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## WHEN The Pursuit of Liberty Collides with the Rule of Law

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WHEN THE PURSUIT OF LIBERTY COLLIDES WITH THE RULE OF LAW

**ABSTRACT**

*In his 1979 article, *Unspeakable Ethics, Unnatural Law*, Arthur Leff argued that in the absence of a god-grounded ethical and legal system, “there cannot be any normative system ultimately based on anything except human will.” Stated differently, any human determination of what is moral that is separated from the unchanging moral standard of God is arbitrary and, likely, inconsistent. The difficulty with a human-will based system is that either each person is morally autonomous, in which case no government rules contradicting the individual's moral determination could be justified, or the will of the majority constitutes what is right, in which case there is no such thing as individual rights. The inherent inconsistency in the standards for right and wrong stems from the fact that what is right potentially changes every time a new group of people is given authority to declare right and wrong. In the end, Leff concluded that the only way to avoid the inevitable power struggle that results from an arbitrary system of moral determinations is to treat the U.S. Constitution as functioning in the role of a god. As Leff predicted, however, a crisis arises when the Constitution is perceived as having gaps in making the moral determinations because someone (or some group of people) will fill the gaps with their moral compass. What Leff did not understand when he wrote the article is that the United States had already reached that crisis.*

*The United States Supreme Court's 1973 pronouncement that our Constitution protected the right of abortion took us swiftly down the path of establishing a system where each person is morally autonomous. That autonomy became the focus of the Court's decisions in *Casey*, *Lawrence*, *Windsor*, and *Obergefell*. Those decisions epitomize the constitutional crisis \*668 about which Leff warned. In particular, a rule of law system ceases to provide consistency, stability, predictability, and equal protection under the law when it defines individual liberties and equal protection based on the ever-changing standard of a majority of Supreme Court Justices.*

*This Article will focus on the Supreme Court's reliance on “transcendent” principles in its quest to bring full meaning to the constitutional guarantee of liberty. The goal of the Article is to demonstrate that “transcendent” principles must refer to a higher source of law that provides objective standards of right and wrong, because a legal system based on man-made determinations of right and wrong undermines the very nature of a rule of law based legal system. In America, with its foundations rooted in Judeo-Christian principles, the only source for a higher law that is objective--not subjectively based on the standards of those deciding the case--is the Bible. Any other standard for right and wrong that is based on the views of individual people, a national consensus, or some common moral standards discerned by five Supreme Court Justices is inherently subjective and leads to the constitutional crisis Leff warned of.*

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*Part I of this Article presents a summary of Casey, Lawrence, Windsor, and Obergefell, highlighting the Court's reliance on "transcendent" principles to decide those cases. It explains that the Court's reliance on transcendent principles has led to arbitrary, man-made law, because the higher law invoked by the Court is in reality the ever-changing moral code of the majority of the Justices on the bench. Part II then discusses the proper foundation for interpreting the U.S. Constitution, highlighting the biblical foundation for our laws and how separation of powers and principles of limited government best protect our liberties. Part III re-analyzes Casey, Lawrence, and Obergefell in light of the objective, transcendent principles that a rule of law system requires.*

## I. INTRODUCTION

In his 1979 article, *Unspeakable Ethics, Unnatural Law*, Arthur Leff argued that in the absence of a god-grounded ethical and legal system, "there cannot be any normative system ultimately based on anything except human will."<sup>1</sup> Stated differently, any human determination of what is moral \*669 that is separated from the unchanging moral standard of God is arbitrary and, likely, inconsistent. The difficulty with a human-will based system is that either each person is morally autonomous, in which case no government rules contradicting the individual's moral determination could be justified, or the will of the majority constitutes what is right, in which case there is no such thing as individual rights. The inherent inconsistency in the standards for right and wrong stems from the fact that what is right potentially changes every time a new group of people is given authority to declare right and wrong. In the end, Leff concluded that the only way to avoid the inevitable power struggle that results from an arbitrary system of moral determinations is to treat the U.S. Constitution as functioning in the role of a god.<sup>2</sup> As Leff predicted, however, a crisis arises when the Constitution is perceived as having gaps in making the moral determinations because someone (or some group of people) will fill the gaps with their moral compasses.<sup>3</sup> What Leff did not understand when he wrote the article is that America had already reached that crisis in America.

The United States Supreme Court's 1973 pronouncement that our Constitution protected the right of abortion<sup>4</sup> took us swiftly down the path of establishing a system where each person is morally autonomous. That autonomy became the focus of the Court's decisions in *Casey*,<sup>5</sup> *Lawrence*,<sup>6</sup> *Windsor*,<sup>7</sup> and *Obergefell*.<sup>8</sup> Those decisions epitomize the constitutional crisis about which Leff warned. In particular, a rule of law system ceases to provide consistency, stability, predictability, and equal protection under the law when it defines individual liberties and equal protection based on the ever-changing standard of a majority of Supreme Court Justices.

This Article will focus on the Supreme Court's reliance on "transcendent" principles in its quest to bring full meaning to the constitutional guarantee of liberty. The goal of the Article is to demonstrate that "transcendent" principles must refer to a higher source of law that provides objective standards of right and wrong, because a legal system based on man-made determinations of right and wrong undermines the very nature of a rule of law based legal system. In America, with its foundations rooted in Judeo-Christian principles, the only source for a \*670 higher law that is objective--not subjectively based on the standards of those deciding the case--is the Bible. Any other standard for right and wrong that is based on the views of individual people, a national consensus, or some common moral standards discerned by five Supreme Court Justices is inherently subjective and leads to the constitutional crisis Leff warned of.

Part I of this Article presents a summary of *Casey*, *Lawrence*, *Windsor*, and *Obergefell*, highlighting the Court's reliance on "transcendent" principles to decide those cases. The Article explains that the Court's reliance on transcendent principles has led to arbitrary, man-made law, because the higher law invoked by the Court is in reality the ever-changing moral code of the majority of the Justices on the bench. Part II then discuss the proper foundation for interpreting the

U.S. Constitution, highlighting the biblical foundation for our laws. Part III re-analyzes *Casey*, *Lawrence*, and *Obergefell* in light of the objective, transcendent principles that a rule of law system requires.

## II. THE SUPREME COURT'S ASSERTED RELIANCE ON HIGHER LAW PRINCIPLES

### A. *Planned Parenthood of Southeastern Pennsylvania v. Casey*

Nineteen years after the Supreme Court declared in *Roe v. Wade*<sup>9</sup> that the United States Constitution embodies a fundamental right of privacy that permits a woman to abort her child, the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>10</sup> affirmed its prior declaration of that right. In *Roe*, the Court admitted that the Constitution does not explicitly mention a right to privacy, but found a privacy right arising out of the penumbras of the Bill of Rights.<sup>11</sup> After identifying prior decisions where the Court had declared a right to marriage, procreation, contraception, and child rearing, the Court concluded that the privacy right \*671 “is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.”<sup>12</sup> While the *Roe* Court engaged in legal sophistry in admitting, on the one hand, that a woman's asserted right to abortion would fail if the unborn fetus were established to be a person,<sup>13</sup> and then, on the other hand, stating that it “need not resolve the difficult question of when life begins,”<sup>14</sup> the *Casey* decision is, in some respects, more legally indefensible.

In at least three respects, the *Casey* decision represents the arbitrary decisionmaking that Arthur Leff believed created a constitutional crisis. First, the *Casey* Court refused to perform the one task the Supreme Court is to fulfill--that of applying the Constitution to the case before it. In *Casey*, the Court was again presented with the question of whether a woman had a right to abort her unborn child and, if so, whether certain state laws were constitutional in the face of the woman's right.<sup>15</sup> The Court, however, refused to state whether *Roe* was properly decided. Instead, the Court stated,

We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.<sup>16</sup>

In fact, the Court twice referred to the fact that the Court should affirm *Roe* even if “in error ....”<sup>17</sup> Thus, rather than address whether *Roe* correctly weighed the state's interest in life as against the declared right to abortion, the *Casey* Court assumed it was true and then built on *Roe* as if it were legitimate precedent.

Second, the *Casey* Court affirmed *Roe's* conclusion that there was a right to abortion because the Court was concerned about its legitimacy. \*672 Specifically, the Court stated that a decision overruling *Roe* “would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a nation dedicated to the rule of law.”<sup>18</sup> Thus, the Court elevated public perception of the judiciary over an attempt to reach the right result.

Third, and most relevant to the discussion in this Article, is the Court's decision to untether the definition of the liberty guarantee in the Fourteenth Amendment from any solid footing. The *Casey* Court announced, for the first time in its precedents, that “[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>19</sup> It further explained that whatever liberty means, it precludes the Court (and ostensibly the Pennsylvania legislature that enacted the law struck down in *Casey*) from mandating its “own moral

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code.”<sup>20</sup> The Court did not provide much guidance on what the outer limits are of a person's right to define his own concept of existence, of meaning, and of the universe, except to suggest in passing that eugenics would not be protected.<sup>21</sup>

In addition to the highly individualistic perspective on the meaning of liberty--that each person defines for herself the concept of existence, of meaning, and even of the universe--the *Casey* Court laid bare its position that the meaning of the written words in the Constitution evolve over time: “Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one.”<sup>22</sup> Admittedly, our Constitution embodies principles that are to survive one generation to another, but to state that the terms must be understood anew with each generation permits the Constitution to evolve (or devolve) to something very different than its original meaning. To permit the Constitution's protections to change through judicial interpretations strips the Constitution's amendment provision of any meaning and puts the Supreme Court, as Arthur Leff warned, in the role of a god.<sup>23</sup> The Court's decision in *Lawrence v. Texas* highlights this point.

**\*673 B. Lawrence v. Texas**

In 2003, the United States Supreme Court declared unconstitutional a Texas law that criminalized sodomy.<sup>24</sup> The specific question presented in *Lawrence* was whether plaintiffs had a right in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to engage in sodomy.<sup>25</sup> Seventeen years earlier, the Court had examined the same question and concluded that liberty did not include the right to engage in that conduct.<sup>26</sup> In *Lawrence*, the Court concluded that there was such a right.<sup>27</sup>

The Court's newfound understanding of what is protected by the liberty guarantee explicitly rested on asserted higher law principles. In the opening paragraph, the Court stated,

Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more *transcendent* dimensions.<sup>28</sup>

This definition vastly expands on prior decisions in invoking transcendent principles and a right extending beyond spatial bounds.

