. 31.

³⁶ See, eg, Benegas Lynch, Alberto (h). 2006. *La Tragedia de la Drogadicción: Una propuesta*. Ed. Lumiere. p. 179.

³⁷ See, Spooner, Lysander. 1875. *Vices Are Not Crimes: A Vindication Of Moral Liberty*. <http://www.mises.org/books/vicescrimes.pdf>

³⁸ See, eg, Tannehill, Morris and Linda Tannehill. [1970] 1984. *The Market for Liberty*, New York: Laissez Faire Books. See also, Tinsley, Patrick. 1998-1999. "With Liberty and Justice for All: A Case for Private Police," *Journal of Libertarian Studies*, Vol. 14, No. 1, Winter, pp. 95-100; http://www.mises.org/journals/jls/14_1/14_1_5.pdf. See also, Woolridge, William C. 1970. *Uncle Sam the Monopoly Man*, New Rochelle, N.Y.: Arlington House.

³⁹ There are actually more private than public police in numerous countries and in the world as a whole. See on this Bayley and Shearing, 1996; Evans, 2011; Nalla and Newman, 1991; Shearing and Stenning, 1988; Swol, Karen. 1997

In the second case, government can take three different courses of action: (a) Offensive; (b) Defensive; (c) Preventative.

Let us posit a limited government. Which course of action would it take? The offensive government violates individual rights. It is a nanny state. It seizes resources from some individuals to benefit others. This is the government that fights the war against drugs. But history gives us no cause for optimism down this path. In 1839 the Chinese Communist Party declared war against opium. They said that in two years opium would be eradicated. The objective was “successful” but, individual rights were violated on a wholesale basis and perhaps millions of people died.⁴⁰ A measure that brings so much grief cannot be considered “successful.” Offensive governments meddle in private affairs where they have no proper business. Penalties are usually based on the weight of the drug and not on its potency, which increases the incentive for drugs to become more and more dangerous.⁴¹

Governments cannot achieve their goals. They continue violating more and more property rights in an inept effort to do so. They listen in on phone conversations without warrants so as to interdict shipments. They encourage people to spy and denounce each other in exchange for money. Informers are paid for such activities.⁴² Some informers earn millions of dollars. The result: fathers denouncing their children and vice-versa; friends turning against each other. It seems that the war against drugs has generated mercenaries instead of soldiers. Do we really want our society set upon the path followed by East Germany and the Soviet Union?

All this is because governments cannot win⁴³ that war. Where is the limit? In spite of the inefficiency of governments, why should it be their role to take care of us in this matter? As Szasz points out:

“... the government (...) is supposed to be our servant, not our master; because it is expected to treat us as adult moral agents, not as irresponsible children or incompetent

⁴⁰ See especially, Sorman, Guy. 1993. *The Immigrant and the Drug Addict*. Ed. Vikas.

⁴¹ See especially, Benson, Bruce L. 1996. “Illicit Drugs and Crime”. *The Independent Institute*: http://www.independent.org/publications/policy_reports/detail.asp?type=full&id=2

⁴² See, Duke, Steven. 2000. “The Drug War on the Constitution”. *After Prohibition: An Adult Approach to Drug Policies in the 21st Century*. 2000. Ed. Cato Institute. pp. 41-59.

⁴³ Every time the statists win a battle, they weaken their side in the war. When the government interdicts a shipment of drugs and burns it (often this creates graft as the police sell the proceeds privately), the price of this economic good rises. *Ceteris paribus*, more profits may now be earned in the drug trade than before. But this just *empowers* the drug gangs. Imagine if every time an army dropped a bomb on an enemy it *strengthened* the latter. It would not take too much intelligence to see they could never win the war that way.

mental patients; and because we possess our inalienable rights as persons, not as the beneficiaries of the magnanimous state.”⁴⁴ ⁴⁵

The government is fighting an un-winnable war. And because it cannot prevail, it continually increases its violation of our personal and private property rights. In Sorman’s words, “The war against drugs seems to have created two kinds of addicts: addicts under the influence of their drug and bureaucrats under the influence of their war.”⁴⁶

A defensive government will be one that limits itself to punishing guilty individuals and compelling them to compensate victims. For example, if A steals a watch from B then the government punishes “A” and brings amends to “B.”

Finally, a preventive government would be one that tries to prevent crime before it happens. This case is different from a defensive government where individual “A” could be pointing a gun at individual “B”’s head and government can do nothing because it only acts in a defensive way. On the other hand, those who promote a preventive government will assert that government must act to prevent individual “A” from shooting individual “B.” In spite of legalization as the best option to solve the drug dilemma, a preventive government would do much less harm than an offensive one.⁴⁷

VIII. Moral Values and Legalization

What of the argument that legalizing something will send the message that our society should go ahead and “have at it?” According to Wehner drug legalization would send the signal that “Drug use is not a big deal.”⁴⁸ He recoils in horror from any such sentiment and concludes that legalizing drugs would be an irresponsible stance on behalf of government leaders. He argues that prohibition serves to protect children and leads them to become responsible adults. He explains that it is “the task of parents, schools, religious institutions and civic groups” to protect children and help shape their character by standing against drug legalization. He further argues that drug use is problematic “because of what it can do to the mind and soul.”

⁴⁴ See, Szasz, Thomas. [1992] 1996. *Our Right to Drugs*, New York: Syracuse University Press. p. 96.

⁴⁵ The nanny state is profoundly at odds with the concept of democracy. If people are so stupid that they need a guardian to control their lives, how can they be entrusted with the political vote? And if they can be, does that demonstrate that they are capable of running their own lives? How can they be allowed to control an entire country, when they are incapable of self-control?

⁴⁶ See, Sorman, Guy. 1993. *The Immigrant and the Drug Addict*. Ed. Vikas. p. 299.

⁴⁷ This is true if the preventive government does not cross the boundary and becomes an offensive state.

⁴⁸ See, Wehner, Peter. 2013. “GOP should stand firm against drug legalization.” *The Washington Post*: WP Opinions. http://articles.washingtonpost.com/2013-04-02/opinions/38216087_1_drug-legalization-drug-czar-gil-kerlikowske (accessed April 21, 2013).

While it is indeed undeniable that drugs can harm “the mind and soul,” the argument to legalize them is not at all synonymous with advocating their use. Legalizing drugs stands for making the trade and consumption of drugs legal to diminish the consequences that stem from their very illegality. The purpose of legalization is not to encourage the use of drugs. According to Block, ‘Abortion, gambling, prostitution, alcohol and homosexuality are no longer criminal offenses in civilized societies,’⁴⁹ and this has not encouraged a vast majority of our population to engage in any of these things. In fact, keeping drugs illegal attaches the lure of the forbidden to drugs, which actually makes them more tempting to society. With legalization, sellers would no longer find a need to lure youth into addiction, just as tobacco and alcohol sellers do not resort to any such thing in order to sell their products.

Initially, with the legalization of tobacco and alcohol, demand did increase, and this demand did not come solely from new addicts, or old ones, increasing their dosages. Rather, there was previously an issue of undercounting. Once legal, social users could for the first time feel comfortable admitting they consumed these products. When it comes to “newbie users” however, the legalization of drugs would not encourage many to begin using drugs. As Block argues, ‘Anyone who wants to, can shoot up right now’⁵⁰ even if drugs are illegal, so it is not necessary for drugs to be illegal to discourage people from using them.

There need not be any special laws set up to protect adults from starting to use newly legalized drugs, nor from increasing their usage, any more than such provisions were needed for beer, wine and liquor. Under legalization, these would all become private concerns, to be dealt with by psychologists, psychiatrists, and groups such as Alcoholics Anonymous and Narcotics Anonymous. In any case, if the “lure of the forbidden” effect is strong enough, drug use and abuse could be discouraged much more effectively than under prohibition.

The “War on Drugs” is such a dismal failure that the authorities cannot even prevent them from being used in maximum-security prisons. If they cannot do that, how can they even hope to do so for the society at large? In the United States, when President Nixon declared war on drugs in 1970, for years traffickers, users, transporters, etc., were put in jail. But the problem was that new inmates kept arising. More and more prisons were built to handle the greater supply of law violators. And this happened because

⁴⁹ See especially, Block, Walter. January 18, 2007B. “Objections to drug legalization unfounded” The Maroon. <http://www.loyolamaroon.com/2.8031/objections-to-drug-legalizations-unfounded-1.1125956#.UWnA7iv5IOE> (accessed April 13, 2013).

⁵⁰ See, Block, Walter. February 17, 2007C. “Rejoinder to Prof. Perlstein on Legalizing Drugs in New Orleans” LewRockwell.com. <http://www.lewrockwell.com/block/block74.html> (accessed April 13, 2013).

demand for drugs is so inelastic that profits are very high (because of the risk). There is no way government can win this war, because new traffickers will appear, lured by these gigantic profits. It is akin to fighting a hydra headed monster: you chop one head off, and another appears. On the other hand, legalization could bring respect, education and therapy for the better management of drugs in our society, as opposed to the current state of war that exists with illegal drugs.

IX. Legalization: More Benefits Than Downsides

With such pervasive crime battering the Central American region, the solution cannot possibly be to strengthen law enforcement and continue the futile and vicious war against drugs. As evidenced by the deep degree to which DTOs have engrained themselves in the social tissue of Central America, it is impossible to hold that even stricter laws are the answer. DTOs are only able to be so successful in their pursuits because of the exorbitant revenues they earn from the drug trade— funds which are only increased as it becomes more difficult for them to traffic drugs.

Walters argues that many nations have tried legalization in the past, only to return to prohibition.⁵¹ Examples he cites include Sweden, Britain, Portugal and even the Netherlands. Yet, it is evident that drug legalization has more benefits for the majority, and especially for the poor. This only demonstrates the error of those jurisdictions that have taken this tragic step backwards.

More importantly, it is necessary to acknowledge that unless all nations legalize the drug trade, black markets will continue to exist and people will still engage in crime. According to Bolton,⁵² keeping drugs illegal only encourages DTOs to become more deeply engrained in the social tissue of the most vulnerable nations, increasing crime rates and decreasing the quality of life even further. Additionally, addicts and dealers will flock to those nations where the trade is proliferating, such as Central American nations, making conditions worse for this region. If drugs remain illegal, people involved in the trade will only contribute to further increasing crime rates, but if they are legalized, much of the impetus would be taken out of criminal behavior.⁵³ There is also an economic benefit for the majority aspect, as Kane notes, ‘Americans wisely rejected the prohibition

⁵¹ See especially, Walters, John P. 2012. “Legalized Drugs: Dumber Than You May Think. The Weekly Standard. http://www.weeklystandard.com/articles/legalized-drugs-dumber-you-may-think_642178.html (accessed April 22, 2013).

⁵² See, Bolton, Gene. October 16, 2012. “Drug Legalization in Latin America: Could it be the Answer?” Council on Hemispheric Affairs. <http://www.coha.org/drug-legalization-in-latin-america-could-it-be-the-answer/> (accessed March 18, 2013).

⁵³ Presumably, DTOs fear legalization more than anyone else, with the possible exception of other beneficiaries, such as jailors, policemen, etc.

of alcohol and we are not considering it for tobacco because we realize the waste of money involved.⁵⁴

In the view of those against drug legalization, the daunting situation in Central America has become another bad reason to legalize drugs. However, this is in fact a compelling reason that makes legalization even more urgent. It is unrealistic to expect vulnerable Central America to deny participating in the profitable industry of the drug trade when the majority of its people live in conditions of poverty, and they struggle to find any sources of legal income. It is therefore urgent to legalize drugs—yet not only for the sake of Central Americans to live in peace, but also for the reduction of crime and social ills across the globe.

We have made the case that drug prohibition has been a disaster wherever it has been tried. However, accuracy requires us to concede that this policy does have some benefits and beneficiaries. Although many criminals die in this industry, successful ones do indeed gain financially. As well, based on their acceptance of bribes from drug lords, many policemen, judges, politicians, army officers and others in a position of trust have become very rich as well.⁵⁵ The prison industrial complex has also grown, creating lucrative jobs as wardens, guards, constructing jails, etc. Finally, Hollywood, novelists, book publishers, magazines have all profited from the drug war: without it many a movie, play, story, would have been bereft of a topic. Yet, as we have argued throughout, world-wide drug legalization is the definitive step that will bring peace to those in suffering from the drug trade and the war on drugs itself.

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⁵⁴ See, Kane, Joseph P. 1992. "The challenge of legalizing drugs." *America* 167, no. 3: 61-63. Academic Search Complete, EBSCOhost (accessed March 18, 2013).

⁵⁵ However, often these payments are accepted under duress, so we cannot infer benefits to the recipients.

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Natural Unity and Paradoxes of Legal Persons

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Abstract

This essay proposes an ontological model in which a legal person such as a polity possesses natural unity from group properties that emerge in the self-organization of the human population. Also, analysis of customary legal persons and property indicates noncontradictory paradoxes that include Aristotelian essence of an entity, relative identity over time, ubiquitous authority, coinciding authorities, and identical entities. Mathematical modeling helps to explain the logic of the paradoxes.

1. Introduction

Ancient Rome authorized the existence of legal persons/entities called *juristic persons*. A Roman juristic person was an organization that possessed rights and duties. Examples of the persons included tribunals, provinces, cities, towns, religious bodies, associations of government officials, associations of commercial proprietors, social associations, and universities. Juristic persons are also called *fictional persons* or *artificial persons*. However, the communities of local governments are in some way natural and necessary.² This natural necessity suggests that some types of juristic persons are natural while others are artificial.