What *Lawrence* added to the rights analysis is a complete untethering of the meaning of liberty from any objective standard. Significantly, the Court's reliance on “transcendent dimensions” to define liberty places unbridled discretion in the Court to find new rights as it sees fit. For example, the Court stated that the founders “knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”<sup>29</sup> Thus, an enlightened Court finds new meaning as each generation searches for greater freedom than the prior generation.

**\*674** The Court did not define the scope or source of the transcendent dimensions. It did, however, draw upon several sources in reaching its conclusion on the scope of liberty, which shed light on the fact that the meaning of liberty is based on subjective, man-made determinations.

First, the Court adopted an individualistic vision of the liberty guarantee insofar as each person has the “right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>30</sup> As long as each person has the right to define one's own concept of existence and of the universe, liberty has an inherently subjective foundation.

Second, to help it decide whether the liberty guarantee prohibits criminalization of sodomy, the Court considered (i) what foreign nations had decided with respect to rights based on same-sex sexual conduct and (ii) the changing views in this nation during the fifty years preceding *Lawrence*.<sup>31</sup> Specifically, the Court explained that England had decriminalized homosexual conduct in 1967 and the European Court of Human Rights in 1981 had held that the laws of Northern Ireland that criminalized homosexual conduct were unconstitutional.<sup>32</sup> With respect to reliance on this nation's history to determine the meaning of liberty, the Court explained that history and tradition were just a “starting point,” but that the “laws and traditions in the past half century are of most relevance .... These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>33</sup>

If the scope of the liberty guarantee in the United States Constitution is based on principles that are defined by each person, by foreign countries, and by standards that change and emerge, then, by definition, the standard is subjective and changeable rather than objective and immutable. When the Supreme Court places itself as arbiter of the meaning of a subjective and changeable definition of liberty, it has, as Arthur Leff warned, placed itself in the position of a god.

### C. United States v. Windsor

Although *Windsor* did not invoke the same “transcendent” principles in its rationale, Justice Kennedy's majority opinion relied on the same principles of individual autonomy as *Casey* and *Lawrence*. *Windsor* also laid \*675 the groundwork for the Court's decision two years later in *Obergefell* that declared unconstitutional a state's definition of marriage as the union of one man and one woman.<sup>34</sup>

In *Windsor*, two women, who were New York residents, married in Canada in 2007. When Ms. Spyer died, Ms. Windsor sought to claim the federal estate tax exemption that is available for surviving spouses.<sup>35</sup> After Windsor paid the \$363,053 estate tax, she sought a refund.<sup>36</sup> The Internal Revenue Service denied the exemption because Section 3 of the federal Defense of Marriage Act (DOMA) defined marriage, for purposes of all federal statutes, regulations, and rulings, as the union of one man and one woman.<sup>37</sup>

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.<sup>38</sup>

Thus, Windsor was not a surviving spouse.

Windsor filed suit in the Southern District of New York in November, 2010, claiming that DOMA violated the guarantee of equal protection.<sup>39</sup> On February 23, 2011, while the tax refund suit was pending in the District Court, United States

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Attorney General Eric Holder notified the Speaker of the House of Representatives that “the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.”<sup>40</sup>

In that letter, Attorney General Holder admitted that “the Supreme Court has yet to rule on the appropriate level of scrutiny for classifications \*676 based on sexual orientation.”<sup>41</sup> The letter stated, however, that the Supreme Court has “rendered a number of decisions that set forth the criteria that should inform this and any other judgment as to whether heightened scrutiny applies ....”<sup>42</sup> The letter set forth an independent analysis of each of those factors and reached a decision that neither the Supreme Court nor any federal Circuit Court had reached at the time--that sexual orientation should be considered a suspect classification.<sup>43</sup> Applying heightened scrutiny, the letter concluded that DOMA was unconstitutional.<sup>44</sup>

The Attorney General notified the Speaker that, pursuant to 28 U.S.C. § 530D, the Department of Justice (DOJ) would no longer defend DOMA.<sup>45</sup> Pursuant to House Rule II.8, the House Bipartisan Legal Advisory Group (BLAG) voted 3-2 to intervene in the litigation to defend DOMA.<sup>46</sup> The District Court granted the BLAG's motion to intervene in the case.<sup>47</sup>

\*677 Despite the fact that DOMA had been enacted in 1996 with wide, bipartisan support, and signed into law by President Clinton,<sup>48</sup> there was significant public criticism of the BLAG's decision to use funds to defend the law.<sup>49</sup> If the BLAG had not voted to defend the law, however, the litigation would have continued in the trial court with no real defense.<sup>50</sup>

The United States District Court for the Southern District of New York granted summary judgment for the plaintiff,<sup>51</sup> and the United States Court of Appeals for the Second Circuit affirmed.<sup>52</sup> The United States Supreme Court granted certiorari review and instructed the parties to address two additional questions: (1) “whether the United States' agreement with Windsor's legal position precludes further review” and (2) “whether BLAG has standing to appeal the case.”<sup>53</sup> Because all parties agreed that the Court had jurisdiction to hear the appeal under those circumstances, the Court appointed another attorney, as *amicus curiae*, to argue the position that the Court lacked jurisdiction.<sup>54</sup>

The Supreme Court concluded that the United States retained a sufficient stake in the litigation to satisfy Article III jurisdiction.<sup>55</sup> Specifically, even though the Executive agreed with Windsor's legal argument, the United States had continued to refuse to refund the estate \*678 taxes sought by Windsor.<sup>56</sup> Thus, Windsor had been denied the tax relief she sought. In addition to the Article III requirements, the Court explained that “prudential considerations demand that the Court insist upon ‘that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.’”<sup>57</sup> That requirement can be satisfied even where the named parties do not themselves present the adverseness. According to the Court in *Windsor*, the presence of the BLAG and other *amicus curiae* prepared to defend the constitutionality of DOMA was sufficient to satisfy the prudential concern with adverseness.<sup>58</sup>

In concluding that it had Article III standing, the Court considered the fact that if it dismissed the case, other litigation would ensue across the country raising the exact issue. In the meantime, the “[r]ights and privileges of hundreds of thousands of persons would be adversely affected, pending a case in which all prudential concerns about justiciability

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are absent.”<sup>59</sup> Thus, despite the DOJ's refusal to defend the law, the Court found that the Article III requirements were satisfied and prudential concerns warranted a conclusion that the Court had standing to hear the case.<sup>60</sup>

The Court did express concern, however, over the “Executive's failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions ....”<sup>61</sup>

[I]f the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law ... would become only secondary to the President's. This would undermine the clear dictate of the separation-of-powers principle that “when an Act of Congress is alleged to conflict with the Constitution, ‘[i]t is emphatically the province and duty of the judicial department to say what the law \*679 is ....’” Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court.<sup>62</sup>

Although the Court acknowledged the “difficult choice” that an Executive faces when he personally believes a statute is unconstitutional,<sup>63</sup> the Court explained that

there is no suggestion here that it is appropriate for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal. The integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise.<sup>64</sup>

Justice Scalia, joined by the Chief Justice and Justice Thomas, took the position in a dissenting opinion that the Court should have dismissed the case for lack of Article III standing because the plaintiffs and Government “agree entirely on what should happen in this lawsuit.”<sup>65</sup> He essentially characterizes the majority opinion as a “jaw-dropping” power-grab--the “assertion of judicial supremacy over the people's Representatives in Congress and the Executive.”<sup>66</sup> Justice Scalia explained that when the parties are not adverse, and agree on the appropriate outcome, the Court is stripped of the jurisdiction to hear the case.<sup>67</sup> “Article III requires not just a plaintiff (or appellant) who has standing to complain but *an opposing party* who denies the validity of the complaint.”<sup>68</sup> In *Windsor*, the government did not deny the validity of plaintiff's claims. However, if the Court had held that the BLAG lacked standing, the Executive branch would have had the \*680 ability to essentially repeal a validly-enacted law through non-defense of those laws in court.

As to the merits of the DOMA challenge, a five-member majority of the Court held that the federal definition of marriage as the union of one man and one woman denied plaintiffs the “liberty protected by the Due Process Clause of the Fifth Amendment”<sup>69</sup> by denying them equal protection of the laws. Writing for the Court, Justice Kennedy described DOMA as an “indignity”<sup>70</sup> that imposed a “stigma”<sup>71</sup> upon and “demean[ed]”<sup>72</sup> same-sex couples. In contrast, Justice Kennedy explained that a law must not be enacted based on “a bare congressional desire to harm a politically unpopular group ....”<sup>73</sup> He further explained that is also could not be “motivated by an improper animus or purpose ....”<sup>74</sup> He then concluded that DOMA violated those standards.<sup>75</sup> In contrast, Justice Kennedy characterized New York's decision to



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permit same-sex couples to marry as “responding ‘to the initiative of those who sought a voice in *shaping the destiny of their own times*.’”<sup>76</sup> The ability to shape one's destiny is consistent with Justice Kennedy's prior decisions finding a right to autonomy that relies on Justice Kennedy's notion of transcendent principles.

Justices Roberts, Scalia, and Alito each wrote dissenting opinions. Justices Roberts and Scalia believed that the Court lacked jurisdiction to hear the case because there was no ongoing controversy to decide insofar as all named parties in the case agreed on the proper outcome.<sup>77</sup> Justice Alito, on the other hand, would have found standing by the BLAG in the limited circumstances where, as there, a court had struck the law down as unconstitutional and the Executive declined to defend the law.<sup>78</sup> Justice Roberts spoke critically of the majority's willingness to “tar the political branches with the brush of bigotry” without more “convincing evidence that the Act's principal purpose was to codify malice, and that it furthered *no* legitimate government interests ....”<sup>79</sup> Justice Scalia similarly criticized \*681 the majority's characterization of the coordinate political branches.<sup>80</sup> He maintained that “[l]aying such a charge against them should require the most extraordinary evidence ....”<sup>81</sup> Rather, Justice Scalia concluded that “[i]n the majority's judgment, any resistance to its holding is beyond the pale of reasoned disagreement.”<sup>82</sup>

Justice Scalia also predicted what would happen in *Obergefell* despite the majority opinion's assurances that the *Windsor* decision had nothing to do with whether a state could constitutionally define marriage as the union of one man and one woman.<sup>83</sup>

It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here--when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it.<sup>84</sup>

In a similar vein, Justice Alito took issue with the majority's willingness to exceed its proper role by predicating its opinion on quintessential legislative decisions.<sup>85</sup> Echoing oft-repeated language by prior Supreme Court Justices of the need to proceed cautiously in finding rights in the Constitution, he explained that judges should proceed with “both caution and humility.”<sup>86</sup> He found that to be particularly true where, as in *Windsor*, the underlying issue implicated matters in dispute among “social scientists, philosophers, and historians,” and thus, was a matter where “judges are certainly not equipped to make such an assessment” of “what the long-term ramifications of widespread acceptance of same-sex marriage will be.”<sup>87</sup> He took issue with the majority's belief that it could “arrogat[e] to ourselves the power to decide a question that philosophers, historians, social scientists, and theologians are better qualified to explore.”<sup>88</sup>

Justice Alito's dissenting opinion also accurately predicted how the Court would ultimately view those who opposed same-sex marriage when the day \*682 came for it to render a decision on the constitutionality of state marriage laws defining marriage as the union of one man and one woman. “Acceptance of the argument [that DOMA is subject to and violates heightened scrutiny] would cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools.”<sup>89</sup>

Finally, looking ahead to the day when the Court squarely addressed the question of the constitutionality of state marriage laws defining marriage as the union of one man and one woman, he explained that he hoped the Court would

decide, as it did in *Windsor*, that the question of marriage is one for the states to decide.<sup>90</sup> We now know that the Court did not leave the question to the states.