This essay proposes an ontological model in which a legal person/entity such as a polity possesses natural unity from group properties that emerge in the self-organization of the human population. Also, noncontradictory paradoxes of a customary legal person include Aristotelian essence of an entity, identity over time, ubiquitous authority, coinciding authorities, and identical entities.³ Section 2 outlines the types of legal persons and property; section 3 defines the natural unity of legal persons; section 4 delineates the paradoxes.

¹ I dedicate this essay to the late Peter Thomas Geach (1916–2013). Also, I thank John Wilkins, Harry Deutsch, Michael Rea, reviewers from three other journals, and interlocutors at Dale Tuggy's blog for challenging comments about various concepts in this paper.

² George Long, "Universitas," In *A Dictionary of Greek and Roman Antiquities*, ed. William Smith (John Murray, 1875), 1214–1217, <http://www.ancientlibrary.com/smith-dgra/1221.html>.

³ See section 4 for the definition of a *paradox* and the nonexistence of absolute contradictions.

2. Legal Personality

2.1 Types of Legal Persons and Property

A legal person by definition possesses rights and duties. A primary right of a legal person is the right to own property. Legal persons originate by custom or statutory law. The legal persons originated by statutory law are artificial.

The two primary types of legal persons are a natural person and a juristic person.⁴ A natural person is a human who is a freeman and may own a proprietorship. Types of juristic persons include a public entity and a private business entity. The juristic persons may contain departments and divisions that may incorporate into juristic persons themselves.

Types of public entities are a polity, a political department, and a political official. Types of polities are a geopolitical entity and a geopolitical division. A modern geopolitical entity is a sovereign state. The Convention on Rights and Duties of States in 1933 defined that a sovereign state *factually* exists as a *person* if it contains (1) defined territory, (2) permanent population, (3) government and (4) a capacity to enter into relations with other sovereign states.⁵ Two primary types of geopolitical entities are a federation and a unitary state. A geopolitical division is a subnational entity that contains a human population, a defined territory, and a government. Types of geopolitical divisions are a province, a state, a territory, a city, a municipality, a district, a town, a village, and a hamlet. A political department is an agency of a polity. A political official is a natural person who is an agent of a polity or a political department.

Types of private business entities are an unincorporated proprietorship, a private corporation, and an unincorporated limited liability business entity that is a corporation-proprietorship hybrid such as a limited liability company. Types of unincorporated proprietorships are a sole proprietorship and a general partnership.

Private business entities contain private officials. An official of a proprietorship is a proprietor or a representative of a proprietor. A proprietor is inseparable from the

⁴ George F. Deiser, "The Juristic Person: 1," *The University of Pennsylvania Law Review and American Law Register* 57, no. 3 (1908): 131–142, <http://www.jstor.org/stable/3313312>; Deiser, "The Juristic Person: II," *University of Pennsylvania Law Review and American Law Register* 57, no. 4 (1909): 216–235, <http://www.jstor.org/stable/3313929>. Deiser, "The Juristic Person: III." *University of Pennsylvania Law Review and American Law Register* 57, no. 5 (1909): 300–314, <http://www.jstor.org/stable/3313740>.

⁵ Convention on Rights and Duties of States, December 26, 1933, http://avalon.law.yale.edu/20th_century/intam03.asp.

proprietorship. Types of proprietors are a sole proprietor of a sole proprietorship and a general partner of a general partnership. A private corporate official represents a corporation and is artificially separable from the corporation. An official of an unincorporated limited liability business entity is a member who is separable from the entity.

Legal property is tangible/corporeal or intangible/incorporeal. The two types of tangible property are real property and personal property. Real property is immovable real estate while personal property is movable. Types of intangible property include copyright, patents, and trademarks.

2.2 The Origin of Legal Personality

Conceivably, legal personality first emerged during an informal Upper Paleolithic Era / Later Stone Age band tribunal.⁶ Eventually, types of Neolithic / New Stone Age legal persons included a proprietorship, a town, a city, an autonomous state, and a political official.⁷

2.3 Legal Fiction

The legal term *fiction* notoriously developed when ancient Roman praetors in a court of law endorsed false procedural statements that extended a right of action beyond its intended scope.⁸ The modern definition of a *legal fiction* is "a proposition that is an indisputable fact in a legal system despite possible or definite falsity in the proposition." Despite the possibility of falsity, the concept of legal fiction does not intrinsically suggest mockery or injustice.

Legal fiction is also associated with statutory law that by definition is made by a legislature instead of custom. In examples of legal personality, a legal person originated by statutory law is fictitious or artificial and a legal person originated by custom is not fictitious or artificial. For instance, a customary proprietor is inseparable from the sole proprietorship or general partnership while various statutory laws permit a private

⁶ For Upper Paleolithic / Later Stone Age, see Joseph V. Ferraro, "A Primer on Paleolithic Technology," *Nature Education Knowledge*, 2012, <http://www.nature.com/scitable/knowledge/library/a-primer-on-paleolithic-technology-83034489>.

⁷ Michael Bang Peterson and Svend-Erik Skaaning, "Ultimate Causes of State Formation: The Significance of Biogeography, Diffusion, and Neolithic Revolutions," *Historical Social Research* 35, no. 3 (2010): 200–226, <http://nbn-resolving.de/urn:nbn:de:0168-ssoar-310750>; Charles Keith Maisels, "Models of Social Evolution: Trajectories from the Neolithic to the State," *Man* 22, no. 2 (1987): 331–359.

⁸ Nancy J. Knauer, "Legal Fictions and Juristic Truth," *St. Thomas Law Review* 23, no. 1 (2010): 1–51, <http://www.stthomaslawreview.org/wp-content/uploads/2010/10/OFFICIAL-KNAUER-MACRO.pdf>.

corporation or an unincorporated limited liability business entity that separates a business owner from the business.⁹ Also, legal fiction typically does not define the legal personality of a geopolitical entity or a natural person.

2.4 Controversies of Business Entities

One might hear about controversies of private corporate personality in the news and misunderstand the legal personality of business entities. For example, various misguided news headlines suggest that private corporations recently gained or could lose their status of legal personality. However, no lawyer challenges the general legal personality of business entities, but extensive debate revolves around the extent of rights and duties for business entities and their owners.¹⁰

In the case of the United States (US), Supreme Court recognition of private corporations with rights and duties began in 1819 with *Dartmouth College*.¹¹ Later, the Supreme Court in 1888 stated that the 1868 Fourteenth Amendment secured the rights of personality for private corporations.¹² Since then, new breeds and hybrids of business entities formed according to the laws of the US states. For example, a limited liability company is an artificial unincorporated business entity formed according to various state laws that provides the members with separation from unlimited liability of their business while a basic old-fashioned sole proprietorship or general partnership provides the proprietors no separation from unlimited liability of their business. The different classes of business entities benefit from different levels of rights and duties while legislation and legal cases redefine the rights and duties. Despite the redefinitions, all legitimate business entities are nonetheless legal persons.

⁹ Savo Randazzo, "The Nature of Partnership in Roman Law," *Australian Journal of Legal History* 9, no. 1 (2005): 119–129; "Are Owners of a Partnership Personally Liable for Business Debts?" Nolo, accessed November 12, 2013, <http://www.nolo.com/legal-encyclopedia/partnership-faq-29130-5.html>; Uniform Partnership Act, February 4, 1997, http://www.uniformlaws.org/shared/docs/partnership/upa_final_97.pdf.

¹⁰ Deiser, "The Juristic Person: I"; Deiser, "The Juristic Person: II"; Deiser, "The Juristic Person: III."

¹¹ *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), http://www.law.cornell.edu/supct/html/historics/USSC_CR_0017_0518_ZS.html.

¹² *Pembina Consolidated Silver Min. & Milling Co. v. Commonwealth of Pennsylvania*, 125 U.S. 181 (1888), <http://www.law.cornell.edu/supremecourt/text/125/181>.

3. Self-organization of Geopolitical Entities

3.1 The Ontological Model

This essay proposes an ontological model in which a legal person such as a polity possesses natural unity from group properties that emerge in the self-organization of the human population. This subsection analyzes the self-organization. For example, measurable patterns of self-organization and collective behavior among vertebrates include (1) schools of fish, (2) flocks of birds, (3) herds/flocks of ungulate mammals, (4) human crowds, and (5) basic leadership and followership among fish, birds, ungulate mammals, primates, and human crowds.¹³ This indicates that patterns of self-organization among social vertebrates first emerged in the Paleozoic Era, 542 to 252 million years ago.¹⁴ The strong evidence of self-organization patterns among social vertebrates supports a theory of real/factual self-organized social vertebrate groups.

Self-organization is a process that involves numerous interactions among local-level components of a system that cause the emergence of global-level patterns.¹⁵ In the case of a self-organized social group, the organization involves the unity of multiple components while each component is in some context spatially disconnected from the other components. The spatial disconnection of the components within the group that possesses measurable self-organization suggests that the group possesses real undetected properties of unity. For example, if there are no real undetected properties of unity, then there are no real social groups such as schools of fish and flocks of birds. Also, if there are no real social groups, then there is no self-organization of a social group despite the measurements that suggest the existence of various self-organized social vertebrate groups. As stated earlier, this theory assumes that the strong evidence of self-organization patterns among social vertebrates indicates the real existence of various self-organized social groups.

Additional evidence comparable to the self-organization of social vertebrate groups includes the strong evidence that most primate populations develop organic social organization.¹⁶ Also, strong evidence indicates that humans who develop farming

¹³ Iain D. Couzin and Jens Krause, "Self-Organization and Collective Behavior in Vertebrates," In *Advances in the Study of Behavior: Vol. 32*, ed. Peter J. B. Slater et al. (San Diego: Academic Press, 2003): 1–75.

¹⁴ "International Chronostratigraphic Chart," International Commission of Stratigraphy, January 2013, <http://www.stratigraphy.org/ICSchart/ChronostratChart2013-01.pdf>.

¹⁵ Couzin and Krause, "Self-Organization."

¹⁶ Larissa Swedell, "Primate Sociality and Social Systems," *Nature Education Knowledge*, 2012, <http://www.nature.com/scitable/knowledge/library/primate-sociality-and-social-systems-58068905>.

technology possess an organic tendency to form the custom of a geopolitical entity.¹⁷ The customary geopolitical entities with all of their faults and virtues are organic while the human population is self-organized.

The existence of undetected properties of self-organization challenges various notions of organization. For example, one might say that a flock of sheep is individual sheep that are corporeal parts while the unity of the whole flock is a mind-dependent ideal and not a mind-independent/objective entity.¹⁸ However, a flock of sheep is a mind-independent/objective entity that is unified by natural self-organization.

The observation of self-organization in vertebrate groups as previously mentioned is limited to simple behavior. This suggests that self-organization does not determine complex behavior that *may* occur in respective groups. In this theory, the self-organization of a social group continues to exist during complex behavior that is beyond the statistical methods of self-organization research.

A point of caution is that policy of a natural polity can be moral or immoral or practical or impractical.¹⁹ For instance, immoral examples of custom included capturing humans into slavery while repressing the natural personhood of the humans. In cases of immoral or unnecessarily impractical custom, a polity should reform or amend policy.

3.2 Speculative Science of Undetected Properties

One might object to the existence undetected properties in the self-organization of social animal groups that by definition are outside of proper science. However, science constantly discovers new properties that were previously undetected. Also, proper science researches the effects of undetected properties while deductions about the undetected properties are in the realm of speculative science. For example, Albert Einstein predicted and observed the gravitational theory of general relativity but nobody has yet detected the source of gravity.²⁰

An interesting twist in science is that the Standard Model of particle physics makes amazing detectable predictions of positive-energy elementary particles such as the real existence of the Higgs boson, but the Standard Model offers no coherent model of gravity that is negative energy. Alternatively, various string theories predict that the

¹⁷ Peterson and Skaaning, "Ultimate Causes of State Formation"; Maisels, "Models of Social Evolution."

¹⁸ Long, "Universitas," 1215.

¹⁹ See moral realism in sections 3.3–4.

²⁰ Rahul Basu and Tanumoy Mandal, "Graviton Signals in Central Production at the LHC," *Advances in High Energy Physics* 2013, (2013): Article ID 652714, 17 pages, doi:10.1155/2013/652714.

source of gravity is extra-dimensional *graviton* particles. For example, string theory variant M-theory predicts three observable space dimensions and seven undetected space dimensions. Some string theorists hope to generate detectable gravitons in a high-energy particle accelerator and catch a brief glimpse of the gravitons that would rapidly disappear into extra dimensions. These gravitons are negative-energy gauge boson particles with a spin of 2 *if* gravitons factually exist.

Gravity and self-organization are part of speculative science. For example, a speculative physics theory proposes that the fundamental weak force causes various types of self-organization.²¹ In the case of self-organized social animal groups, perhaps the causal natural forces of the self-organization include neurobiological instinct for social interaction combined with the forces of space dimensions.

3.3 The Unity of a Natural Person

As previously mentioned, a natural person is a human who possesses rights and duties. The consensus of jurists and political scientists assumes the real/factual/objective/mind-independent existence of natural rights and morality in the context of natural law. Sophisticated statements of natural rights include The Universal Declaration of Human Rights.²² Alternatively, legal positivism assumes that rights exist only when custom or a legislature codifies the rights, which are legal rights. Other concepts that reject the realism of natural rights and morality include moral anti-realism and the similar notion of moral relativism.²³ In the case of a natural person, *natural rights realism* suggests real unity of a natural person while *natural rights anti-realism* suggests mind-dependent unity of a natural person. The scope of this essay excludes an extensive debate about the existence of natural rights, but this subsection outlines a model of natural rights based on moral realism. The natural rights realism supplements the section 3.1 model of self-organized geopolitical entities.

Natural rights, as stated above, tie into moral theory. Two major categories of moral theory that traditionally oppose each other are deontologism and consequentialism/utilitarianism. Deontologists say that moral rightness or wrongness of an action is based on the intrinsic qualities of the action. Consequentialists say that moral rightness or wrongness of an action is based on the consequences of the action.

²¹ Maurice Goodman, "Toward Linking Material Self-Organization and the Weak Force," *Speculations in Science and Technology* 20, no. 1 (1997): 33–44.

²² "The Universal Declaration of Human Rights," UN General Assembly, December 10, 1948, <http://www.un.org/en/documents/udhr/>.

²³ James Nickel, "Human Rights," *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Summer 2013, <http://plato.stanford.edu/archives/sum2013/entries/rights-human/>.

However, Henry Sedgwick and Derek Parfit advance partial harmony of deontology and consequentialism.²⁴ This outline of natural rights focuses on basic concepts of consequentialism that are compatible with deontology.

Traditional consequentialism is, more or less, naturalistic moral realism.²⁵ The moral theory evaluates the natural consequences of actions. Also, consequentialism assumes the existence of moral facts that reduce to the laws of nature. However, a deontologist may also strongly consider natural consequences of actions.

A basic concept of natural rights includes distinguishing between natural rights and legal rights. This model analyzes natural rights and legal rights in the examples of safety ethics and personal property.

3.3.1 Safety Ethics

Basic natural rights respect human life. For example, safety ethics and codes are an interesting example of respecting human life and limb that date back to at least the eighteenth-century-BC Code of Hammurabi.

Contemporary safety standards and legal codes develop from empirical research that evaluates the consequences of respective procedures. Example agencies of international safety standards include ASTM International and ISO.²⁶ The safety standards involve voluntary compliance while people from diverse backgrounds including religious and nonreligious alike adhere to safety standards and legal codes.

Safety ethics are based on safety standards and legal codes. Consider the following generalization of safety ethics: intentional adherence to safety standards that protect others is morally good while intentional neglect of safety standards that unnecessarily risks harm to others is morally wrong. One may find complicated exceptions to the generalization, but safety related procedures nonetheless involve ethics.

The empirical research of safety indicates strong evidence that some aspects of safety are objective/mind-independent. Likewise, safety ethics are, more or less, based on safety facts discovered by empirical research. Exceptions include safety myths that have been exposed by safety research. Regardless of the myths, the existence of safety facts and the universal concern for safety suggests a natural moral imperative to respect the

²⁴ Mark Schroeder, "Derek Parfit: On What Matters, Volumes 1 and 2," *Notre Dame Philosophical Reviews*, 2011.08.01, <http://ndpr.nd.edu/news/25393-on-what-matters-volumes-1-and-2/>.

²⁵ Peter Railton, "Moral Realism," *Philosophical Review* 95, no. 2 (1986): 163–207.

²⁶ See <http://www.astm.org/> and <http://www.iso.org/>.

safety of all humans. For example, The Universal Declaration of Human Rights: Article 25 says, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family." This standard of living includes objectively safe buildings, roads, vehicles, appliances, and food.

3.3.2 Personal Property

Personal property, as stated in section 2.1, is a thing owned by a human or other legal person. Some personal property is a basic human need. For example, The Universal Declaration of Human Rights: Article 17 says that all humans possess the right to own property.

Rudimentary concepts of property ownership likely emerged among Paleolithic humans in the cases of food from hunting and gathering, stone tools, clothing, jewelry, and portable shelter.²⁷ This personal property was natural. Also, analogous to prehistoric human property is the ubiquitous non-human animal construction and protection of nests.

One might argue that an owner of personal property does not always visibly possess the property, so the ownership in these cases is a mind-dependent ideal instead of a mind-independent reality. However, the evidence of moral facts, the human need for some personal property, and the ubiquity of personal property ownership suggest the existence of an invisible natural force that causes property ownership regardless of the visiblenss or invisiblenss of the ownership.

3.3.3 Note on Moral Relativism

The American Anthropological Association (AAA) in 1947 exemplified moral relativism when their executive committee stated opposition to the progress of human rights that supposedly would represent values only from Western Europe and America and not values from Asia and Africa.²⁸ However, the AAA in 1995 reversed their position and started to support various cases of human rights through their Committee of Human

²⁷ For Paleolithic artifacts, see Ferraro, "A Primer on Paleolithic Technology."

²⁸ The Executive Board, American Anthropological Association, "Statement on Human Rights," *American Anthropologist* 49, no. 4 (1947): 539–543, <http://www.jstor.org/stable/662893>; Nickel, "Human Rights." (2013) *J. JURIS.* 35

Rights. For example, AAA members in 1999 adopted the "Declaration on Anthropology and Human Rights."²⁹

Consider the case of chattel slavery, which involved humans who were owned as property with no legal rights. Every nation eventually established laws that prohibit chattel slavery, but many great thinkers such as Aristotle had supported the institution of chattel slavery. For example, Aristotle said that some humans are natural slaves while other humans are natural freeman.³⁰ Aristotle somehow defended Grecian enslavement of humans including various skilled artisans and pedagogues. In this case, a moral relativist cannot say that chattel slavery in various societies was objectively wrong while a moral realist can say that chattel slavery was objectively wrong. For instance, the wrongness of chattel slavery was mind-independent despite the thoughts of great minds such as Aristotle.

4. Paradoxes of Legal Persons

Legal persons appear paradoxical because of the invisible properties. Despite the partial invisibility, the study of past and current phenomena indicates that legal persons sometimes generate enormous force. Great nations rise and fall. Government officials declare war and armies fight with tangible weapons. Legal persons buy and sell property. Universities grant academic degrees. A cartoon character is intangible property that generates multibillions of US dollars per year. Banks and law enforcement foreclose mortgages of family residences. Governments and economies around the world operate according to the logic of law.

Concerning paradoxes, this essay supposes the golden rule of philosophy that says there are no absolute contradictions. Likewise, a *paradox* is a thing that looks contradictory at some level while the thing is actually noncontradictory. For example, one may only partially comprehend a paradox because of limited information. Or debaters may defend contradictory positions. Or a set of legal codes may contain contradictions subject to amendment or termination. Regardless, there are no absolute contradictions.

The legal paradoxes in this section assume the real existence of geopolitical entities and natural persons. The paradoxes include Aristotelian essence of an entity, relative identity over time, ubiquitous authority, coinciding authorities, and identical entities. Mathematical modeling helps to explain the logic of the paradoxes.

²⁹ "Declaration on Anthropology and Human Rights," American Anthropological Association, June 1999, <http://www.aaanet.org/about/Policies/statements/Declaration-on-Anthropology-and-Human-Rights.cfm>.

³⁰ Aristotle, *Politics*, trans. Benjamin Jowett, 1.3—7, <http://classics.mit.edu/Aristotle/politics.1.one.html>. (2013) J. JURIS. 36

4.1 Origination, Termination, Essence, Accidents, and Identity

Legal paradox includes the *origination* and *termination* of entities. For example, in most legal systems, the birth of a human is the origination of a natural person while the permanent death of a human is the termination of the natural person. Similarly, various legal persons emerge and possibly terminate based on a declaration, contract, formal legislation, or war.

This origination and termination of entities resemble Aristotle's model of *essential* and *accidental/nonessential* properties of an *object/entity*. Aristotle distinguished between essential and nonessential changes of a thing/entity.³¹ Essential changes result in the instant origination or termination of an entity while nonessential changes impact but never terminate an entity. Likewise, every entity has its *essence* that is the minimal properties that define the *identity* of the entity while identity distinguishes an entity from everything else.

The criterion for distinguishing between an essential change and a nonessential change is straightforward. Essential changes originate or terminate an entity while nonessential changes do not. Complications occur when a nonessential change to an entity originates another entity. In these cases, the change is nonessential in relation to the former entity and essential in relation to the new entity.

4.1.1 Natural Persons

In the case of natural persons, the only essential changes of identity in most cases are birth and permanent death. Examples of nonessential changes include the following activity in the life of natural person N:

1. Constant movement of the elementary particles inside N's biological body and tangible property
2. Constant change in the thermodynamic processes of N's body and tangible property
3. Constant change in the biological cellular processes inside N's body
4. Constant change in the biological systems processes inside N's body
5. Many changes of N's tangible and intangible property ownership
6. Occasionally changes of N's career from one office to another office

4.1.2 Geopolitical Entities

³¹ Andre Gallois, "Identity Over Time," *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Summer 2012, <http://plato.stanford.edu/archives/sum2012/entries/identity-time/>.

Essential changes of geopolitical entities result from agreements or wars. The US is an interesting case of origination and nonessential changes. The US originated from thirteen United Kingdom (UK) colonies at war with the UK; the thirteen colonies turned into thirteen states that officially declared independence from the UK on July 4, 1776, which was an act of high treason. Nonessential changes of the US include:

1. Representatives from the thirteen states drafted the Articles of Confederation from 1776 to 1777 and the thirteen states ratified the Articles by early 1781.
2. The US Constitution replaced the Articles on March 4, 1789.
3. The first ten amendments to the Constitution known as the Bill of Rights were ratified in 1791.
4. Seventeen more amendments to the Constitution were ratified from 1795 to 1992.
5. US Supreme Court decisions since 1789 have defined and redefined constitutional law.
6. The US expanded from thirteen states in 1790 to fifty states and additional territories.
7. The population size of natural persons constantly changes.
8. Each natural person changes according to the example in subsection 4.1.1.
9. All material entities in the US have constant movement of elementary particles and constant changes of thermodynamic processes.
10. All juristic persons in the US are subject to change.

4.1.3 Theseus's Ship and Automobiles With a VIN

Plutarch in the first century cited that philosophers mused over the ship of the mythical Athenian king Theseus. Legend says that the city of Athens preserved Theseus's ship in the Athenian harbor for several centuries by replacing worn wooden planks with new planks. Eventually, the Athenians replaced every material part of the ship. Philosophers took sides if the vessel with all replaced material remained the same Theseus's ship or if the vessel became a mere replica of Theseus's ship.³²

Thomas Hobbes in the seventeenth century added to the identity puzzle by proposing the scenario of a custodian who stored all of the worn original material of Theseus's ship and then reassembled the original material. This resulted in two vessels while proposing two original Theseus's ships is absurd.³³

If one argues that the vessel in the Athenian harbor with all replaced material is a replica of Theseus's ship, then those proponents need to determine the criteria for

³² Plutarch, "Theseus," in *Plutarch's Lives: Vol. 1*, trans. Bernadotte Perrin (London: William Heinemann, 1914), 49–51, <http://www.archive.org/stream/plutarchslives01plutuoft#page/48/mode/2up>.

³³ Thomas Hobbes, *The Metaphysical System of Hobbes in Twelve Chapters From Elements of Philosophy Concerning the Body Together With Briefer Extracts From Human Nature and Leviathan*, 2nd ed. trans. Mary Whiton Calkins (Chicago: Open Court, 1913), 84–85, <http://archive.org/details/cu31924014604007>.

distinguishing the original from the replica. For example, what percent of replacement material would turn the original vessel into a replica? Would the original vessel turn into a replica after 1% replacement? Or is the criterion for the original turning into a replica 2% replacement, 3% replacement, 4% replacement, or so on to 100% replacement? Any such criterion is subject to debate. Alternatively, if one argues that the vessel in the Athenian harbor with all replaced material is Theseus's ship, then the vessel's identity is independent from the vessel's condition.

This essay adds a scenario of property law to this puzzle. The city of Athens is a legal person that owns Theseus's ship, which is tangible personal property. Per custom, the vessel in the Athenian harbor is Theseus's ship despite any number of times that all of the vessel's material is replaced. Also, the Hobbesian custodian of the original worn parts reassembles the parts into a replica of Theseus's ship. The sole Theseus's ship is the vessel with all new material despite an indefinite number of times that the vessel's replaced material is reassembled into a replica. No property law would say that the identity of the personal property changes because of repair. This supports that the vessel's identity is independence from the vessel's condition.

A similar modern day scenario of tangible personal property involves automobiles in North America, Europe, and Australia. All such vehicles possess a Vehicle Identification Number (VIN). Despite any amount of vehicle repair using replacement auto parts, the VIN remains the same even if the VIN label needs replacement. Likewise, if a mechanic replaces all material parts of a respective automobile, the VIN remains the same. Also, if the mechanic later reassembles the original auto parts into a vehicle for use on public roads, then the second vehicle made from the original auto parts needs its own new VIN.

4.1.4 Essence, Identity Over Time, and Mathematical Equality

Identity over time of tangible entities is paradoxical because tangible entities constantly change. For example, Leibniz's Law (LL) defines the concept of absolute identity / numerical identity and absolute identicalness. LL states that no two distinct things possess the same properties and no other properties. More specifically, the LL formula of absolute identicalness says: "If, for every property F , object x has F if and only if object y has F , then x is identical to y ."³⁴ However, tangible entities constantly change. Consider the subsection 4.1.1 case of natural person N's nonessential changes. N at point of time 1 (NT1) and N at point of time 2 (NT2) are nonidentical compositions of

³⁴ Peter Forrest, "The Identity of Indiscernibles," *Stanford Encyclopedia of Philosophy*, Winter 2012, ed. Edward N. Zalta, <http://plato.stanford.edu/archives/win2012/entries/identity-indiscernible/>.

the same identity. Likewise, $NT1 \neq NT2$ in the context of composition and $NT1 = NT2$ in the context of identity.

At face value, $NT1 \neq NT2$ in the context of composition is incompatible with LL. This indicates that $NT1 = NT2$ in the context of identity refers to a type of identity other than absolute identity.