#### **D. Obergefell v. Hodges**

In *Obergefell*, the Court had before it a consolidated appeal from separate cases challenging the constitutionality of the marriage laws of Michigan, Kentucky, Ohio, and Tennessee.<sup>91</sup> Each of those states defined marriage as the union of one man and one woman.<sup>92</sup> The district courts in each of the cases ruled in favor of the plaintiffs, declaring the marriage laws unconstitutional.<sup>93</sup> The United States Court of Appeals for the Sixth Circuit consolidated those appeals and concluded that the states had no constitutional requirement to permit same-sex couples to marry or to recognize same-sex marriages from other jurisdictions.<sup>94</sup> The United States Supreme Court agreed to hear both issues.<sup>95</sup>

The five-member majority opinion, written by Justice Kennedy, held that the marriage laws violated the substantive due process and equal protection guarantees under the Fourteenth Amendment and that there was no basis for a State to refuse to recognize a same-sex marriage performed in another State.<sup>96</sup> The majority opinion began with the premise that the Constitution promises “liberty to all within its reach” and explained that liberty “includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”<sup>97</sup> Justice Kennedy then offered the majority’s \*683 view on how same-sex marriage is a right protected by that guarantee of liberty. He described marriage as having “transcendent importance” in the annals of human history, with the “lifelong union of a man and a woman ... promis[ing] nobility and dignity.”<sup>98</sup> The opinion described marriage as “essential to our most profound hopes and aspirations” and acknowledged that marriage historically has been understood as consisting of two persons of the opposite sex.<sup>99</sup>

Before launching into the due process analysis, the majority opinion made two assumptions that went to the heart of the broader societal discussion about same-sex marriage. The opinion assumes that permitting same-sex marriage would not “demean” marriage and, in fact, if that were petitioners’ intent, their “claims would be of a different order.”<sup>100</sup> The opinion also rested on the presumption that same-sex attractions are of an “immutable nature,”<sup>101</sup> which is a matter very much in dispute among medical professionals.<sup>102</sup> The opinion also plainly articulated its judicial philosophy in taking the position that the Court is free to find new rights in the Constitution over time as “new dimensions of freedom become apparent to new generations ....”<sup>103</sup> That judicial philosophy stands in contrast with that of the dissenting justices who believe that the \*684 Constitution should be interpreted according to longstanding history and tradition, with new protections afforded through the amendment process.<sup>104</sup>

The majority articulated four principles and traditions that support its conclusion that same-sex marriage is a fundamental right. First, the Court found that a “right to personal choice regarding marriage is inherent in the concept of individual autonomy.”<sup>105</sup> The Court compared a decision about whom to marry with rights previously found by the Court to “contraception, family relationships, procreation, and childrearing.”<sup>106</sup> The Court then made the moral determination that “[t]here is dignity in the bond between two men or two women who seek to marry ....”<sup>107</sup>

The second rationale offered by the majority was that “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”<sup>108</sup> Although referring to the “two-person” aspect of marriage, the Court’s discussion of this principle focused on the intimate association rights announced in the Court’s prior cases dealing with contraception, the right of prisoners to marry, and same-sex sexual conduct.<sup>109</sup>

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Although not expressly stated by the Court, the two-person rationale likely refers to same-sex marriage as the better solution to supporting a long-term commitment between two people than, for example, civil unions or domestic partnerships.

\*685 The third basis for the decision “is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”<sup>110</sup> Despite ongoing debate by social scientists and medical professionals about the long-term effects on children raised in homes with two men or two women, the Court accepted the proposition that same-sex couples provide loving and nurturing homes to biological and adopted children.<sup>111</sup> The Court relied on the fact that most states allow same-sex couples to adopt or foster.<sup>112</sup> According to the Court, without same-sex marriage, children raised in those homes suffer stigma and material costs. The marriage laws preventing same-sex couples from marrying “thus harm and humiliate the children of same-sex couples.”<sup>113</sup>

A final basis for the Court's decision was that “the Nation's traditions make clear that marriage is a keystone of our social order.”<sup>114</sup> That statement begs the questions that the Court left unanswered: what about marriage has made it a keystone of our social order and does same-sex marriage advance those interests in the same manner as marriage between one man and one woman? Justice Kennedy quoted (i) Alexis de Tocqueville, who found a connection between the strong bonds found in the American family and the success of democracy in America and (ii) an 1888 Supreme Court decision that concluded that marriage “is the foundation of the family and of society, without which there would be neither civilization nor progress.”<sup>115</sup> The Court explained that given the importance of marriage to society, “society pledge[s] to support the couple, offering symbolic recognition and material benefits to protect and nourish the union.”<sup>116</sup> States have traditionally conferred upon married couples

an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and \*686 benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.<sup>117</sup>

The Court then went on to conclude that there is no difference between same-sex and opposite-sex couples with respect to this principle; a state's refusal to provide these benefits to same-sex couples “demeans gays and lesbians” because “[s]ame-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.”<sup>118</sup>

Respondents had argued in the case that the Court should have framed the question as petitioners seeking the right to same-sex marriage rather than the right to marry given that marriage has, as the Court acknowledged, been understood in the annals of American history as the union of one man and one woman.<sup>119</sup> A majority of the Court disagreed, explaining that although the right to marriage is fundamental as a matter of history and tradition, “rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”<sup>120</sup> Justice Kennedy pointed out that many who “deem same-sex marriage to be wrong” do so “based on decent and honorable religious or philosophical premises ....”<sup>121</sup> The opinion, however, maintained that when those sincere personal beliefs are enacted into law, “the necessary consequence is to put the imprimatur of the state itself on the exclusion that soon demeans, or stigmatizes those whose own liberty is then denied.”<sup>122</sup> To deny the right to marriage “would disparage their choices and diminish their personhood ....”<sup>123</sup> For

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the same reasons that the marriage laws denied the liberty guarantee of the Fourteenth Amendment, the Court held that it violated the guarantees of equality.<sup>124</sup>

The majority opinion concluded by staking out a moral position on same-sex marriage:

\*687 No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves .... They ask for equal dignity in the eyes of the law. The Constitution grants them that right.<sup>125</sup>

Each of the dissenting Justices wrote a separate opinion, which was joined by one or more other of the dissenting Justices.<sup>126</sup> Justice Roberts made four points in his dissent. First, he criticized the majority for overstepping its role. He explained that “[i]t can be tempting for judges to confuse our own preferences with the requirements of the law” and then took the position that the “majority today neglects that restrained conception of the judicial role.”<sup>127</sup> The majority answered the question before it “not on neutral principles of constitutional law, but on its own ‘understanding of what freedom is and must become.’”<sup>128</sup> To allow “unelected federal judges to select which unenumerated rights rank as ‘fundamental’--and to strike down state laws on the basis of that determination--raises obvious concerns about the judicial role.”<sup>129</sup> After surveying the Supreme Court's substantive due process jurisprudence, including a discussion of how the pendulum has swung back and forth over the years, Chief Justice Roberts concluded that the majority's “aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*.”<sup>130</sup>

\*688 Chief Justice Roberts disagreed with the majority's reliance on the Court's privacy cases (*Griswold*, *Eisenstadt*, and *Lawrence*) “because petitioners do not seek privacy .... [T]hey seek public recognition of their relationships, along with corresponding government benefits.”<sup>131</sup> Chief Justice Roberts also criticized the majority's attempt to minimize the expansive definition it ascribed to the liberty guarantee.

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own “reasoned judgment,” informed by its “new insight” into the “nature of injustice,” which was invisible to all who came before but has become clear “as we learn the meaning” of liberty .... The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that “it would disparage their choices and diminish their personhood to deny them this right ....” Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*.<sup>132</sup>

Chief Justice Roberts explained that the purpose of insisting that unenumerated fundamental rights are rooted in the history and tradition of our nation “is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs.”<sup>133</sup> The founders “would never have imagined” turning

over decisions on matters of social policy to “unaccountable and unelected judges.”<sup>134</sup> Such a grab for power is a cause for concern because “[t]he Court's accumulation of power does not occur in a vacuum. It comes at the \*689 expense of the people.”<sup>135</sup> The Court's role, Justice Roberts explained, is a modest and restrained judiciary that is “sensitive to the fact that judges are unelected and unaccountable” and is “less pretentious than to suppose” that it was “chosen to burst the bonds” of thousands of years of history and tradition.”<sup>136</sup>

Justice Scalia wrote separately to decry the majority's power grab. He referred to the majority's opinion as evidence that the new “Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.”<sup>137</sup> The Court's decision represented “a naked judicial claim to legislative--indeed, super-legislative--power ....”<sup>138</sup> He explained that judges are selected because of their skill as lawyers, not because of their policy views. He discussed the lack of diversity among the Supreme Court Justices: all nine studied at Harvard or Yale Law School; eight of them grew up in the east or west coasts; none are from the Southwest; and none are evangelical Christians or Protestants (despite these faith traditions representing a large portion of the population).<sup>139</sup> “[T]o allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation; no social transformation without representation.”<sup>140</sup> He characterized the majority's opinion as “pretentious” and “egotistic.”<sup>141</sup>