One explanation for the compatibility of the respective $NT1 \neq NT2$ and $NT1 = NT2$ is mathematical equality. For example, mathematical equality indicates that $A = B$ means that A and B are nonidentical expressions that are an identical value. Comparatively, $NT1 = NT2$ means that $NT1$ and $NT2$ are nonidentical compositions that are an identical object. Also, the respective identicalness of the two nonidentical compositions necessarily involves identicalness other than their entire compositions. This identicalness other than their entire compositions supports a theory of essential properties or essence that by definition never changes apart from possible termination. This unchanging essence is the basis for identity over time despite changes of composition. In the case of N , the essence of $NT2$ is absolutely identical to the essence of $NT1$. In the case of the US, the essence of the nation has remained absolutely identical since July 4, 1776. In the case of Theseus's ship, the replacement of all the original material never changed its essence.

The mathematical equality and essence of $NT1$ and $NT2$ also compare to Peter Geach's formula logic of relative identity that says, " x and y are the same F but x and y are different G s."³⁵ For example, according to the theory of relative identity, $NT1$ is x ; $NT2$ is y ; F is a natural person; G s are compositions. Likewise, $NT1$ and $NT2$ are the same natural person and different compositions, which exemplifies relative identity over time. Similarly, the relative identity theory models identity over time for any entity that changes composition. Also, relative identity over time possibly corresponds to the Saul Kripke and Hilary Putnam concept called *causal theory of reference*.³⁶

The above examples indicate that universal customary law of natural legal personality and property suggests the existence of Aristotelian essential properties of an entity and relative identity over time.

³⁵ Peter Thomas Geach, "Identity," *The Review of Metaphysics* 21, no. 1 (1967): 3–12, <http://www.jstor.org/stable/20124493>; Geach, *Reference and Generality: An Examination of Some Medieval and Modern Theories*, 3rd ed. (Ithaca: Cornell University Press); Harry Deutsch, "Relative Identity," *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Winter 2012, <http://plato.stanford.edu/archives/win2008/entries/identity-relative/>.

³⁶ Hilary Putnam, *Mind, Language, and Reality: Philosophical Papers: Vol. 2* (Cambridge: Cambridge University Press, 1975).

4.2 Ubiquitous Authority and Coinciding Authorities

4.2.1 Ubiquitous Authority

Legal paradox includes the ubiquity of authority. In the case of a geopolitical entity, the complete authority of the government is present in every territorial location of the geopolitical entity. The authority might lack consistent enforcement, but the authority nonetheless exists in every location. On a smaller scale, the governmental authority of a geopolitical division is present in every location of the division and the authority of a property owner is present in every location of the property. Also, the authority of government officials is present in every respective location. For example, the authority of any monarch is present in every location of the respective kingdom.

The ubiquitous authority in every territorial location compares to a set of all Cartesian coordinates in a three-dimensional shape that corresponds to a respective territory that includes underground and atmosphere.

4.2.2 Coinciding Territorial Authorities

Legal paradox includes coinciding territorial authorities that are multiple authorities with ubiquitous presence in the same territory. The coinciding authorities might involve unity or disunity.

Examples of unified coinciding authorities include a geopolitical entity that establishes an indefinite number of departments while each department is an authority in the entire geopolitical entity. Similarly, unified coinciding authorities occur when a geopolitical division establishes an indefinite number of departments while each department is an authority in the entire geopolitical division. Another example involves the authorities of a geopolitical entity and a respective geopolitical division that coincide in the geopolitical division.

Examples of dis-unified coinciding authorities include civil war and military occupation. For instance, during the 49–45 BC Great Roman Civil War, dis-unified coinciding authorities originated in the Roman Republic on January 10, 49 BC, when Julius Caesar and his armies crossed the Rubicon River in conflict with Pompey and the Roman Senate. The dis-unified coinciding authorities terminated when Caesar won the civil war on March 17, 45 BC.

4.3 Identical Entities

Legal paradox includes identical entities. Two distinct categories of identical entities are (C1) an undivided human who is multiple entities and (C2) multiple natural persons who are an identical entity.

4.3.1 An Undivided Human Who Is Multiple Entities

A human who is an official exists as an undivided human who is multiple entities. For example, a public official is both a natural person and an official, which is two types of entities. The human is not part natural person and part official, but the human is the natural person and the official. Additionally, a natural person may simultaneously hold an indefinite number of political offices and likewise exist as an indefinite number of political entities. For instance, Roman emperors typically accumulated multiple offices and some modern day public employees hold multiple political offices.

4.3.2 Multiple Natural Persons Who Are an Identical Entity

Two types of multiple natural persons who are an identical entity are (T1) general partnerships and (T2) co-regencies.

A general partnership is a natural unincorporated business entity that consists of multiple natural persons who are general partners while each general partner is the inseparable proprietor of the partnership. Each general partner by default is the entire authority of the partnership and completely liable for the partnership, except if a legal contract signed by each general partner states otherwise.

Judges and attorneys in many courts never flinch at the premise of multiple natural persons who exist as an identical entity in cases of a lawsuit against a general partnership. If a general partnership owes defaulted debt to a plaintiff, then the court unequivocally asserts that each general partner is identical to the partnership. The plaintiff may conveniently sue any general partner for some or all of the debt. Evidence of the defaulted debt is *prima facie* evidence, which means that the evidence is sufficient to prove the case apart from sufficient contrary evidence. In such cases, the only possible sufficient contrary evidence would involve evidence against the existence of the defaulted debt or evidence that the defendant is not a general partner.

Similar to general partnerships, occasional ancient co-regencies consisted of joint monarchs while each monarch possessed the identical monarchical office with identical

authority. Notable ancient examples of co-regencies included various examples in Egypt, Israel, and Rome

The earliest recorded examples of co-regencies were Egyptian pharaohs in the second millennium BC who appointed their successors as joint rulers in a senior-junior relationship but with identical monarchical authority.³⁷ Some Egyptian queens also rose to the position of joint monarch with identical authority.

Similarly, in the united monarchy of Israel, King David near the end of his life appointed his son Solomon the king of Israel.³⁸ The joint monarchs enjoyed identical monarchical authority until David died.

The Roman Republic contained important examples of identical office while monarchical-like authorities in the republic such as Octavian Augustus avoided the title of monarch or emperor. In the case of the 44–33 BC triumvirate of Octavian, Marcus Lepidus, and Mark Antony, each of the triumvirs enjoyed identical dictatorial authority that was restrained only by a term limit. Similarly, the Roman Senate in AD 13 appointed Octavian and Tiberius to identical office.

4.4 Multi-Units

An entity consisting of multiple entities is called a *multi-unit*. A *collective multi-unit* consists of entities that are unidentical to the multi-unit while an *identical multi-unit* consists of entities that are identical to the multi-unit.

4.4.1 Collective Multi-Units

The most common multi-units are collective multi-units. Any legal person that contains multiple components is a collective multi-unit. For example, a natural person who consists of a human and the human's property is a multi-unit. In a general context, most organizations are collective multi-units such as sports teams, stadium crowds, primate groups, herds of mammals, flocks of birds, schools of fish, insect colonies, colonial organisms, symbioses, and ecosystems. Fully visible examples of collective multi-units include conjoined identical siblings in a variety of species, colonial organisms, and various long-term symbioses. Partly visible examples of collective multi-units include legal persons that contain multiple components.

³⁷ Aidan Dodson, "Co-regency (Egypt)." October 26, 2012, *The Encyclopedia of Ancient History*, <http://onlinelibrary.wiley.com/doi/10.1002/9781444338386.wbeah15087/abstract>.

³⁸ 1 Chronicles 29.

4.4.1.1 Fully Visible Collective Multi-Units

A set of human conjoined siblings is an exceptional example of a fully visible collective multi-unit involving two natural persons and one human body. The conjoined siblings are identical twins who originated from a sole identical fertilized egg and never completely separated during early embryonic development unlike normal identical siblings.³⁹ In theory, human conjoined siblings could involve identical triplets, quadruplets, and so on, but evidently only conjoined twins have survived to birth. Comparatively, conjoined siblings also occur in various vertebrate species while case studies of conjoined turtles and conjoined snakes document the phenomena of multiple heads sharing a single body that is called *polycephaly*, which results in a mix of coordinated and uncoordinated movement.⁴⁰ Most conjoined vertebrates in the wild expire before adulthood but some nonetheless make curious news stories, star in farm show attractions, and inspired the imagination of ancient mythmakers.

An extraordinary example of conjoined humans in the popular media is Abigail and Brittany Hensel, the Hensel twins.⁴¹ Abigail and Brittany have a dicephalic/two-headed body with two normal arms and two normal legs. Each twin has her own duplicated central nervous system, spine, esophagus, set of lungs, heart, gall bladder, and stomach. They incompletely share a peripheral nervous system, a conjoined circulatory system, one rib cage, one liver, one large intestine, one small intestine, one pelvis, one urinary bladder, and one set of reproductive organs. Abigail's head is nearest to the right shoulder while Brittany's head is nearest to the left shoulder. Abigail controls the right limbs while Brittany controls the left limbs. Abigail feels only the left limbs while Brittany feels only the right limbs. Regardless that each controls and feels only the limbs on their own side, they astonish doctors while instinctively coordinating as one person. They manage e-mails with two-handed typing, play two-handed piano, and enjoy sports such as bowling, volleyball, cycling, softball, and swimming. On their sixteenth birthday, they passed their driver's tests. When they drove, they each had a hand on the steering wheel as Brittany controlled the blinkers and the lights while Abigail controlled the

³⁹ "Conjoined Twins," The Children's Hospital of Philadelphia, last modified November 2012, <http://www.chop.edu/service/fetal-diagnosis-and-treatment/fetal-diagnoses/conjoined-twins.html>.

⁴⁰ Candice Swarts, "Rare Two-Headed Tortoise Found in South Africa," May 30, 2003, *National Geographic News*, May 30, 2003, http://news.nationalgeographic.com/news/2003/05/0529_053003_twoheadedtortoise.html; Hillary Mayell, "Life Is Confusing For Two-Headed Snakes," last modified March 22, 2002, *National Geographic News*, http://news.nationalgeographic.com/news/2002/03/0318_0319_twoheadsnake.html.

⁴¹ "Living Life to Its Fullest," *Mail Online*, September 12, 2012, <http://www.dailymail.co.uk/femail/article-2202087/Conjoined-twins-Abigail-Brittany-Hensel-sights-London-latest-episode-reality-show.html>; Helen Weathers, "Abigail and Brittany Hensel: An Extraordinary Bond," *Mail Online*, December 31, 2006, <http://www.dailymail.co.uk/femail/article-425736/Abigail-Brittany-Hensel-extraordinary-bond.html>.

pedals and stick shift. They often understand each other's thoughts and desires without speaking to each other. However, they developed different academic strengths. They simultaneously and separately hand wrote during school examines while earning different grades. They are a physical and metaphysical wonder who push the boundaries of sole natural personhood and a shared tangible body.

4.4.2 Partly Visible Collective Multi-Units

Individual humans inevitably self-organize into partly visible collective multi-units such as families, geopolitical entities, and various types of social organizations. The concept of a collective multi-unit is fundamental for society.

4.4.3 Identical Multi-Units

An identical multi-unit is an entity that consists of multiple identical entities such as subsection 4.3 models of C1, T1, and T2. C1 is an undivided human who is multiple entities; T1 is multiple natural persons who are an identical general partnership; T2 is multiple natural persons who are an identical monarchial office.

Consider an example of a T1 multi-unit. Natural person N simultaneously holds two federal offices. N is the commerce minister called *C* and the defense minister called *D*. N is an undivided natural person; all of N is all of C; all of N is all of D; C is not D while C has no authority in D's department and vice versa. All of N is C but not all that coincides with N is C while all of N is D but not all that coincides with N is D.

Consider an example of a C1 multi-unit. Natural persons P, S, and H develop general partnership T. P is 100% of T, which is 100% of the authority and liability of T; S is 100% of T; H is 100% of T; P is not S or H; S is not H.

Consider an example of a C2 multi-unit. Natural person David becomes the king of Israel and near the end of his life he appoints his son Solomon as joint monarch with identical authority. David is the entire monarch of Israel; Solomon is the entire monarch of Israel; David is not Solomon.

At first sight, the above examples of identical multi-units might appear incompatible with Aristotelian syllogism and mathematical equality. Consider if $A = B$ and $A = C$, then $B = C$ ($A=B=C$). For example, the above C1 model states $N = C$; $N = D$; $C \neq D$, which might appear incompatible with $A=B=C$. However, similar to the examples in subsection 4.1, the $A=B=C$ variables are three different expressions with identical value, which indicates that *A*, *B*, and *C* are equal in value but not identical in every way.

Comparatively, N, C, D are three different types of entities that are an identical human. Also, $A=B=C$ and the C1 model resemble the formula logic of relative identity, which as stated in subsection 4.1 says: " x and y are the same F but x and y are different G s."

Consider $A=B=C$. In the case of formula relative identity, x is A ; y is B ; z is C ; F is a mathematical value; G s are mathematical expressions. Likewise, the variables A , B , and C are the same value and different expressions, which exemplify relative identity.

Consider the above N who simultaneously is C and D. In the case of formula relative identity, x is C; y is D; F is the natural person N; G s are officials. Likewise, x and y are the same F but x and y are different G s.

Consider the above general partnership T and formula relative identity. Natural persons P, S, and H form general partnership T. P is 100% of T; S is 100% of T; H is 100% of T; P is not S or H; S is not H. In the case of formal relative identity, x is P; y is S; z is H; F is T; G s are natural persons P, S, and H.

Consider the above co-regency of natural persons David and Solomon who are an identical monarchial office. In the case of formula relative identity, x is David; y is Solomon; F is the monarchial office; G s are natural persons. David and Solomon are an identical monarchial office and different natural persons.