A key focus of Justice Thomas' dissent was on the majority's fundamental misconception of the source of human dignity. Justice Thomas pointed out that our Declaration of Independence states that human dignity is innate whereas the majority opinion suggests that human dignity is bestowed by the government.<sup>142</sup> “When the Founders proclaimed in the Declaration of Independence that ‘all men are created equal’ and ‘endowed by their Creator with certain unalienable Rights,’ they referred to a vision of mankind in which all humans are created in the image of God and therefore \*690 of inherent worth.”<sup>143</sup> As a result, “human dignity cannot be taken away by the government .... The government cannot bestow dignity, and it cannot take it away.”<sup>144</sup> In contrast, the majority opinion repeatedly states that the marriage laws either demeaned or denied dignity and that by permitting same-sex couples to marry government confers dignity on that relationship.<sup>145</sup>

Justice Alito highlighted his concerns with the majority opinion's impact on religious liberties. He asserted that the majority opinion “will be used to vilify Americans who are unwilling to assent to the new orthodoxy.”<sup>146</sup> His belief is based, in part, on the majority's comparison of the marriage laws to the laws that previously denied equal treatment to African-Americans and women. “The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.”<sup>147</sup> Rather than leaving the issue of marriage to the states, with states reaching different results, the majority “impos[ed] its own views on the entire country,” which “facilitates the marginalization of many Americans who have traditional ideas.”<sup>148</sup>

### *E. Meaning of Transcendent Dimensions*

That the Court is making itself the subjective arbiter of right and wrong becomes clearer given the meaning of the word “transcendent.” Despite the Supreme Court's repeated use of the term, it does not appear in Black's Law Dictionary. Webster's Dictionary, however, defines “transcendent” as “exceeding usual limits,” “extending or lying beyond the limits of ordinary experience,” “being beyond the limits of all possible experience and knowledge” “being beyond comprehension,” “transcending the universe of material existence,” and “universally applicable or significant.”<sup>149</sup> These

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\*691 definitions of “transcendent” require someone to make value determinations as to what, for example, is “usual,” “ordinary,” “beyond the limits of possible experience and knowledge,” and “universally acceptable.” When transcendent principles are invoked to decide the constitutionality of an act, it requires a determination of right and wrong. If the standard of right and wrong rests with a group of people in power, it can change over time and, therefore, is inherently at risk of arbitrariness and inconsistency.<sup>150</sup> If, however, the standard of right and wrong rests on objective standards of right and wrong, there is consistency and objectivity.

The Supreme Court's usage of “transcendent” outside the context of interpreting “liberty” highlights the idea, consistent with the Webster's Dictionary definitions, that transcendent refers to a higher law concept, without explaining the source of that higher law. For example, the Court has referred to free speech and academic freedom as “of transcendent value.”<sup>151</sup> The right to a public jury trial is a “transcendent privilege”<sup>152</sup> and is guaranteed for the “transcendent reason[s]” of “efficiency, competence, and integrity in the overall operation of the judicial system.”<sup>153</sup> The Court also has referred to certain things as “of transcendent public good,” including the “President's physical safety”<sup>154</sup> and the mental and physical health of the nation's citizenry.<sup>155</sup> The states similarly have a “transcendent interest” in protecting the welfare of children.<sup>156</sup> The Court has referred to “transcendent legislative purposes” for certain legislation<sup>157</sup> and to the “transcendent importance of the Bill of Rights to our society.”<sup>158</sup> Ensuring \*692 that people have adequate information about their government in order to govern themselves is “of transcendent importance.”<sup>159</sup>

One dissenting opinion relied on a quote by Sir William Blackstone, where he referred to the king as having the “attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of the government.”<sup>160</sup> Finally, in *Edwards v. Aguillard*, where the Court decided the constitutionality of a state law that required creation and evolution to both be taught whenever either was taught, the Court quoted Webster's definition of the doctrine of creation as including the belief that the world was “created by a transcendent God out of nothing.”<sup>161</sup>

The last two references expressly incorporate into the meaning of transcendent the idea that there is a superior being, outside of mankind, that has established an objective, never-changing set of standards of right and wrong. In Federalist No. 43, Madison stated that the compact among the states “can be superseded without the unanimous consent of the parties” by “the transcendent law of nature and of nature's God ....”<sup>162</sup>

Although the Court has not defined the meaning of transcendent principles, in order to be consistent and workable, the reference to transcendent principles and values in a legal system based on the rule of law must be based on objective standards of right and wrong.<sup>163</sup> As Professor Leff pointed out in *Unspeakable Ethics, Unnatural Law*, “[t]he moment one suggests a criterion, then individual men have ceased to be the measure of all things.”<sup>164</sup> The Court, however, invokes higher law principles while relying on man-made standards of right and wrong.

The Court's reliance on transcendent values begs two related questions. First, is it proper to rely on higher law principles in deciding what terms such as liberty and freedom mean under the United States Constitution? As Arthur Leff appropriately pointed out, it is impossible not to rely on such principles in a rule of law system.<sup>165</sup> Second, what is the appropriate source \*693 of higher law principles for the Court to rely on in interpreting the United States Constitution?

### III. To WHAT HIGHER LAW PRINCIPLES SHOULD COURTS LOOK IN AMERICA?

*A. Non-Biblical Sources of a Higher Law are Inherently Subjective and, In Fact, Not Higher Law Principles*

As mentioned above, “transcendent” is defined in the dictionary as something beyond human experience and knowledge.<sup>166</sup> If a value determination is based on what a group or people believe is right or wrong then, by definition, the standard is not transcendent and, therefore, not a higher law principle. For example, the Humanist Manifesto II states that “moral values derive their source from human experience. Ethics is autonomous and situational needing no theological or ideological sanction. Ethics stems from human need and interest.”<sup>167</sup> Inherent in this definition is that an individual or group of people glean from human experience what should be declared right and wrong. As times change, so too does the standard of what is right and wrong. The Humanist Manifesto plainly does not rest on transcendent principles.

Some Supreme Court precedent highlights the subjectivity that has been infused into the constitutional interpretive process. For example, the Court has adopted an “evolving standards of decency” standard to determine whether government action violates the Eighth Amendment. The text of the Eighth Amendment provides that “cruel and unusual punishments” shall not be “inflicted.”<sup>168</sup> Since early in the twentieth century, the Supreme Court has expressly rejected the notion that the Eighth Amendment is to be interpreted according to the standards that prevailed when the Eighth Amendment was adopted in 1791.<sup>169</sup> Instead, the Supreme Court has tested the constitutionality of criminal punishments--primarily the death \*694 penalty--by asking whether the punishment imposed comports with “evolving standards of decency that mark the progress of a maturing society.”<sup>170</sup> To determine what comports with the evolving standards of decency, the Court considers “objective indicia of society's standards, as expressed in legislative enactments and state practice.”<sup>171</sup> As a result, the question of what constitutes cruel and unusual punishment “necessarily embodies a moral judgment” that “change[s] as the basic mores of society change.”<sup>172</sup> In fact, the Court also has expressly stated that its “own independent judgment” plays a part in the determination of whether certain punishment violates the Eighth Amendment.<sup>173</sup> Reliance on the independent judgment of the Court to determine whether the basic mores of society have changed, resulting in an evolution of the standard of decency, is an inherently subjective process.

A similar, subjective standard was adopted in *Lawrence*.<sup>174</sup> Justice Kennedy first discussed the Court's decision in *Bowers v. Hardwick*, where the Court concluded that there was no constitutional right to engage in same-sex sexual conduct.<sup>175</sup> Justice Burger explained in a concurring opinion in *Bowers* that “[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.”<sup>176</sup> Justice Kennedy noted that the *Bowers* Court relied on longstanding history and tradition on the issue \*695 of same-sex sexual conduct, but then stated that only the “laws and traditions in the past half century are of most relevance here.”<sup>177</sup> He asserted that the past fifty years “show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>178</sup> That emerging awareness was based on a strong reliance on the 1955 Model Penal Code promulgated by the American Law Institute, which did not recommend or provide for “criminal penalties for consensual sexual relations conducted in private”<sup>179</sup> and on the fact that states had begun to change their penal laws to conform the Model Penal Code.<sup>180</sup>

Justice Kennedy then relied on foreign precedent and the trends in a minority of states to conclude that the *Bowers* Court was wrong and that, indeed, there was a right for two people to engage in same-sex sexual conduct in the privacy of their home.<sup>181</sup> He referred to these and other examples as the “emerging recognition” of same-sex relations.<sup>182</sup> The opinion

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then relied on *Casey* to bolster its conclusion that there is a constitutional right relating to marriage, procreation, and family relations broad enough to cover same-sex sexual relations and on *Romer* to conclude that “equality of treatment” demands respect for that same-sex sexual conduct.<sup>183</sup> These cases highlight that the judiciary has assumed the role of deciding what is morally acceptable, which is inherently a subjective, legislative function.<sup>184</sup>

In a 1977 Book Review, Arthur Leff echoed his premise from *Unspeakable Ethics, Unnatural Law* that a rule-based system is inherently \*696 arbitrary when it rests on man-made determinations of right and wrong.<sup>185</sup> “[W]hat *must* be, even if it must be for *everyone*, is ‘good’ only if some evaluator so sets things up by defining ‘the good’ to be ‘that which must be for everyone.’”<sup>186</sup> Professor Leff explained in *Unspeakable Ethics, Unnatural Law* that a system without an objective standard of right and wrong either makes each person morally autonomous and free to do whatever the person desires or it denies full individual autonomy by placing an individual or group in power to determine right and wrong for everyone.<sup>187</sup> Justice Kennedy invokes higher law principles to suggest the Court's reliance on universal, objective “oughts,” but the decisions have actually turned on the subjective determination of a majority of the Court.

***B. Our Founding Documents Point to an Objective Source of Higher Law Principles***

Justice Kennedy's reliance on higher law principles is not entirely misplaced. Significantly, the founders intended for our laws to be based on a higher law. Justice Kennedy, however, has invoked higher law principles while attempting to base that higher law on something that is the antithesis of a higher law; he has adopted an interpretive doctrine that rests entirely on mankind as the alleged source of higher law. By definition, a man-made standard is not a higher law standard.

As long as you wanted simultaneously to make something in the world--mankind-- into the good and still reserve the right to judge its goodness, you were doomed. You were trapped in what, to save time, I might call a Gödel problem: how to validate the premises of a system from within itself. “Good,” “right” and words like that are evaluations. For evaluations you need an evaluator .... From the world, only a man can evaluate a man, and unless some arbitrary standards are slipped into the game, all men, at this, are equal.

....

[B]y dispensing with God we did more than just free ourselves of some intellectual anachronism. We also dispensed with the only intellectually respectable answer to the ultimate “Why is it right to do X?”<sup>188</sup>

\*697 Professor Leff concluded his book review with the following thought: “If there is no God, everything is permitted; if there is a God, it's even more terrifying, because then some things are not permitted, and men have got to find out which are which.”<sup>189</sup>

The Declaration of Independence lays out that God's standards of right and wrong are to inform our understanding of the guarantee of liberty.