The above examples indicate that an identical multi-unit exemplifies mathematical equality and formula relative identity.

5. Conclusion

Self-organization of a human population and natural rights unify a respective geopolitical entity. Despite undetectable elements of the organization, the legal personality of geopolitical entities is not a mind-dependent ideal but a mind-independent reality. The properties of legal persons also instigate philosophical debate about organization, Aristotelian essence of an entity, relative identity over time, authority, and relative identity of identical entities. Speculative physicists, neuroscientists, anthropologists, philosophers, jurists, and political scientists may join together to further analyze the nature of legal persons.

**IN DEFENSE OF JUDICIAL PRUDENCE:
AMERICAN CONSTITUTIONAL THEORY, VIRTUE, AND
JUDICIAL REVIEW IN HARD CASES**
Nicholas Buccola*

I. Introduction

What is the most important virtue for judges to exhibit when they are interpreting and applying the U.S. Constitution to “hard cases” involving vague and abstract language such as “cruel and unusual punishment” and “equal protection of the laws”?¹ In this essay, I contend that advocates of three major theories of judicial review – majoritarianism, originalism, and perfectionism – emphasize the virtues of restraint, fidelity, and justice respectively, but that a fourth virtue – prudence – ought to be regarded as the most important judicial virtue for judges deciding hard constitutional cases.² Advocates of each of these three theories of judicial review embrace these respective virtues because they accept three particular constitutional theories.³ By

* Associate Professor of Political Science at Linfield College. I am grateful to Aila Wallace, Helen Knowles, Paul Chen, Donald Jackson, Chief Justice Thomas Balmer of the Oregon Supreme Court, Les Swanson, Andrew Valls, Curtis Johnson, Chana Cox, John Holzwarth, Alex Sagers, Maggie Hawkins, and Bill Curtis for their thoughtful feedback on this paper.

¹ I follow Ronald Dworkin in defining “hard cases” as “those cases in which the result is not clearly dictated by statute or precedent.” See Ronald Dworkin, “Hard Cases,” *Harvard Law Review*, Volume 88, No. 6, April 1975, 1057. Throughout this essay, I follow the custom in scholarship on constitutional theory by focusing on how theory applies to Supreme Court justices. This is, of course, the norm because lower court judges are bound by additional constraints that serve to distract us from foundational questions of constitutional theory.

² This typology of judicial philosophies is taken from Cass Sunstein, *Radicals in Robes* (New York: Basic Books, 2005). The only difference is that Sunstein calls originalism “fundamentalism” in his text. It may be objected that Sunstein’s typology is not the “standard” in the field. A leading textbook in the field, for example, includes chapters on “Textualism and Constitutional Interpretation,” “Originalism and Constitutional Interpretation,” “Structural Reasoning,” “Moral Reasoning,” and “Precedent in Constitutional Adjudication” in its Part on “Judicial Review and Constitutional Interpretation.” See Michael J. Gerhardt, Stephen M. Griffin, and Thomas D. Rowe, Jr. *Constitutional Theory: Arguments and Perspectives*, 3rd Ed. (Newark: LexisNexis, 2007), xv-xix. While it is certainly true that scholars differ on how exactly to categorize various theories of judicial review and list could be endless, I feel that Sunstein’s typology is defensible for a variety of reasons. Most importantly for this paper, Sunstein’s typology is useful because it invites us to see the constitutional theories at the foundation of several prominent theories of judicial review and does not over-emphasize the importance of interpretive methodology. It is for this reason that I find Sunstein’s typology especially useful. All too often in the study of judicial review, we get caught up in the details of interpretive method and neglect underlying debates about constitutional theory.

³ I should note that I admit judges do not always rely on “theory” to guide their decisions. Many scholars of constitutional theory and theories of judicial review continue to believe, though, that whatever the

“constitutional theory,” I have in mind what legal scholar David Strauss described as the “effort to justify a set of prescriptions about how certain controversial constitutional issues should be decided” based on what Judge J. Harvie Wilkinson has called “a grand and unifying constitutional vision.”⁴ Advocates of majoritarianism, a theory of judicial review that envisions a limited role for the judiciary and encourages judges to defer to the elected branches of government, emphasize the virtue of restraint. The constitutional theory at the foundation of majoritarianism is one that emphasizes democracy as the supreme constitutional value. Advocates of originalism, a theory of judicial review (and an interpretive method) that envisions a judiciary that is active in defense of the original meaning of the Constitution and passive when the Constitution is silent, emphasize the virtue of fidelity; they believe a good judge is a judge who remains *faithful* to the original understanding of the law even when there is political and moral pressure to do otherwise. The constitutional theory at the foundation of originalism is one that emphasizes the rule of law as the supreme constitutional value. Advocates of perfectionism, a theory of judicial review that envisions a judiciary that actively pursues an agenda guided by a desire to perfect the American political system, emphasize the virtue of justice; a good judge is a judge who makes decisions that are in accord with our aspirations to act consistently with the dictates of morality, or “higher law,” in our politics. The constitutional theory at the foundation of perfectionism was described by the scholar Edward S. Corwin as the idea that the Constitution contains within it certain “principles of right and justice which are entitled to prevail” in constitutional interpretation because of “their intrinsic excellence...regardless of the attitude of those who wield the physical resources of the community.”⁵

I believe majoritarians, originalists, and perfectionists are right to identify respect for democracy, preservation of the rule of law, and the pursuit of a more perfect union as central to the American constitutional project and, therefore, they are all right to identify restraint, fidelity, and justice as essential judicial virtues.⁶ In other words, my argument is rooted in the claim that we live under a *pluralist Constitution*. By this, I mean to say that our Constitution – understood here both as the text and the history, tradition, and precedent that has developed through interpretation of that text – contains within it simultaneous commitments to democracy, the rule of law, and justice and that these

descriptive truth of these theories, there is still a strong normative case for carrying on this discussion of what judges *should* do when confronted with hard cases.

⁴ David Strauss, “What is Constitutional Theory,” *California Law Review*, Volume 87, Issue 3 (1999), 582. J. Harvie Wilkinson, *Cosmic Constitutional Theory* (New York: Oxford University Press, 2012), 1.

⁵ Edward S. Corwin, “The Higher Law Background of American Constitutional Law,” Part 1, *Harvard Law Review*, vol. 42, no. 2 (December 1928), 152.

⁶ When I refer to “the American constitutional project” and “the American constitutional order” in this essay, I have in mind the written constitutional text, the history that produced that text, and interpretations of that text over time.

commitments are often in tension with each other. To demonstrate this point, I ask you to recall Isaiah Berlin's brilliant passage on pluralism in "Two Concepts of Liberty":

If, as I believe, the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict — and of tragedy — can never wholly be eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition.⁷

To paraphrase Berlin and apply his ideas to my argument here: If, as I believe, the ends of our Constitution are many, and not all of them are in principle compatible with each other, then the possibility of conflict — and of tragedy — can never wholly be eliminated from judicial decision-making in hard constitutional cases. The necessity of choosing between absolute constitutional claims is then an inescapable characteristic of the judicial office.

In the face of constitutional pluralism, what is a judge to do? It is precisely because majoritarians, originalists, and perfectionists capture part of the truth that I contend prudence, or *phronesis*, ought to be considered the most important virtue when judges are deciding hard cases.⁸ Prudence is a notoriously difficult virtue to define, but at a very general level we can describe it as a virtue that is concerned with translating moral principle into practice.⁹ Political theorist Ethan Fishman has written that, for Aristotle, "the unique value of prudence for politics is its ability to explain how to realize abstract ends through concrete means available to human beings so that we may do the right thing to the right person at the right time 'for the right motive and in the right way.'"¹⁰ Prudence is, in short, practical wisdom. Without prudence, one cannot be wise in a practical sense; one cannot act on the appropriate principles in appropriate ways in the real world. It is for this reason that Thomas Aquinas called prudence the "master" virtue. Prudence "governs" the other virtues in the sense that is through the guidance of prudence that we act virtuously in the world. Political theorist Ronald Beiner describes the concept in this way:

⁷ Isaiah Berlin, "Two Concepts of Liberty," in *The Proper Study of Mankind* (Farrar, Straus, and Giroux, 1997), 191.

⁸ I am not the first to recommend prudence as a judicial virtue. For a classic defense of the importance of prudence in constitutional interpretation, see Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, (Indianapolis: Bobbs-Merrill, 1962), 235-243.

⁹ It is worth noting that my focus in this essay is on prudence as an intellectual virtue not as a temperamental disposition.

¹⁰ *Ibid.*, 4.

Phronesis is not one virtue among others, but is the master virtue that encompasses and orders the individual virtues. Virtue is the exercise of ethical knowledge as elicited by particular situations of action, and to act on the basis of this knowledge as a matter of course is to possess *phronesis*. Without *phronesis* one cannot properly be said to possess any of the virtues, and to possess *phronesis* is, conversely, to possess all the virtues, for *phronesis* is knowledge of which virtue is appropriate in particular circumstances, and the ability to act on that knowledge.¹¹

The prudential theory of judicial review I defend in this essay recognizes democracy, the rule of law, and justice as relevant sources of “ethical knowledge” for judges deciding hard constitutional cases and, as such, it acknowledges that all of the virtues described above – restraint, fidelity, and justice – are essential. The unique value of prudence for judicial review in hard constitutional cases is its ability to realize constitutional ends through concrete means available to justices so that they may do the right thing in the right case at the right time for the right motive and in the right way. Prudence is the supreme judicial virtue precisely because we live under a Constitution in which several ends exist in a state of dynamic tension with each other. “Since, in practical life, there are always multiple ends to pursue [e.g., security and freedom, inclusiveness and excellence, etc.],” political theorist Richard Ruderman has written, “*phronesis* should determine, at any given time, which end to pursue [in light of the resources, not the least the moral resources, required to pursue it].” For Ruderman, therefore, “the beginning of prudence is the recognition that conflict [of principle as well as interest] is a permanent part of political life.”¹² It is precisely because, in the words of legal scholar John Hart Ely, “our Constitution is too complex a document to lie still for *any* pat characterization,” that we need justices to exercise prudence in hard constitutional cases.¹³ For the “prudent man,” writes theologian Josef Pieper, “does not expect certainty where it cannot exist, nor...does he deceive himself by false certainties.”¹⁴

My argument proceeds as follows. In Part II, I describe the theory of majoritarianism and I make the case that majoritarians emphasize the virtue of restraint because they believe judges should be deferential to the will of democratic majorities. In Part III, I describe the theory of originalism and make the case that originalists are committed to the virtue of fidelity because they believe it is necessary for a judge to be faithful to the original understanding in order to preserve the rule of law. In Part IV, I describe the

¹¹ As quoted in Ethan Fishman, “Introduction,” *Tempered Strength: Studies in the Nature and Scope of Prudential Leadership* (Lanham: Lexington Books, 2002), 2.

¹² *Ibid.*, 5.

¹³ John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980), 101. Emphasis in original.

¹⁴ Josef Pieper, *The Four Cardinal Virtues* (South Bend: Notre Dame University Press, 1962), 18.

theory of perfectionism and I make the case that perfectionists are committed to the virtue of justice because they believe judges should be animated by a desire to perfect the American polity. In Part V, I conclude by contending that the virtue of prudence invites the appreciation of complexity and dynamism that is necessary for judges to balance the simultaneous commitments to democracy, the rule of law, and justice that are at the heart of the American constitutional order.

II. Majoritarianism and the Virtue of Restraint

Advocates of majoritarianism embrace a modest approach to constitutional interpretation in hard cases. The restrained view of the judiciary accepted by majoritarians is rooted in their belief that the primary commitment of the American constitutional order is to popular sovereignty. Legislative majorities, they contend, ought to be given a great amount of leeway in the governance of political communities. According to the majoritarian way of thinking, judges ought to conceive of their role in the constitutional system as facilitators of, not impediments to, democratic action.

A restrained judge is able to resist the temptation to abuse the immense power of judicial office. According to this view, a good judge will have the self-control to abstain from exercising his power when it is inappropriate and to exercise his power with moderation when it is appropriate. In the words of Robert H. Bork, who might justly be called a majoritarian in originalist clothing, it is because the “orthodoxy of our civil religion...holds that we govern ourselves democratically” that “abstinence” is of “inestimable value” as a judicial virtue.¹⁵

We can identify many advocates of majoritarianism throughout the history of American politics and see that the virtue of restraint emerges as central to their philosophy. The classic nineteenth century expression of majoritarianism is found in James Bradley Thayer’s *The Origin and Scope of the American Doctrine of Constitutional Law*.¹⁶ “The judicial function,” Thayer argued, “is merely that of fixing the outside border of reasonable legislative action” and the greatest sin a judge can commit is to attempt to “step into the shoes of the law-maker.”¹⁷ Our constitutional system provides “our courts a great and

¹⁵ Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon & Schuster, 1990), 153, 163.

¹⁶ James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* (Boston: Little, Brown, and Company, 1893).

¹⁷ *Ibid.*, 22, 26.

stately jurisdiction,” but it is incumbent upon judges to refrain from abusing their immense powers.¹⁸

Not long after Thayer published his important tract, Justice Oliver Wendell Holmes penned his famous majoritarian dissent in *Lochner v. New York*.¹⁹ According to constitutional scholar Howard Gillman, Holmes’ jurisprudence “emphasized the need for judges to get out of the habit of imposing anachronistic constraints on contemporary officeholders, and embracing instead an ethic of judicial restraint and a tolerance for political adaptation through legislative innovation.”²⁰ In *Lochner*, the Court was confronted with the question of whether or not a New York maximum hour labor law violated the liberty protection of the 14th Amendment’s Due Process Clause. The Court answered this question in the affirmative, with the majority declaring that the maximum hour law was “unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract.” Holmes authored a dissent in which he argued the Court’s decision was rooted in “an economic theory” and it is not the province of the judiciary to decide upon the wisdom of economic legislation: “I do not conceive it to be my duty [to make up my mind about the wisdom of this economic theory]...because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.” The Constitution, Holmes declared, “is made for people of fundamentally differing views” and it is illegitimate for judges to impose their own opinions of legislation on the democratic majorities of various political communities.²¹

Armed with abstract constitutional text and confronted with what they took to be an unwise economic regulation, the *Lochner* majority decided to exercise its power to overturn the law. From Holmes’ perspective, this decision demonstrated a lack of judicial self-control. According the majoritarian theory of judicial review, it is precisely when judges are confronted with laws that they believe are unwise that their virtue is put to the test. Judges *can* step in and overturn what they believe to be unwise legislation, but majoritarians contend they *should* have the humility to respect the opinions of democratic majorities. According to Gillman, Holmes’ judicial philosophy was “almost anti-constitutional in its commitment to legislative supremacy and the sovereignty of elected officials.”²² Even when a judge objects to a law, he must appreciate the fact that on most

¹⁸ *Ibid.*, 26.

¹⁹ *Lochner v. New York*, 198 U.S. 45 (1905).

²⁰ Howard Gillman, “The Collapse of Constitutional Originalism and the Rise of the Notion of the ‘Living Constitution’ in the Course of American State-Building,” *Studies in American Political Development* 11 (Fall 1997): 191-247.

²¹ *Lochner v. New York*, 198 U.S. 45 (1905).

²² Howard Gillman, “Political Development and the Origins of the Living Constitution,” (2006). *Schmooze ‘tickets’*. Paper 53, 4.

matters “men reasonably might differ” and in a democratic system it is illegitimate for a small handful of elites to impose their views on legislators who are, according to this view, closer to the will of the people.²³

The disagreement between Holmes and the *Lochner* majority was carried on by progressives and conservatives for several decades. While conservatives appealed to originalism as a basis for striking down some regulatory and social welfare legislation, progressives embraced majoritarianism. On the Supreme Court, the philosophy of Holmes was carried on by Justice Felix Frankfurter and his allies. Prior to his ascent to the Court, Frankfurter’s majoritarianism was on display in a short essay entitled “The Present Approach to Constitutional Decisions on the Bill of Rights.” In the essay, he singled out Thayer and Holmes for praise and argued that it is “a fundamental of American constitutional law” that “the wisdom or justice of legislative policy is entirely outside the judicial province” before lamenting that this “rule has not always been honored” in judicial practice. Frankfurter concluded the essay on an emphatically majoritarian note: the “responsibility for mischievous or inadequate legislation” should be “brought home where it belongs” – “to the legislature and to the people themselves.”²⁴

Over the course of the last several decades, socially conservative judges have often appealed to majoritarianism as the basis for judicial deference to the will of legislative majorities in the moral realm. In *Lawrence v. Texas*, for example, the Court was confronted with the question of whether or not a Texas “Homosexual Conduct” law that forbade “deviant sexual intercourse with an individual of the same sex” violated the liberty protection of the Fourteenth Amendment’s Due Process Clause.²⁵ The Court’s majority declared that it did. In the majority opinion, Justice Anthony Kennedy argued that the Due Process Clause protected individuals from excessive state interference with consensual, intimate, non-commercial conduct. In dissent, Justice Scalia defended a majoritarian role for the Court. Scalia argued that the long-standing laws against bigamy, bestiality, fornication, obscenity, and incest are evidence that the “promotion of majoritarian sexual morality” is well within legitimate state police powers: “What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new constitutional right by a court that is impatient of democratic change.” Rather than using the Due Process Clause as a basis for interference with the sexual morality of democratic majorities, Scalia contended that members of the Court should have adopted a deferential stance: “the

²³ Justice Holmes dissenting, *Bartels v. Iowa* 262 U.S. 404 (1923).

²⁴ Felix Frankfurter, “The Present Approach to Constitutional Decisions on the Bill of Rights,” *Harvard Law Review*, Vol. 28, No. 8 (June 1915), 790-793.

²⁵ *Lawrence v. Texas* 539 U.S. 558 (2003).

Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.”²⁶

Justice Thomas concurred with Scalia in *Lawrence* and also offered a brief dissent of his own. A brief mention of Thomas’ dissent is worthwhile here because his words draw a sharp contrast between the majoritarian view of the judiciary and the perfectionist view. Thomas wrote separately in order to declare that he thought Texas’ law was “uncommonly silly” and that, if he were a member of the legislature, he would vote to repeal it.²⁷ Although he disapproved of the law, he believed it was imperative that he resist the temptation to strike it down because such an action would not be in keeping with the deference to democracy that is required of judges in the American political system.

To sum up, majoritarians believe judges must exhibit the virtue of restraint because self-control is necessary for judges to resist interfering with the legitimate processes of democratic governance. Throughout the history of American constitutional law, majoritarianism has been advocated by both liberals and conservatives with the former tending to embrace deference to legislative majorities in the economic realm and the latter tending to embrace deference to legislative majorities in the realm of sexual morality. In both instances, the defense of restraint was rooted in the contention that a commitment to popular sovereignty lies at the heart of the American constitutional order.

III. Originalism and the Virtue of Fidelity

Advocates of originalism believe the best judge is the one who remains faithful to the rule of law even in the face of political and moral pressure to do otherwise. Originalism can be defined as strict adherence to the text of the Constitution and when the meaning of the text is not clear to the public understanding of the text in question at the time of its adoption. In the words of political scientist Keith Whittington, “Originalism regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.”²⁸ Unlike majoritarianism, Whittington notes, “originalism is less likely to emphasize a primary commitment to judicial restraint” because originalists believe the doctrine “may often require the active exercise of the power of judicial review in order to *keep faith* with the

²⁶ *Ibid.*, Justice Scalia dissenting.

²⁷ *Ibid.*, Justice Thomas dissenting.

²⁸ Keith Whittington, “The New Originalism,” reprinted in Michael Gerhardt, et al., *Constitutional Theory: Arguments and Perspectives* (Newark: Lexis-Nexis, 2007), 233.

principled commitments of the founding.”²⁹ The “primary virtue” of originalism, Whittington has argued, “is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism.”³⁰ In a recent book entitled *Constitutional Redemption*, legal scholar Jack Balkin has challenged the claim that fidelity is a virtue essential to originalism. Balkin objects, though, not because he thinks fidelity is unimportant to originalism, but rather because he thinks it is so important that “virtue” does not quite capture its essence. “Fidelity is not a virtue,” Balkin writes, “but a precondition. It is not just a good thing, but the point of the practice of constitutional interpretation. To claim to interpret the Constitution is already to claim to be faithful to it. Conversely, insisting that one does not care about fidelity...is to announce that one is doing something else—whether it is political theory, economics, or sociology, but most assuredly not constitutional law. When we say that fidelity is not important to us, we are no longer interpreting the Constitution, we are criticizing it.”³¹

Why do originalists emphasize fidelity to the Constitution as the primary judicial virtue? Like the majoritarian view, the originalist answer to this question has something to do with how they understand the core commitments of the American constitutional order. For some originalists, like Keith Whittington, the obligation of fidelity is rooted in the idea that there is a foundational commitment in American politics to fundamental law that has been legitimated by popular consent. In *Constitutional Interpretation*, Whittington contends that the authority of the Constitution is rooted in the fact that it was created by an act of popular sovereignty. The process by which the Constitution was created and has been amended has by no means been perfect, he admits, but it is still binding on contemporary interpreters. “By accepting the authority of the Constitution,” Whittington writes, “we accept our own authority to remake it. The existing Constitution is a placeholder for our own future expression of popular sovereignty. As such it performs an important function. It is not simply a vacancy but an instrument that maintains a political space. We can replicate the fundamental political act of the founders only if I am willing to recognize the reality of their act. Stripping them of their right to constitute a government would likewise strip us of our own.”³² Although Whittington shares the majoritarian belief that popular sovereignty is at the core of the American constitutional order he rejects their conclusion that this should lead to a deferential view of the judicial role. Instead, Whittington concludes that activism can sometimes be justified precisely because the Constitution is a product of popular sovereignty.

²⁹ *Ibid.*, 242-3.

³⁰ *Ibid.*

³¹ Jack Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Cambridge: Harvard University Press, 2011), 106.

³² Keith Whittington, *Constitutional Interpretation* (Lawrence: University of Kansas Press, 1999), 133.

For other originalists, like Randy Barnett, the commitment to originalism and the belief that judges must be faithful to its dictates is rooted in something other than popular sovereignty. According to Barnett, our obligation to be faithful to the original understanding of the Constitution cannot be maintained through popular sovereignty because none of us were given the opportunity to choose whether or not we consented to the Constitution. For a libertarian like Barnett, this is unacceptable. “What legitimates a constitution,” Barnett writes, “is the merits of the lawmaking process it establishes.”³³ More specifically, Barnett says “the legitimacy of a constitutional regime” should “be assessed by how well it protects individual rights.”³⁴ When Barnett reads the Constitution he sees a document that, if followed according to its original meaning, would yield a better society than if we ignored it. Barnett is willing to admit that a return to the original meaning of the Constitution would bring about radical changes in American society, but he believes those changes would be well worth making. If Barnett’s originalism was enforced by the Supreme Court, the size and scope of the federal government would be reduced dramatically and the constitutionality of many state and federal laws would be called into question. This may seem like a daunting proposal, but Barnett thinks judges should feel that fidelity requires them to take these steps if the original understanding of the Constitution requires it.

There are many examples in Supreme Court jurisprudence in which a justice has claimed he or she was employing an originalist method. Many of these examples have been the subject of much debate in political and academic circles. If we can set some of those debates to the side and take a justice at his word for a moment, we might better be able to see why originalists might place such a high value on fidelity. The following passage from Justice Antonin Scalia’s *A Matter of Interpretation* is worth quoting at length:

Several terms ago a case came before the Supreme Court involving a prosecution for sexual abuse of a young child. The trial court found that the child would be too frightened to testify in the presence of the (presumed) abuser, and so, pursuant to state law, she was permitted to testify with only the prosecutor and defense counsel present, with the defendant, the judge, and the jury watching over closed-circuit television.... I dissented, because the Sixth Amendment provides that “in *all* criminal prosecutions the accused shall enjoy the right...to be confronted with the witnesses against him” (emphasis added). There is no doubt what confrontation meant – or indeed means today. It means face-to-face,

³³ Randy Barnett, “An Originalism for Non-Originalists,” *Boston University School of Law Working Paper Series*, No. 99-14, 25.

³⁴ Randy Barnett, “Scalia’s Infidelity: A Critique of Faint-Hearted Originalism,” in Michael J. Gerhardt, Stephen M. Griffin, and Thomas D. Rowe, Jr. *Constitutional Theory: Arguments and Perspectives*, 3rd Ed. (Newark: LexisNexis, 2007), 269.

not watching from another room....Now no extrinsic factors have changed since that provision was adopted in 1791.³⁵

Scalia introduces this discussion of *Maryland v. Craig* (1990) in order to challenge the claim that “Living Constitutionalism” (the bête noire of originalism) will always lead to the expansion of liberty. Scalia’s argument, though, is rooted in his view that it is only through the sort of fidelity required by originalism that we maintain a “government of laws and not of men.”³⁶ If we think about the constitutional question at stake in *Maryland v. Craig*, the majoritarian might be tempted to defer to the legislature’s interpretation of the Sixth Amendment; after all, the closed circuit television option was a product of state law. Furthermore, I think it is fair to suspect that confronted with the facts of this case, a strong majority of citizens would support the idea that a victim of child abuse should not be forced to testify before the accused perpetrator of the crime. One can also imagine how a perfectionist might go either way in this case. Perhaps the perfectionist would view the constitutional question through the eyes of the victim and conclude that justice requires the right of the child to be spared the trauma of direct confrontation with his or her alleged abuser. One can also imagine that the perfectionist would incorporate very robust protections for the accused into her understanding of justice and would, therefore, conclude that the Maryland closed circuit television option is unconstitutional. The fact that his opinion is counter-majoritarian and it is in tension with some of our notions of justice is precisely why, from Scalia’s perspective, originalism is needed. Originalism, he contends, makes a “difference” in constitutional decision-making because it provides justices with a firm ground upon which to reject “usurpation” principles of constitutional law. In some cases this will mean that the originalist judge will vindicate the rights of the individual – like in the Sixth Amendment case described above – and in other cases, Scalia contends, this will mean the originalist judge will stay out of the way of democratic majorities and government officials because the original meaning of the Constitution does not provide a legitimate basis for intervention.