## 1. The Declaration of Independence

As its name implies, the Declaration of Independence declared to the world the reasons the colonies were led to take the bold, defiant step of declaring independence from their King. The signers explained,

When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to separation.<sup>190</sup>

Not only did the signers seek to declare to the world the just causes for their declaration of independence from the King, but they specifically laid before the “Supreme Judge of the world for the rectitude of [their] intentions” in declaring the independence.<sup>191</sup>

Before identifying the specific reasons for their declaration of independence, the signers articulated foundational principles they believed were necessary for proper government, which principles the King had violated. The signers stated that there were certain “self-evident” truths, including that (i) all men are created equal, (ii) all men are “endowed, by their Creator, with certain unalienable Rights,” among which are “Life, Liberty and the pursuit of Happiness,” (iii) to secure the rights endowed to man by their Creator, “Governments are instituted among men, deriving their just powers from the consent of the governed,” and (iv) “whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government ....”<sup>192</sup>

\*698 At least four biblical principles can be derived from the above-quoted language. First, the signers were establishing their new government on rights rooted in the “Laws of Nature and of Nature's God.” The three thinkers most cited by the Founders were Montesquieu, Blackstone, and Locke and the most cited source was the Bible.<sup>193</sup> In his Commentaries on the Laws of England, which is considered the most famous treatise on common law,<sup>194</sup> Blackstone discussed the relationship between positive law and the laws of nature and nature's God.<sup>195</sup> He described the law of nature as the “will of his Maker.”<sup>196</sup> The law of nature refers to

eternal, immutable laws of good and evil, to which the Creator Himself in all his Dispensations conforms .... This law of nature, being coeval with mankind and dictated by God Himself is of course superior in obligation to any other. It is binding all over the globe in all countries, and at all times: no human laws are of any validity, if contrary to this.<sup>197</sup>

He further explained that all human laws depend on the two foundations of the law of nature and the law of revelation: “that is to say, no human law should be suffered to contradict these.”<sup>198</sup> The law of nature is contrasted by Blackstone with the law of nature's God, which is the revealed law “to be found only in the Holy Scriptures.”<sup>199</sup>

In *The Spirit of Laws*, Montesquieu similarly stated his belief that all law has its source in God. “God is related to the universe, as Creator and Preserver; the laws by which He created all things are those by which He preserves them.”<sup>200</sup> He ridiculed the idea that man-made standards were the final arbiter of right and wrong: “To say that there is nothing

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just or unjust but what is commanded or forbidden by positive laws, is the same as saying that before the describing of a circle all the radii were not equal.”<sup>201</sup> “Man, as \*699 a physical being, is like other bodies governed by invariable laws .... established by God.”<sup>202</sup>

John Locke also frequently cited the Bible in his writings. In his first treatise on government, he cited the Bible eighty times, with forty-two of the citations from the book of Genesis.<sup>203</sup> He directly addressed the idea of a higher law, outside man, that established norms of right and wrong.

Human Laws are measures in respect of Men whose Actions they must direct, albeit such measures they are as have also their higher Rules to be measured by, which Rules are two, the Law of God, and the Law of Nature; so that Laws Human must be made according to the general Laws of Nature, and without contradiction to any positive Law of Scripture, otherwise they are ill made.<sup>204</sup>

Hugo Grotius was also frequently cited by the founders.<sup>205</sup> He believed that God's laws were superior to any man-made laws:

Among all good men one principle at any rate is established beyond controversy, that if the authorities issue any order that is contrary to the law of nature or to the commandments of God, the order should not be carried out. For when the Apostles said that obedience should be rendered to God rather than men, they appealed to an infallible rule of action, which is written in the hearts of all men.<sup>206</sup>

Contrary to modern ideas of natural law, the law of nature is “dictated by God himself,” written on mankind's heart, and must be consistent with Scripture.<sup>207</sup> “Nature's God,” as explained by Blackstone, referred to the revealed law of Scripture. Thus, the signers, in relying on the “Laws of \*700 Nature and of Nature's God,” declared their reasons for independence resting firmly on rights rooted in the laws of nature and nature's God.

Second, the Declaration of Independence makes clear the founders' belief that mankind is endowed by a Creator-God with certain unalienable rights. This fact is significant because it limits the authority of civil government in two key respects. Significantly, because God, not government, gives people rights, civil government does not have proper authority to strip people of those God-given rights. Justice Thomas affirmed this understanding in his *Obergefell* dissent:

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that “all men are created equal” and “endowed by their Creator with certain unalienable Rights,” they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built. The corollary of that principle is that human dignity cannot be taken away by the government.<sup>208</sup>

In contrast, a government based on the concept that government decides what rights mankind has is a government that can strip people of those transient rights.<sup>209</sup> In addition, recognizing that each human being is endowed with certain rights by a Creator-God limits government's attempts to ascribe different values to different people--all are endowed with the same, unalienable rights. Stated differently, God, not government, establishes the inherent value of all mankind.<sup>210</sup>

Third, the Declaration of Independence affirms that there are self-evident, non-changing truths; in other words, there are absolute truths. The Pennsylvania Supreme Court once explained,

**\*701** No free government now exists in the world, unless where Christianity is acknowledged, and is the religion of the country. So far from Christianity, as the counsel contends, being part of the machinery necessary to despotism, the reverse is the fact. Christianity is part of the common law of this state. It is not proclaimed by the commanding voice of any human superior, but expressed in the calm and mild accents of customary law. Its foundations are broad and strong, and deep; they are laid in the authority, the interest, the affections of the people. Waiving all questions of hereafter, it is the purest system of morality, the firmest auxiliary, and only stable support of all human laws.<sup>211</sup>

That view of the common law's reliance on absolute truths stands in direct contrast with the humanist perspective that truth changes and evolves over time based on man's reasoning and experience.<sup>212</sup> In his 1917 dissenting opinion in *Southern Pacific Company v. Jensen*,<sup>213</sup> Justice Oliver Wendell Holmes epitomized the humanist view on the source of truth in proclaiming that “[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified ....”<sup>214</sup> Contrary to Justice Holmes' belief, the American legal system, however, is one that rests on objective values and principles that do not change over time.

Fourth, the Declaration affirms the biblical principle that civil government derives its authority from Scripture. The Declaration states that whenever civil government becomes destructive of protecting the people's God-given rights, the people have a right and duty to throw off the government.<sup>215</sup> That declaration is entirely consistent with Romans 13, **\*702** which states that civil “authorities ... have been established by God”<sup>216</sup> and “[t]hey are God's servants, agents of wrath to bring punishment on the wrongdoer.”<sup>217</sup> When civil authorities act contrary to Scripture, they act outside their delegated authority. Scholar Herman Belz explained that:

Western political thought was premised on the idea of fundamental or higher law. In this approach, human agency is understood to be subject to order and direction by divine or natural law. The existence of political institutions and the power they exercise requires justification and legitimation according to the measure of external standards of justice and right, which possess superior moral and legal authority by virtue of their origin in the fundamental law of God or nature.<sup>218</sup>

If, as this Article suggests, the biblical foundation set forth in the Declaration of Independence is the same foundation on which the Constitution rests, all four of these points are particularly relevant to the question of whether the Court in *Casey*, *Lawrence*, and *Obergefell* properly interpreted the liberty guarantee in the Constitution.

## 2. The United States Constitution

The U.S. Constitution must be interpreted consistently with the Declaration. One scholar has analogized the relationship between the Declaration and Constitution to the articles of incorporation and bylaws of a corporation.<sup>219</sup> In the

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corporate setting, the articles of incorporation set forth the purposes of the entity; the articles bring the entity into existence.<sup>220</sup> The bylaws, in contrast, lay out the corporate structure and define the rules \*703 and regulations that will govern the entity.<sup>221</sup> Bylaws are to be read consistently with the corresponding articles of incorporation.<sup>222</sup>

The Supreme Court has affirmed that the two should be read in conjunction, referring to the Constitution as the “body and letter” of the law and the Declaration as the “thought and the spirit” of the law, explaining that “it is always safe to read the letter of the constitution in the spirit of the Declaration of Independence.”<sup>223</sup> The founders' words and actions affirm their reliance on biblical truths in drafting the Declaration and Constitution.

Although many books have been written discussing the founders' beliefs that our Constitution rested on biblical principles, it bears mentioning a few examples for purposes of this article.<sup>224</sup> On June 28, 1787, when the Constitutional Convention was on the brink of failure, Dr. Benjamin Franklin, who was eighty-one years old at the time, spoke, reminding the delegates that they needed to ask God's assistance and blessing if they intended to successfully create a new form of government.

The small progress we have made after four or five weeks ... with each other ... is methinks a melancholy proof of the imperfection of the human understanding .... In this situation \*704 of this Assembly, groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to us, how has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings?

In the beginning of the contest with Great Britain, when we were sensible of danger, we had daily prayers in this room for the Divine protection. Our prayers, Sir, were heard and they were graciously answered. All of us who were engaged in the struggle must have observed frequent instances of a superintending Providence in our favor .... Have we now forgotten that powerful Friend? Or do we imagine we no longer need His assistance?

I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth: that God governs in the affairs of men. And if a sparrow cannot fall to the ground without his notice, is it probably that an empire can rise without His aid? We have been assured, Sir, in the Sacred Writings that “except the Lord build the house, they labor in vain that build it (Psalm 127:1).” I firmly believe this, and I also believe that without His concurring aid we shall succeed in this political building no better than the builders of Babel. We shall be divided by our little partial local interests; our projects will be confounded and we ourselves shall become a reproach and by word down to future ages. I therefore beg leave to move that, henceforth, prayers imploring the assistance of Heaven and its blessing on our deliberation be held in this assembly every morning ... and that one or more of the clergy of this city be requested to officiate in that service.<sup>225</sup>

President George Washington echoed these sentiments in his inaugural address to Congress where he referred to “that Almighty Being who rules over the Universe,” the “invisible hand which conducts the Affairs of men,” and his belief

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that “the propitious smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right which Heaven itself has ordained.”<sup>226</sup>

\*705 In 1892, after referring to several state court decisions and founding documents, the Supreme Court stated that “[t]hese, and many other matters might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.”<sup>227</sup> James Madison, in his Memorial and Remonstrance of 1785, explained that “religion ... [is] the basis and foundation of government .... Before any man can be considered as a member of civil society, he must be considered as a subject of the Governor of the Universe ....”<sup>228</sup> In 1952, by joint resolution of Congress and signed by President Truman, Congress created the National Day of Prayer.<sup>229</sup>

The Constitution's division of power into three branches of government rests upon the biblical principle that as a result of the fall, mankind is inherently sinful.<sup>230</sup> In Federalist No. 51, James Madison discusses his defense for the checks and balances between the different branches of government.

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.<sup>231</sup>

The doctrine of separation of powers has long been rooted at the core of our nation's system of government. As the Supreme Court has recognized, “[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.”<sup>232</sup> The framers believed “[the] accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether \*706 hereditary, self-appointed, or elective may justly be pronounced the very definition of tyranny.”<sup>233</sup> Thus, to protect against the risk of tyranny, it is crucial that the established branches of government be separate and distinct from one another. In addition to deterring tyrannical rule, specific allocation of powers serves to create an “effective and accountable” National Government.<sup>234</sup> Such precise delineation of responsibilities amongst branches enables citizens to identify who is responsible for making, or failing to make, various decisions.<sup>235</sup>

One of the major concerns of the Antifederalists was the federal judiciary, specifically the Supreme Court. They feared that the “supreme court under this constitution would be exalted above all other power in the government, and subject to no control.”<sup>236</sup> To support this fear, they explained that the judges had been made completely independent:

There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.<sup>237</sup>

In Antifederalist Paper, Brutus 11, there was much concern about the precedent of the British judiciary expanding their jurisdiction contrary to legislation.<sup>238</sup> The Antifederalists feared the American judiciary would likewise expand their

jurisdiction, especially since there was nothing in the Constitution that expressly prohibited it.<sup>239</sup> A dire warning was pronounced in Antifederalist Paper, Brutus 15:

**\*707** Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. They will be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people. Their decisions on the meaning of the constitution will commonly take place in cases which arise between individuals, with which the public will not be generally acquainted; one adjudication will form a precedent to the next, and this to a following one. These cases will immediately affect individuals only; so that a series of determinations will probably take place before even the people will be informed of them .... If the states remonstrated, the constitutional mode of deciding upon the validity of the law, is with the supreme court, and neither people, nor state legislatures, nor the general legislature can remove them or reverse their decrees .... A constitution is a compact of a people with their rulers; if the rulers break the compact, the people have a right and ought to remove them and do themselves justice ... but when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to controul them but *with a high hand and an outstretched arm*.<sup>240</sup>

The Federalists responded to the concerns of their fellow patriots with assurances that the judiciary was sufficiently constrained and presented no threat to liberty. In Federalist Paper No. 81, Hamilton responded by suggesting the concerns were “made up altogether of false reasoning upon misconceived fact.”<sup>241</sup> Although admitting that the Constitution ought to be the standard, Hamilton points out that there is “not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State.”<sup>242</sup> He went on to say the “supposed danger of judiciary encroachments on the legislative authority” is “in reality a phantom.”<sup>243</sup> To show how unfounded the Antifederalists' concern was, he explained:

**\*708** Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty, from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations.<sup>244</sup>

The Federalists viewed the judiciary as the weakest of the three branches and believed it could never threaten liberty:

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely \*709 judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>245</sup>

It is the role of the courts to “declare the sense of the law” but “if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”<sup>246</sup> It is this view of the Judiciary that gave the Federalists confidence that the Constitution provided the necessary protections:

For I agree, that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.” And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments ....<sup>247</sup>

It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive.<sup>248</sup>

Thomas Jefferson also explained the reason to fear the threat to liberty posed by the judiciary:

The germ of dissolution of our federal government is in the constitution of the judiciary; an irresponsible body working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the states, and the judges as the ultimate arbiters of all constitutional questions is a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy.<sup>249</sup>

The value judgments that the Supreme Court exercised in *Planned Parenthood v. Casey*, *Lawrence v. Texas*, and other cases, is far removed from the Federalists' views of on the limited role of the judiciary. As Justice Scalia stated in his dissent in *Casey*:

\*710 As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here--reading text and discerning our society's traditional understanding of that text--the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if ... our pronouncement of constitutional law rests primarily on value judgments, then a free intelligent people's attitude towards us can be expected to be (*ought to be*) quite different .... If, indeed, the “liberties”

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protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours* .... Value judgments, after all, should be voted on, not dictated ....<sup>250</sup>

Accumulation of legislative powers by the judiciary through expanding, subjective notions of the constitutional guarantees stand in contrast with the rule of law system upon which the U.S. legal system is built.<sup>251</sup> Rule of law is a phrase “often used but difficult to define.”<sup>252</sup> It is frequently described as a government of laws, not of men.<sup>253</sup> That understanding is consistent with Samuel Rutherford's 1644 work entitled *Lex, Rex--The Law and the Prince*, which articulated the governmental philosophy that the “law is king” (lex rex) as compared to the king as the law (rex lex).<sup>254</sup> The Magna Carta is often cited as a significant victory for the rule of law because King \*711 John acknowledged in writing that both he and his subjects were subject to the law.<sup>255</sup>

The most recent edition of Black's Law Dictionary defines the “rule of law” as the “supremacy of regular as opposed to arbitrary power” and includes the idea “that every person is subject to the ordinary law within the jurisdiction.”<sup>256</sup> The sixth edition of the Black's Law Dictionary stated it slightly differently as “the supremacy of law; provides that decisions should be made by application of known principles or laws without the intervention of discretion in their application.”<sup>257</sup> One author characterized it this way:

In essence, rule of law refers to having rules that are established, known, accepted, and respected--by both government and nongovernment actors. Rule of law invokes a predictable legal system with fair, transparent, and effective judicial institutions to protect citizens against the arbitrary use of state authority and lawless acts. Rule of law also implies a set of procedures and processes for the resolution of disputes that are accessible and fair to all.<sup>258</sup>

The American Bar Association Division for Public Education has published materials discussing the meaning of the rule of law. Key aspects of the discussion paper included the following ideas:

- “[N]o one person is able to gain absolute power and stand above the law”;<sup>259</sup>
- “[A] person's fate should not be in the hands of a single individual”;<sup>260</sup>
- \*712 • The need in a republican form of government for respect of the laws;<sup>261</sup>
- That chaos ensues when every individual is free to determine for himself what is law;<sup>262</sup>



- That “the laws must not be arbitrary”;<sup>263</sup>
- The rule of law is “intended to promote stability”;<sup>264</sup> and
- That “people can expect predictable results from the legal system.”<sup>265</sup>

The ABA Paper also referred to The World Justice Project's working definition of the rule of law, as comprising four principles. Those principles included “[a] system of self-government in which all persons, including the government, are accountable under the law” and “[a] system based on fair, publicized, broadly understood and stable laws.”<sup>266</sup> John Locke similarly explained,

Freedom of men under government, is, to have a standing rule to live by, common to every one of that society ... a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.<sup>267</sup>

The separation of powers built into American system is based on a foundational premise that governmental authority is necessarily limited.<sup>268</sup> \*713 Key aspects of a limited government are that decision makers are bound by express and certain constitutional standards and restricted to acting within their delegated authority.<sup>269</sup> Writing in the Federalist Papers, James Madison explained that in structuring the system of government, the branches must be constructed such that ambition of one branch can counteract the ambition of another.<sup>270</sup> He further cautioned that “[t]he accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>271</sup>

The antithesis, then, of a limited government is a “unitary and centralized government, or a government in which all the functions or functionaries were concentrated in a single office.”<sup>272</sup> Such a government would be one “that invited despotism and would inevitably become tyrannical and corrupt.”<sup>273</sup> Thus, the separation of powers that exists in our state and federal governments is a “means to certain ends,” which includes “preservation of political liberty ....”<sup>274</sup> The Supreme Court's decisions in *Casey*, *Lawrence*, and *Obergefell* involved subjective determinations of right and wrong, based on ever-changing standards; contrary to the Court's assertion that its decisions are a preservation of liberty, they are a threat to liberty.

**\*714 III. THE DECISIONS IN CASEY, LAWRENCE, AND OBERGEFELL REFLECT A REX LEX APPROACH TO THE LAW THAT IS INCONSISTENT WITH TRANSCENDENT PRINCIPLES ROOTED IN THE LAWS OF NATURE AND NATURE'S GOD**

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If Justice Kennedy had properly applied transcendent principles to decide *Casey*, *Lawrence*, and *Obergefell*, the decisions would have been different. In each case, the Court determined the scope of the liberty guarantee in the Fourteenth Amendment and in each case, the majority opinion expressed its reliance on transcendent principles to justify the decisions reached. Had Justice Kennedy, who wrote the majority opinions in each of those cases, properly understood the source of transcendent principles, he would have had to conclude that the Fourteenth Amendment does not include any right to abortion, same-sex sexual conduct, or same-sex marriage.

### A. *Casey Revisited*

The Declaration of Independence rests upon the Genesis account of how this earth and all of its inhabitants came into existence--that we are "created" beings whose "Creator" endowed us with certain unalienable rights.<sup>275</sup> Scripture explains that we are created in our Creator's image.<sup>276</sup> Our Creator knew us before we were even born and knit us together in our mother's womb.<sup>277</sup> That understanding of our origins forms the basis of Justice Thomas's dissent in *Obergefell* where he explained that government does not confer or take away one's dignity; rather, we have inherent dignity because we are created by our Creator.<sup>278</sup>

The Supreme Court has acknowledged that abortion destroys a "living organism" but somehow distinguishes that "living organism" from a "person."<sup>279</sup> As a result, that "living organism," which undeniably becomes a human life if not aborted, is left without the legal protections afforded under the Constitution until after birth. Only then does that "living \*715 organism" become a "person" who obtains the unalienable rights that we are endowed with by our Creator, including the right to life, liberty, and property.<sup>280</sup> The *Casey* Court stated that before birth, the State has an interest in "protecting the ... life of the fetus that may become a child."<sup>281</sup> Somehow, the Court states that it is not taking contradictory positions in asserting that the fetus is a living being and, yet, a woman can abort that living being.<sup>282</sup> In reality, it is a false distinction and an issue beyond the competency of mankind.<sup>283</sup> A human life is endowed with the right to life because he is created in the image of God, not because he magically transforms into a "person" at birth. Scripture repeatedly describes God making, forming, and knitting together babies in the womb.<sup>284</sup>

The *Casey* Court was willing to affirm the right to abortion even while suggesting that the decision in *Roe* might have been in error.<sup>285</sup> This is troubling given that the *Roe* Court stated that it did "not resolve the difficult question of when life begins," yet went on to conclude that the woman has a right to destroy what may or may not be a life.<sup>286</sup> If the Court was not competent to decide when life begins, and thus whether the fetus is a human life prior to birth, then it should have erred on the side of protecting that fetus. Instead, the Court refused to decide when life begins and found a right to destroy what may or may not constitute life, while protecting a state's interest after viability of the potential life.<sup>287</sup> The legal inconsistencies are magnified by state fetal homicide laws.