IV. Perfectionism & the Virtue of Justice

Perfectionism is a theory of judicial review that is less deferential to democratic majorities or the original understanding of constitutional text than it is devoted to the idea that judges have an important role to play in perfecting the American polity. Perfectionists read the Constitution and find commitments to abstract concepts such as

³⁵ Antonin Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 1998), 42-43

³⁶ *Ibid.*, 25.

liberty, equality, and human dignity. Rather than leaving the meaning of these concepts to democratic majorities or attempting to decipher the meaning of these concepts for those who adopted the text, perfectionists propose that judges have a special role to play in giving these concepts meaning. Legal scholar Henry Monaghan puts the matter succinctly when he says that the “distinctive and controversial premise” of perfectionism is that “the ‘outputs’ of even a fairly structured political process must satisfy some core substantive notions of political morality.”³⁷

It is important to note that perfectionism is not a philosophy that is necessarily wedded to one side of the political spectrum. On the liberal side, the legal philosopher Ronald Dworkin calls this constitutional philosophy “the moral reading.” The Constitution, Dworkin contends, is full of “very broad and abstract language” and the “moral reading proposes that we all – judges, lawyers, citizens – interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice.”³⁸ In so doing, Dworkin continues, interpreters “must decide how an abstract principle is best understood.”³⁹ While thinkers like Dworkin articulate philosophies of liberal perfectionism in order to defend such positions as the unconstitutionality of the death penalty and the constitutional right to have an abortion, there is a tradition of conservative perfectionism as well. Perhaps the most prominent academic defender of conservative perfectionism is the political philosopher Hadley Arkes. According to Arkes and his fellow conservative perfectionists, the Constitution cannot be understood without the light provided by the absolute moral principles expressed in the Declaration of Independence. In Arkes’ words, we “will persistently find a need to appeal to those moral understandings lying behind the text; the understandings never written down in the Constitution, but which must be grasped again if we are to preserve – and perfect – the character of a constitutional government.”⁴⁰

The nature of the differences between perfectionism and the judicial philosophies explored above can be elucidated by a consideration of two perfectionist judicial opinions. Justice William Brennan’s concurring opinion in *Furman v. Georgia* (1972), a case dealing with the constitutionality of capital punishment, stands out as an example of liberal perfectionism. In his opinion, Justice Brennan contends that “the duty” of judges is to decipher the “values and ideals” embodied in the Constitution. When reading abstract text like the Eighth Amendment’s prohibition of “cruel and unusual punishments,” judges should recognize that the Clause “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” When

³⁷ Henry Monaghan, “Our Perfect Constitution,” *New York University Law Review*, Vol. 56, 1981: 368.

³⁸ Ronald Dworkin, *Freedom’s Law*, (Cambridge: Harvard University Press, 1997), 2.

³⁹ *Ibid.*

⁴⁰ Hadley Arkes, *Beyond the Constitution*, (Princeton: Princeton University Press, 1992), 17.

Justice Brennan read the Eighth Amendment in this way, he determined that the judicial task was to ensure that the “State, even as it punishes,” treats “its members with respect for their intrinsic worth as human beings. A punishment is ‘cruel and unusual, therefore, if it does not comport with human dignity.’” It is worth noting that Justice Brennan’s reading of the Eighth Amendment, while not uninterested in democratic and historical considerations, is primarily philosophical in nature. He waxes eloquently on the meaning of human dignity as a philosophical concept, and concludes not only that the practice of capital punishment in the United States in 1972 fails to meet the requirements of the Eighth Amendment, but that the practice of capital punishment is *prima facie* inconsistent with this clause.⁴¹

It is worth noting the ways in which Brennan’s approach in this case differs from the majoritarian and originalist approaches to this issue. Majoritarians would shudder at much of what they would find in Brennan’s opinion, but they would be especially appalled by this line: “Legislative authorization, of course, does not establish acceptance” of any particular punishment.⁴² For the majoritarian, when there is no explicit constitutional condemnation of a particular practice, legislative authorization carries an enormous amount of weight. In the case of capital punishment, the majoritarian would say that this is precisely the kind of issue judges should leave to the elected branches of government. There is no clear constitutional basis for striking down this practice, the majoritarian would say, so the judge should get out of the way.

The originalist approach to the Eighth Amendment would not be all that much different from the majoritarian approach. In the words of originalist thinker Michael McConnell: “There is no serious argument that the framers of either the Eighth or the Fourteenth Amendment deemed death, in all cases, a cruel and unusual punishment; indeed, the very language of the constitutional text belies this. Nor is there any serious argument that the tradition of the nation has judged capital punishment to be immoral.”⁴³ For the originalist, the question of whether or not capital punishment is consistent with the Eighth Amendment is a *historical* question and judges must remain faithful to the historical meaning they find.

In addition to finding conservative perfectionism in the works of theorists like Arkes, we can find examples in Supreme Court decision-making. Perhaps the most obvious example of conservative perfectionism is Justice Clarence Thomas’ jurisprudence in affirmative action cases. In these cases, the Court is confronted with the question of

⁴¹ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁴² *Ibid.*

⁴³ Michael McConnell, “The Importance of Humility in Judicial Review: A Comment Ronald Dworkin’s ‘Moral Reading’ of the Constitution,” in *Constitutional Theory*, 374.

whether or not the government can make distinctions on the basis of race without running afoul of the Equal Protection Clause of the Fourteenth Amendment. Again, we can imagine a variety of paths available to a judge who must respond to this question. First, an originalist judge might seek to determine whether or not the racial distinctions in the law are consistent with the original understanding of the clause. This judge would engage in the historical exercise of seeking to determine whether race-based public policies were consistent with the principles and practices of the generation that adopted the Fourteenth Amendment. Due to his desire to be faithful to the rule of law, the outcome of this historical investigation would direct the originalist judge to the proper conclusion. Although there has been much scholarly debate on this issue, the dominant view is that an originalist judge would be forced to conclude that racial distinctions in the law were fully consistent with the original understanding of the Equal Protection Clause and that there would be no legitimate constitutional basis for him to strike down affirmative action programs.⁴⁴

A majoritarian judge would care less about being faithful to the original understanding of the Fourteenth Amendment than he would about being deferential to the will of the relevant political community. In the case of, say, an affirmative action program at a state university in Iowa, the majoritarian judge would feel a sense of deference to the state legislature in Iowa. According to majoritarian reasoning, it would be essential that the judge check his own views of affirmative action at the door and respect the will of the elected branches, which more closely represent the will of the people who will be governed by the law. Given the polarized debate over the legitimacy of affirmative action and the ambiguity of the constitutional text at issue, the majoritarian judge would argue that the judicial obligation is to resist the temptation to intercede and allow the controversy to be resolved by democratic mechanisms.

The perfectionist judge would ask himself about the meaning of “equality” as an ideal of political morality and then he would ask himself whether or not the program in question promoted or undermined that ideal. Given the level of abstraction invited by perfectionism, one can imagine a judge going in either direction on the question of affirmative action. A liberal perfectionist might say that true equality requires government to make benevolent racial distinctions when making social policy in the present because malignant racial distinctions were such an important part of the American past.

⁴⁴ For two sides of this debate, see, e.g., Raoul Berger, *Government By Judiciary*, (Indianapolis: Liberty Fund Books, 1997) and Michael McConnell, “The Originalist Case for *Brown v. Board of Education*,” 19 *Harvard Journal of Law & Public Policy*, 457 (1996).

We can see in Justice Thomas' concurring opinion in *Adarand Constructors v. Pena* (1995) that perfectionism can cut in the other direction as well. *Adarand* was a case in which the Supreme Court was confronted with the constitutionality of a Department of Transportation practice of giving general contractors on government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals."⁴⁵ The Court concluded that this practice was unconstitutional and in his concurring opinion, Justice Thomas contended that "there is a moral and constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some notion of equality." Even though he is the most committed defender of originalism on the Supreme Court, Thomas' justification for this conclusion is light on history and heavy on moral philosophy. Affirmative action programs, he writes, "undermine the moral basis of the equal protection principle" because they are "at war with the principle of equality that underlies and infuses our Constitution." In order to defend this claim, Thomas cites the famous "All men are created equal..." language of the Declaration of Independence. Here is the vital paragraph in Thomas' opinion:

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("I hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").⁴⁶

Thomas believes that authentic equality requires government to be colorblind. Whatever the merits of this view, it is clear that he could only reach this conclusion by viewing the affirmative action program through a perfectionist, not an originalist, lens. At the time when the Fourteenth Amendment was ratified, most Americans did not believe it required the government to abstain from making laws that made distinctions on the basis of race.⁴⁷ In order to reach this conclusion, then, Thomas had to import the principle of

⁴⁵ *Adarand Constructors v. Pena* 515 U.S. 200 (1995).

⁴⁶ Justice Clarence Thomas, concurring, *Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

⁴⁷ Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, (New York: Oxford University Press 2004), 18.

color-blindness into his judicial analysis. In this case, he was not moved by a desire to be faithful to the rule of law, but rather by a desire to do what he believed to be just.⁴⁸

The connection between perfectionism and the virtue of justice is perhaps more obvious than any of the other connections I am attempting to make in this essay. At the most abstract level, to do justice to another human being is to give him his due. In *Summa Theologica*, Thomas Aquinas writes, “Justice, properly so called, is one special virtue, whose object is the *perfect due*” and later in the text he describes justice as the moral virtue that is “directed to good, which involves the notion of right and due....”⁴⁹ Justice is an enormously complex concept. For the purposes of this essay, it is enough to say that as a virtue, justice is concerned with acting in a way that is consistent with the dictates of morality.

The meaning of justice in particular circumstances is, of course, a matter of unending debate, but I need not enter into that debate to extract what is relevant to my purpose. When we speak of justice as a virtue, we usually have in mind the disposition of an individual to do the right thing. In “hard cases,” perfectionists want judges to exhibit the virtue of justice. When confronted with a difficult question of constitutional interpretation, perfectionists contend judges should be animated by a desire to do what is right. This differs from majoritarianism in the sense that perfectionists believe the disposition to do what is right should often trump the deference the judge feels to the will of a democratic majority. This differs from originalism because perfectionists do not believe respect for the rule of law should be an invitation to ignore the demands of political morality.

To sum up, perfectionists believe that in hard cases judges should be animated by the virtue of justice; that is, they ought to be moved by the desire to do what is right. For perfectionists like those cited above (Dworkin, Arkes, Brennan, and Thomas) this commitment emerges out of a belief that American constitutionalism cannot be understood without an appreciation of the ideals of political morality at its core. Although their conclusions differ dramatically, Dworkin, Brennan, Arkes, and Thomas all agree that the commitments to universal human equality and liberty expressed in the Declaration of Independence are the first principles of the American political order and judges should keep these principles at the front of their mind when they are deciding hard cases.

V. In Defense of Judicial Prudence

⁴⁸ For an extended discussion of Justice Thomas’ jurisprudence in this area, see Cass Sunstein, *Radicals in Robes*, 133-143.

⁴⁹ Saint Thomas Aquinas, *Summa Theologica*, Question 60, Article 4 and Question 61, Article 4. Italics added to emphasize the linking of justice with perfection.

Majoritarians, originalists, and perfectionists all capture part of the truth about the American constitutional project and, as such, they are each right to identify restraint, fidelity, and justice as important virtues for judges to exhibit when interpreting and applying vague and abstract clauses of the Constitution. It is precisely because each of these approaches captures part of the truth about the American constitutional order, though, that no one of these approaches has succeeded in identifying *the* supreme judicial virtue. In the context of constitutional pluralism – in other words, in the context of our simultaneous commitments to democracy, the rule of law, and higher law – what is needed is a virtue that *governs* these other virtues; what is needed is prudence. The beginning of constitutional wisdom is the recognition that there are competing ends enshrined in the Constitution and therefore, it is necessary to exhibit different virtues in different contexts. Prudence is the “master virtue” that should guide the judge as he or she attempts to translate this wisdom into practice.

Let me begin this defense of judicial prudence by returning to the difficult definitional questions I addressed ever so briefly in the introduction. Although it is beyond my scope to provide a detailed analysis of the many conceptions of prudence we find throughout the Western tradition, a brief word must be said on precisely what I mean when I use the term. Prudence is, to put it simply, practical wisdom; it is the habit of mind that we need to guide us as we attempt to translate wisdom into practice. In Aristotle’s formulation, “Virtue makes the goal right, *phronesis* [practical wisdom] the thing toward the goal.”⁵⁰ In other words, *phronesis* is an intellectual virtue – a particular kind of reasoning – that is necessary to achieve virtuous goals in a virtuous way. According to the rhetorical theorist Robert Hariman, in order to understand Aristotle’s formulation of prudence, we must note that he contrasted it with four other kinds of intelligence: “scientific reasoning (*episteme*), technical reasoning (*techne*), wisdom (*sophia*), and comprehension (*nous*).” Prudence is a particular kind of wisdom; it is the wisdom that is necessary to accomplish “the integration of all the virtues” in practice.⁵¹

Marcus Tullius Cicero also identified prudence as a virtue of the utmost importance. According to Cicero, “all that is morally right arises from one of four sources: it is concerned with either (1) with the full perception and intelligent development of the true; or (2) with the conservation of organized society, with rendering to every man his due, and with the faithful discharge of obligations assumed; or (3) with the greatness and strength of a noble and invincible spirit; or (4) with the orderliness and moderation of everything that is said and done, wherein consists temperance and self-control.”⁵² The

⁵⁰ Aristotle, *Nicomachean Ethics*, 1144a7-9.

⁵¹ Robert Hariman, “Theory without Modernity,” in *Prudence: Classical Virtue, Postmodern Practice* (State College: Penn State University Press, 1998), 5.

⁵² Cicero, *De Officiis*, Book I: IV, V.

first “source” – “the full perception and intelligent development of the true” – was, for Cicero, the concern of prudence. A proper understanding of prudence requires attention not only to the practical but to the true. In other words, it is crucial to note the ways in which Cicero draws our attention to the *cognitive* dimension of prudential action. In order to be prudent, we must have a full and intelligent understanding of what is true. Following this division of the virtues into these four categories, Cicero continued,

Although these four are connected and interwoven, still it is in each one considered singly that certain definite kinds of moral duties have their origin: in that category, for instance, which was designated first in our division and in which we place wisdom and prudence, belong the search after truth and its discovery; and this is the peculiar province of that virtue. For the more clearly anyone observes the most essential truth in any given case and the more quickly and accurately he can see and explain the reasons for it, the more understanding and wise he is generally esteemed, and justly so.⁵³

The search for truth, Cicero contends, is the task of wisdom. The “discovery” of truth, he suggests, “belongs” to prudence.