At least thirty-eight states have fetal homicide laws that criminalize harm caused to a fetus.<sup>288</sup> At least twenty-eight of those states impose criminal \*716 penalties at any point post-conception.<sup>289</sup> Many of the states with fetal homicide laws define the fetus as an "unborn child" or "person."<sup>290</sup> Some courts have also held a fetus to be an unborn child in the context of proceedings in juvenile court to protect the unborn child from the mother's neglect.<sup>291</sup> One New York Family Court explained that "[m]aking a child endure an unsafe environment in the womb is ludicrous when this same child is afforded protection from illegal drugs and an unsafe environment the moment it takes its first breath outside the womb."<sup>292</sup>

These decisions and laws recognizing that a fetus is an unborn child are consistent with biblical references indicating that the babies in the womb are human lives. For example, the Bible refers to people who expressed their desire that God had killed them within the womb,<sup>293</sup> a baby grabbing his brother by the heel in the womb,<sup>294</sup> and a baby leaping for joy while still in the womb.<sup>295</sup> A right to abortion--to destroy human life-- stands in conflict with the biblical admonitions not to murder or shed innocent blood.<sup>296</sup> Human life is at its most innocent pre-birth.

The *Casey* Court should have relied on the basic premise of the Declaration of Independence that we are created by a Creator with certain unalienable rights, including life. No one contends that a fetus is born as anything but a human. Thus, that fetus that is declared a human after birth is a human before birth, albeit in various stages of development. Relying on \*717 the transcendent principles rooted in the laws of nature and nature's God, the *Casey* Court should have answered the question left unanswered in *Roe*--when life begins--and found that an unborn fetus is a life entitled to the guarantee of life afforded persons under the Constitution.

Instead, the Court interpreted the liberty guarantee to be a license for pregnant women to do whatever they desire in their quest "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>297</sup> Liberty, however, must be tethered to an objective standard to keep the Court from delving into the policy-making realm reserved for the legislature.<sup>298</sup> Webster's first American Dictionary defined liberty as "freedom from restraint, in a general sense, and applicable to the body, or to the will or mind."<sup>299</sup> "Natural liberty" is then defined as "the power of acting as one thinks fit, without any restraint or control, *except* from the laws of nature."<sup>300</sup> The meaning of liberty should be tethered to the laws of nature and nature's God, which, as Blackstone described represents the revealed law of God.<sup>301</sup> As a result, one does not have the constitutional liberty to do that which is contrary to the laws of nature and of nature's God.<sup>302</sup>

The revealed law of God plainly declares life to begin within the womb, that God (not man) is the creator of life, and that government has the responsibility to protect the most innocent and vulnerable. The Court's decisions that a woman has a right under the guarantee of liberty to destroy unborn life cannot be squared with the higher law principles to protect innocent life. *Casey* should have reversed *Roe* and concluded that there is no right to abortion. Justice Kennedy's pronouncement to the contrary, while ostensibly relying on transcendent principles, manifests his belief that man is the standard of right and wrong. If man is the standard, and that standard changes as times change, then the consistency and objectivity needed to preserve the rule of law does not exist.

#### \*718 *B. Lawrence and Obergefell Revisited*

The Court in *Lawrence* and *Obergefell* collectively held that the liberty guarantee protected a right of same-sex sexual conduct and a right of same-sex couples to marry.<sup>303</sup> If the Court had understood the right of liberty to be rooted in the laws of nature and nature's God, *Lawrence* would have affirmed *Bowers* and *Obergefell* would have affirmed the laws in the majority of states that described marriage as the union of one man and one woman.

From a "law of nature and nature's God" perspective, same-sex sexual conduct cannot be declared a protected right any more than adultery<sup>304</sup> or sexual relations before marriage between opposite-sex couples.<sup>305</sup> Romans 1:25-27 explains how God allowed people to reap the results of their sinful decisions to rebel against God, including the sins of sexual impurity and exchanging "natural relations for unnatural [relations]."<sup>306</sup> The unnatural relations were described as

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women exchanging natural relations with men for unnatural relations with women as well as men abandoning natural relations with women and being inflamed with lust for other men.<sup>307</sup>

A biblical understanding of marriage also recognizes that it is a holy ordinance, instituted by God<sup>308</sup> and not an institution that is subject to redefinition by mankind. The institution of marriage is reflective of Christ's relationship with His church, with Christ as the bridegroom and the \*719 Church as the bride.<sup>309</sup> An understanding that liberty is the right to do what one ought,<sup>310</sup> rather than what one desires, would have led the Court to reach the opposite conclusions in *Lawrence* and *Obergefell*.

The stark contrast that exists between those who believe mankind defines rights and those who believe God is the source of our rights, is manifest in *Obergefell*. Justice Kennedy characterized laws that defined marriage as the union of one man and one woman as disparaging,<sup>311</sup> stigmatizing,<sup>312</sup> denying same-sex couples dignity,<sup>313</sup> demeaning them,<sup>314</sup> and disrespecting them.<sup>315</sup> He concluded that those laws denying same-sex couples the right to marry, therefore, infringed on their right to make “certain personal choices central to individual dignity and autonomy ....”<sup>316</sup>

In contrast, relying on the founding principles of this nation, Justice Thomas understands that God is the source of our dignity and rights.<sup>317</sup> As a result, nothing government does can strip us of our God-given dignity. Laws can infringe on our God-given rights, but mankind lacks authority to strip us of our dignity. Similarly, it is God who confers unalienable rights. Those rights must, therefore, be consistent with the principles articulated by God. To refuse to allow same-sex couples to marry certainly impinges on that couple's choice to have their relationship validated by the state, but it cannot possibly infringe upon any God-given unalienable right that the couple has. If liberty is properly understood as the right to do what one ought, not necessarily anything one might want, it is clear that the Court was wrong in *Lawrence* and *Obergefell*.

As the dissenting opinions make plain in *Obergefell*, the majority's willingness to usurp legislative powers for itself and decree rights based on \*720 the personal wishes of the majority (all the while relying on some asserted transcendent principles) is a threat to the rule of law in America.

The opinion in these cases is the furthest extension in fact--and the furthest extension one can even imagine--of the Court's claimed power to create “liberties” that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.<sup>318</sup>

#### IV. CONCLUSION

The checks and balances have not worked the way the founders envisioned. Perhaps for reasons of political expediency, the Court has adopted a might makes right philosophy. Since *Griswold's* pronouncement of a privacy right lingering in the shady penumbras of the Constitution that guaranteed a right to contraception, the Court has arrogated to itself the authority to amend the Constitution through new interpretations of the constitutional guarantees. If the Court now possesses the authority to amend the Constitution on the vote of five Justices, it necessarily limits the amendment power conferred on the people in the Constitution. It also necessarily makes all Americans subject to the whim and desires of those unelected Justices.

The Court's new interpretations of the constitutional guarantees also have untethered our nation from its founding principles. There is always an ultimate arbiter of what is right and what is wrong. If that ultimate arbiter is in the form of five Justices of the Supreme Court who can constantly bring new meaning to the words of the text, then we are subject to the arbitrary and inconsistent determinations of those in power. The rule of law, however, demands consistency and rejects the idea that anyone is above the law. Professor Leff warned of the very crisis which currently faces our nation. With the coordinate federal branches having abdicated their responsibility to check each other, the states now have to choose whether to perform their duties in a federalist system to push back an overreaching national government.

Benjamin Franklin is quoted as saying to a woman he met outside the constitutional convention that the founders had given us a republican form <sup>\*721</sup> of government, *if we could keep it*.<sup>319</sup> Perhaps now, more than any other point in the nation's history since the civil war, the nation is faced with a decision about its identity and foundational principles. America stands at a crossroads. It can either choose the path the founders chose for the nation as the best preservation of liberty, which would require a return to principles of federalism, rule of law, and limited government, or it can choose the path of so many other nations that have had their history marred by revolutions as competing factions seek to control the nation.

To restore the rule of law, the Supreme Court must be reined in: it can no longer be permitted to make public policy determinations under the guise of legal determinations, and it cannot continue to redefine the constitutional guarantees by invoking higher law principles when, in reality, it is making subjective determinations of right and wrong. If Benjamin Franklin were alive today, he likely would announce that the nation had, in fact, failed to keep the government the founders developed. It is time to return to the principles of limited government and separation of powers, and recognize that there are indeed transcendent principles that stand as an objective standard of right and wrong against which all man-made laws should be judged.

#### Footnotes

<sup>d1</sup> Professor of Law, Liberty University School of Law. J.D., *magna cum laude*, Brooklyn Law School. This article has been a work in progress for nearly a decade as this author learned more about the Christian foundation of this nation and its importance to the preservation of our constitutional liberties. The author wishes to thank Steve Weaver for his invaluable assistance at the infancy stages of this article, Professor Jeffrey Tuomala for his mentorship over the years in integrating a biblical worldview into teaching and scholarship, and so many other colleagues and former students who have helped shape this final article.

<sup>1</sup> Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 6 DUKE L.J. 1229, 1229-30 (1979) [hereinafter Leff, *Unspeakable Ethics*]. In an earlier book review, Professor Leff stated it differently: "How does one tell, and tell about, the difference between right and wrong? ... How can one ground any statement in the form 'It is right to do X in anything firmer than the quicksand of bare reiterated assertion?'" Arthur Allen Leff, *Unger: Knowledge and Politics*, 29 STAN. L. REV. 879, 880 (1977) (book review) [hereinafter Leff, *Book Review*].

<sup>2</sup> Leff, *Unspeakable Ethics*, *supra* note 1, at 1245-47.

<sup>3</sup> *Id.* at 1247.

<sup>4</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>5</sup> *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>6</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

7 [United States v. Windsor](#), 133 S. Ct. 2675 (2013).

8 [Obergefell v. Hodges](#), 135 S. Ct. 2584 (2015).

9 [Roe](#), 410 U.S. 113.

10 505 U.S. 833 (1992).