In the *Summa Theologica*, Saint Thomas Aquinas defined prudence as “wisdom concerning human affairs” or “right reason with respect to action.”⁵⁴ Following Aristotle, Aquinas contends that the virtue of prudence is what provides human beings with the ability to put moral principles into practice. In other words, prudence is what is required for human beings to actually do good things in the world. What prudence requires, therefore, will depend on the situation and on what principles that one accepts as true. In the theologian Josef Pieper’s words, “the virtue of prudence resides in this: that the objective cognition of reality shall determine action; that the truth of real things shall become determinative.”⁵⁵

In addition to these classical definitions and these scholarly interpretations, contemporary thinkers have had much to say about how the classical understanding might be “translated” into contemporary language. I do not have adequate space to explore these definitions in great detail, but I would like to take a moment to reflect on a contemporary definition that is especially relevant to my aims in the paper. Contemporary legal scholar Anthony Kronman has written extensively on the idea of prudence in law. In *The Lost Lawyer*, Kronman explains his understanding of prudence by comparing the ideas of Aristotle and Thomas Hobbes. “Hobbes,” Kronman writes,

⁵³ *Ibid.*

⁵⁴ Thomas Aquinas, *Summa Theologica*, (IIaIIae, 47.2) and (IIaIIae47.4).

⁵⁵ *Ibid.*, 15.

“sought to establish a new science of politics consciously modeled on that of geometry.” In so doing, Kronman contends, Hobbes was “repudiating an ancient tradition of thought reaching back to Aristotle.” More specifically, by attempting to apply “his geometrical method to the most basic questions of politics,” Hobbes was imagining a politics in which there would be no need for prudence as it was understood by the classics. Prudence is necessary, on Kronman’s reading of the ancients, because it is a “trait of character” that allows us to navigate the political world, which is a world that lacks the precision of mathematics.⁵⁶ In another discussion of prudence, Kronman explains just what he means when he uses the concept:

By prudence I mean a trait or characteristic that is at once an intellectual capacity and a temperamental disposition. A prudent judgment or political program is, above all, one that takes into account the complexity of its human and institutional setting, and a prudent person, in this sense, is one who sees complexities.... A prudent person is also one with a distinctive character – a person who feels a certain “wonder” in the presence of historically evolved institutions...[and] who...is able to accept the final incommensurability between any system of ideas and the world as it is given to us with all its raggedness and inconsistency....⁵⁷

Kronman’s definition is helpful because it reminds us of the importance of complexity and incommensurability as we attempt to translate principle into practice. As I noted in the introduction, political theorist Richard Ruderman captured the idea well when he wrote, “the beginning of prudence is the recognition that conflict [of principle as well as interest] is a permanent part of political life.”⁵⁸

With these definitional matters now on the table, we can return to the primary questions at hand: what is judicial prudence in hard constitutional cases and why should prudence be considered the supreme judicial virtue in these cases? It is not enough to simply import the language of Aristotle, Cicero, or Aquinas into the debates over judicial review. What would it mean to appeal to Aristotle to conclude that judicial prudence is the intellectual virtue that allows judges to do the right thing, in the right way, for the right reasons, in the right case? What would it mean to appeal to Cicero to say that judicial prudence is the ability to act on the “full perception” of what is true? What

⁵⁶ Anthony Kronman, *The Lost Lawyer* (Cambridge: Harvard University Press, 1993), 175-176.

⁵⁷ Anthony Kronman, “Alexander Bickel’s Philosophy of Prudence,” *Yale Law Journal*, Volume 4, No. 7 (June 1985), 1569. I should note that the ellipses in this quotation skip over language Kronman included that linked prudence to a conservative temperamental disposition toward social and institutional change. I did so because I think these ideas have their roots in modern redefinitions of prudence and are not a prominent part of the classical idea I am seeking to capture.

⁵⁸ As quoted in Ethan Fishman, “Introduction,” *Tempered Strength*, 5.

would it mean to appeal to Aquinas to say that judicial prudence is “wisdom” concerning judicial affairs in hard constitutional cases? Prudence, as Pieper reminds us, is near impossible to understand in the abstract because “it applies to specific situations.” It is, in his felicitous phrase, “situation conscience.”⁵⁹ So in order to make sense of what judicial prudence is we must say more about the “situation” of judicial review in hard constitutional cases.

Consider the situation confronting a Supreme Court justice in a hard constitutional case. Recently, the Supreme Court considered a case regarding the constitutionality of California’s Proposition 8, the state’s ban on same-sex marriage.⁶⁰ The Court ended up deciding the case based on questions of standing, but just consider some of the questions on the merits at the heart of this controversy: does a law banning same-sex marriage violate the Due Process Clause and/or the Equal Protection Clause of the Fourteenth Amendment? The majoritarian would likely exercise restraint and let the law stand; after all, it was approved by a democratic majority. Even a more activist majoritarian like John Hart Ely would let the law stand unless it could be shown that the process that produced the law was undemocratic. The originalist would likely say that fidelity to original understanding requires us to let the law stand as well. He would ask himself if the original understanding of the clauses in question included the right to marry someone of the same sex (or, for a more liberal originalist, the right to marry someone of your own choosing) and if he answered in the negative, he would see no legitimate reason to strike down the law. The perfectionists, as always, could go either way. A liberal perfectionist like Ronald Dworkin would see the exclusion of same-sex marriage to be deeply at odds with the principles of liberty and equality at their best and hence would see a strong basis to strike down Proposition 8. The conservative perfectionist, on the other hand, might be animated by a moral defense of the “traditional family” and argue for the justice of the law.

Judicial prudence requires that the judge confronting this case take none of these easy routes. The majoritarian is right that democracy is at the core of our constitutional tradition, but so too are the rule of law and justice. The originalist is right to say that fidelity to the rule of law is at the core of our constitutional tradition, but so too are democracy and justice. And the perfectionist is right to say that aspiration to become a more perfect union is vital to our constitutional tradition, but so too are democracy and the rule of law. If I am right to argue that we live under conditions of constitutional pluralism, then the first lesson of judicial prudence in hard cases is this: pure majoritarianism, pure originalism, and pure perfectionism (and their corresponding virtues) ought to be rejected because they fail to recognize the tensions between the core

⁵⁹ *Ibid.*, 11.

⁶⁰ *Hollingsworth v. Perry*, 571 U.S. ____ (2013).

principles at the heart of the American constitutional project. [See Table 1 for a presentation of a typology of theories of judicial review with prudentialism included].

Table 1

Theory of Judicial Review	Constitutional Theory	Supreme Judicial Virtue
Majoritarianism	Popular Sovereignty	Restraint
Originalism	Rule of Law	Fidelity
Perfectionism	Higher Law	Justice
Prudentialism	Constitutional Pluralism	Prudence

In Pieper’s commentary on Aquinas, he argues there are two crucial dimensions of prudence: cognition and judgment. If what I said in the preceding paragraph is true, then the cognitive dimension of judicial prudence in hard constitutional cases requires us to recognize constitutional complexity and resist the temptation to choose the easy answers of majoritarians, originalists, and perfectionists. In the face of this complexity, though, the judge still must decide. This is where the second dimension of prudence – judgment – becomes central. Notice that I am not saying concerns about democracy, the rule of law, and justice should be left out of our consideration. Indeed, I am arguing just the opposite. The prudent judge should feel an obligation to respect all of these values in hard constitutional cases. As such, the virtues of restraint, fidelity, and justice are all competing for control of his soul in the process of deliberation. What is needed, though, is judgment in order to determine which value and virtue (or combination of values and virtues) is most appropriate for the case before him. Prudence, to paraphrase Pieper, “is not concerned directly with...ultimate...ends,” but with the proper “means to these ends.”⁶¹ Judicial prudence will not help the judge decide which ultimate constitutional end is superior in all cases at all times, but it is what is needed as he attempts to determine which end ought to be served (and in what way) in the particular case before him. Prudence, in the words of philosopher Andre Comte-Sponville, “governs” the other virtues; it “determines which of them are apt” in particular situations.⁶² The prudent Supreme Court justice in the Proposition 8 case would feel the pull of restraint, fidelity, *and* justice because he would recognize the legitimacy of the demands of

⁶¹ Josef Pieper, *The Four Cardinal Virtues*, 11.

⁶² Andre Comte-Sponville, *A Small Treatise on the Great Virtues* (New York: Picador, 1996), 32.
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democracy, the rule of law, *and* higher law. In the end, he would have to exercise judgment about which virtue or virtues would allow him to best promote the ultimate ends of our Constitution in this particular case. This process cannot, in the famous words of John Marshall Harlan's dissent in *Poe v. Ullman*, be "reduced to any formula;" balances must be struck and judgments must be made.⁶³

It is worth pointing out that I am concerning myself here with constitutional theory, which is just one level of analysis that must be part of a comprehensive theory of judicial review. Once judges have taken the cognitive step of appreciating the complexity of the American constitutional order, good judgment will depend, at least in part, on the judge's sense of her institutional role within this order. In other words, even a prudential judge who recognizes the complexity of the commitments at the core of American constitutionalism might still decide that the institutional design of the system requires her to give more weight to certain values in hard cases. More specifically, a strong argument can be made – without denying the importance of popular sovereignty in the American order – that the relative insulation of judges from popular pressure provides them with the institutional protection necessary to give more weight to the rule of law and justice than to democracy in hard cases.⁶⁴

One may object at this point that the prudential approach invites too much judicial discretion in deciding hard constitutional cases. After all, does not the acknowledgement that democracy, the rule of law, and the higher law of moral principle are all at the core of American constitutionalism invite the conclusion that a judge has substantial flexibility to reach his or her desired outcomes? The short answer to this question is yes, but this should not be considered a mark against prudentialism. Indeed, judges already have this flexibility, but prudentialism asks them to admit it rather than hiding behind the false certainties of other judicial philosophies.

This flexibility should not lead us to conclude, though, that prudentialism should be equated with judicial pragmatism. While there may be some areas of agreement between prudentialism and pragmatism, I believe there are significant differences as well. Like prudentialism, pragmatism is often rooted in the recognition that the beginning of constitutional wisdom is acknowledging what one cannot know and recognizing the reality of constitutional contradiction. In the words of the pragmatist judge and scholar Richard Posner, "On a pragmatist view, our ideas, principles, practices and institutions simply are tools for navigating a social and political world that is shot through with indeterminacy." In the realm of constitutional understanding, pragmatists see that the

⁶³ *Poe v. Ullman*, 367 U.S. 497 (1961).

⁶⁴ For some discussion of this kind of argument, see e.g., Rebecca Brown, "Accountability, Liberty, and the Constitution," 98 *Columbia Law Review* 531, (1998).

“Constitution is full of contradictions and ambiguities [and] sources of endless contestation.”⁶⁵

With these areas of agreement in mind, I must also acknowledge areas of difference. First, for at least some pragmatists, the “quest for constitutional foundations” is misguided and judges should feel no strong obligation to be faithful to these indeterminate foundations.⁶⁶ I do not think the “quest for constitutional foundations” is “misguided.” To say that the Constitution’s foundations are pluralist is *not* to say that the Constitution lacks foundations at all. Instead, I believe that majoritarians, originalists, and perfectionists have erred in their contentions that this quest leads to a simple commitment to democracy, the rule of law, *or* higher law. The complexity of constitutional foundations is not, in my view, cause to dismiss them and the judicial virtues they encourage. Instead, I believe judges should feel obliged to respect these foundations, tangled though they may be.

Second, I view many forms of pragmatism as versions of perfectionism. Instead of proposing that judges be guided by abstract moral principles, pragmatists suggest judges be guided by, in the words of judicial pragmatist Richard Posner, “the best results for the future.”⁶⁷ In *Problematics of Moral and Legal Theory*, Posner described *his* conception of judicial “prudence” as “interest balancing” when deciding a particular case.⁶⁸ In more recent work, Posner has declared that “pragmatic adjudication” has “at its core” a “heightened judicial concern for consequences and thus a disposition to base policy judgments on them rather than conceptualisms or generality.”⁶⁹ In an important sense, the pragmatist’s conception of prudence is uprooted from the sorts of constitutional foundations I have discussed in this essay.

I admit there may be something less than satisfying about this call for judicial prudentialism. While majoritarianism, originalism, and perfectionism seem to provide fairly clear directives to judges, the prudential approach asks judges to accept that the task of constitutional interpretation in hard cases is complex. While it is certainly true that my account provides a more nuanced approach to judicial review in hard cases, I do not think this is cause for dismissing it. If I am right to say that the American constitutional tradition contains within it commitments to democracy, the rule of law, and the “higher law” of moral principle, then the approach I recommend is more faithful to the spirit of that tradition. As noted above, Josef Pieper has written, “The prudent

⁶⁵ Richard Posner, *How Judges Think* (Cambridge: Harvard University Press, 2009), 231, 251.

⁶⁶ Suzanna Sherry and Daniel Farber, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (Chicago: University of Chicago Press, 2002).

⁶⁷ Richard Posner, *Problematics of Moral and Legal Theory* (Cambridge: Harvard University Press, 2002), 241.

⁶⁸ Richard Posner, *Law and Literature* (Cambridge: Harvard University Press, 2009), 129.

⁶⁹ Posner, *How Judges Think*, 238.

man does not expect certainty where it cannot exist, nor...does he deceive himself by false certainties.”⁷⁰ These wise words capture the essence of my message in this essay: a prudent judge should not expect certainty when interpreting a document as complex as the American Constitution, nor should he deceive himself with the false certainties of an overly-simplistic theory of judicial review.

⁷⁰ Josef Pieper, *The Four Cardinal Virtues*, 19.