11 [Roe](#), 410 U.S. at 152. Webster's dictionary defines a "penumbra" as the shading that occurs from an eclipse or sunspot; "a surrounding or adjoining region in which something exists in a lesser degree;" and "a body of rights held to be guaranteed by implication in a civil constitution." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 858 (10th ed. 2001). Noah Webster's 1828 dictionary defined penumbra with reference only to the astronomical meanings. NOAH WEBSTER, II AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 32. Interestingly, the definition is that which exists as the penumbra is of a lesser degree than the object it adjoins. In the context of the asserted privacy right, any right found within the penumbra should, by definition, be of a lesser degree than the express rights in the Constitution. However, the Court has grounded some of its most controversial decisions on the penumbral privacy right, including its decisions in [Roe](#), [Casey](#), [Lawrence](#), and [Obergefell](#).

12 [Roe](#), 410 U.S. at 153.

13 *Id.* at 156-57.

14 *Id.* at 159.

15 [Casey](#), 505 U.S. at 843 (five provisions of the Pennsylvania Abortion Control Act of 1982 were at issue).

16 *Id.* at 871.

17 *Id.* at 858 ("Even on the assumption that the central holding of [Roe](#) was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty."); *id.* at 869 ("A decision to overrule [Roe](#)'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law.").

18 *Id.* at 865.

19 *Id.* at 851.

20 *Id.* at 850.

21 In support of its conclusion that [Roe](#) should be affirmed, the Court stated that absent such a right, the State's interest in "population control, or eugenics" could justify a State's decision to force a woman to abort her unborn child. [Casey](#), 505 U.S. at 859.

22 *Id.* at 901.

23 Dean Herbert W. Titus explained that "[t]o claim that one has the right to define one's own meaning, existence, universe, and the mystery of human life is to claim that one is God." Herbert W. Titus, [Defining Marriage and the Family](#), 3 WM. & MARY BILL RTS J. 327, 338 (1994); see also U.S. CONST. art. V (setting forth the process to amend the Constitution).

24 [Lawrence v. Texas](#), 539 U.S. 558, 564 (2003).

25 *Id.* at 564.

26 [Bowers v. Hardwick](#), 478 U.S. 186 (1986).

27 [Lawrence](#), 539 U.S. at 578-79.

28 *Id.* at 562 (emphasis added).

29 *Id.* at 579.

30 *Id.* at 574.

31 *Id.* at 571-72.

32 *Id.* at 572.

33 *Lawrence*, 539 U.S. at 571-72.

34 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (“The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.”).

35 *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

36 *Id.*

37 *Id.*

38 1 U.S.C. § 7 (2012).

39 *Windsor*, 133 S. Ct. at 2683.

40 Press Release, Department of Justice, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act>.

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 Section 530D provides that the Attorney General shall submit to the Congress a report of any instance in which the Attorney General ... determines ... to refrain (on the grounds that the provision is unconstitutional) from defending or asserting, in any judicial, administrative, or other proceeding, the constitutionality of any provision of any Federal statute ... or not to appeal or request review of any judicial, administrative, or other determination adversely affecting the constitutionality of any such provision ....

28 U.S.C. § 530D(a)(1)(B) (2012).

In *Windsor*, the Supreme Court mentioned that the § 530D letter in that case was unique because it had been issued *before* any adverse judgment against the law. *Windsor*, 133 S. Ct. at 2683. In the past, the DOJ had submitted § 530D letters after a court had already ruled against the government. *Id.*

This case is unusual, however, because the § 530D letter was not preceded by an adverse judgment. The letter instead reflected the Executive's own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.

*Id.* at 2683-84.

46 Molly K. Hooper, *House Leaders Vote to Intervene in DOMA Defense*, THE HILL (Mar. 9, 2011, 10:43 PM), <http://thehill.com/blogs/blog-briefing-room/news/148521-house-leaders-vote-to-intervene-in-doma-defense>.

47 *Windsor*, 133 S. Ct. at 2684.

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- 48 See the legislative tracking report at <https://www.govtrack.us/congress/bills/104/hr3396> (passed by 79 percent of the House and 85 percent of the Senate).
- 49 Press Release, Nancy Pelosi, Democratic Leader, Pelosi Statement on Speaker Boehner's Waste of \$1.5 Million in Taxpayer Dollars Defending DOMA (Oct. 16, 2012), <http://www.democraticleader.gov/newsroom/pelosi-statement-speaker-boehners-waste-1-5-million-taxpayer-dollars-defending-doma/>; Andrew Rosenthal, *G.O.P. Wastes Taxpayer Dollars*, N.Y. TIMES (Jan. 15, 2013, 5:24 PM), [http://takingnote.blogs.nytimes.com/2013/01/15/g-o-p-wastes-taxpayer-dollars/?\\_php=true&\\_type=blogs&\\_r=0](http://takingnote.blogs.nytimes.com/2013/01/15/g-o-p-wastes-taxpayer-dollars/?_php=true&_type=blogs&_r=0) (The Opinion Pages) (“[T]hey seem to relish spending taxpayer dollars on the plainly unconstitutional Defense of Marriage Act.”).
- 50 The constitutionality of a duly enacted law should not be decided on a default when the only basis for refusing to defend in an official's personal beliefs that the law is unconstitutional. See Rena M. Lindevaldsen, *The Erosion of the Rule of Law When a State Attorney General Refuses to Defend the Constitutionality of Controversial Laws*, 21 BARRY L. REV. 1 (2015) (explaining that an attorney general lacks discretion to refuse to defend the constitutionality of duly-enacted laws absent express, patent unconstitutionality of the law).
- 51 [Windsor v. United States](#), 833 F. Supp. 2d 394 (S.D.N.Y. 2012).
- 52 [Windsor v. United States](#), 699 F.3d 169 (2d Cir. 2012).
- 53 [United States v. Windsor](#), 133 S. Ct. 2675, 2684 (2013).
- 54 *Id.* at 2684.
- 55 *Id.* at 2686.
- 56 *Id.* Although not an issue in *Windsor*, if the United States had granted her refund, contrary to the law, arguably no one would have had standing to litigate the constitutionality of DOMA. In addition, the Executive branch would have unilaterally effected a change in the law through an unconstitutional suspension of the law. See Lindevaldsen, *supra* note 50, at 26-31.
- 57 [Windsor](#), 133 S. Ct. at 2687.
- 58 *Id.* at 2688.
- 59 *Id.*
- 60 As a result, the Court did not reach the question of whether the BLAG had standing to appeal the district court's decision. *Id.*
- 61 *Id.*
- 62 *Id.* at 2688 (alteration in original) (internal citations omitted).
- 63 [Windsor](#), 133 S. Ct. at 2689.
- 64 *Id.*
- 65 *Id.* at 2698 (Scalia, J., dissenting).
- 66 *Id.*
- 67 *Id.* at 2700 (Scalia, J., dissenting) (“In the more than two centuries that this Court has existed as an institution, we have never suggested that we have the power to decide a question when every party agrees with both its nominal opponent *and the court below* on that question's answer.”).
- 68 *Id.* at 2701 (Scalia, J., dissenting).



- 69 *Windsor*, 133 S. Ct. at 2695 (majority opinion).
- 70 *Id.* at 2692.
- 71 *Id.* at 2693.
- 72 *Id.* at 2694-95.
- 73 *Id.* at 2693.
- 74 *Id.*
- 75 *Windsor*, 133 S. Ct. at 2693.
- 76 *Id.* at 2692 (emphasis added).
- 77 *Id.* at 2696 (Roberts, J., dissenting); *id.* at 2697-98 (Scalia, J., dissenting).
- 78 *See id.* at 2711 (Alito, J., dissenting).
- 79 *Id.* at 2696 (Roberts, J., dissenting).
- 80 *Id.* at 2707 (Scalia, J., dissenting).
- 81 *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting)
- 82 *Id.* at 2708 (Scalia, J., dissenting).
- 83 *Id.* at 2709.
- 84 *Id.*
- 85 *Id.* at 2716 (Alito, J., dissenting).
- 86 *Id.* at 2715.
- 87 *Windsor*, 133 S. Ct. at 2716 (Alito, J., dissenting).
- 88 *Id.* at 2718.
- 89 *Id.*
- 90 *Id.* at 2720.
- 91 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).
- 92 *Id.* at 2593.
- 93 *Id.*
- 94 *Id.*
- 95 *Id.*
- 96 *Id.* at 2604-05, 2607-08.
- 97 *Obergefell*, 135 S. Ct. at 2593.

98 *Id.* at 2593-94.

99 *Id.* at 2594.

100 *Id.*

101 *Id.* at 2594.

102 As Justice Alito explained in his dissent in *Windsor*,  
We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. Others think that recognition of same-sex marriage will fortify a now-shaky institution. At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the longterm ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment.

*United States v. Windsor*, 133 S. Ct. 2675, 2715-16 (2013); see also Jason Richwine & Jennifer A. Marshall, *The Regnerus Study: Social Science on New Family Structures Met with Intolerance*, HERITAGE FOUNDATION (Oct. 2, 2012), <http://www.heritage.org/research/reports/2012/10/the-regnerus-study-social-science-on-new-family-structures-met-with-intolerance> (discussing methodological flaws in studies claiming that “‘no differences’ exist between children whose parents had a same-sex relationship and children who were raised by their married biological parents, previous research cannot support such an assertion”).

103 *Obergefell*, 135 S. Ct. at 2596.

104 Chief Justice Roberts noted in his *Obergefell* dissent:

An established method of substantive due process analysis has two primary features. First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition” ... and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.”

*Id.* at 2618 (Roberts, C.J., dissenting). The Court also requires a “‘careful description’ of the asserted fundamental liberty interest.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). In *Obergefell*, Justice Roberts, Scalia, Thomas, and Alito reaffirmed the *Glucksberg* analysis as the proper analysis for asserted fundamental rights under the due process clause. See *Obergefell*, 135 S. Ct. at 2618 (Roberts, C.J., dissenting, joined by Justices Scalia and Thomas); *id.* at 2640 (Alito, J., dissenting, joined by Justices Scalia and Thomas) (“To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that ‘liberty’ under the Due Process Clause should be understood to protect only those rights that are ‘deeply rooted in this Nation’s history and tradition.’”).

105 *Obergefell*, 135 S. Ct. at 2599.

106 *Id.* at 2599.

107 *Id.*

108 *Id.*

109 *Id.* at 2599-2600.

110 *Id.* at 2600.

111 *Obergefell*, 135 S. Ct. at 2600. But see Peter Sprigg, *New Study on Homosexual Parents Tops All Previous Research*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/issuebrief/new-study-on-homosexual-parents-tops-all-previous-research> (last visited Apr. 21, 2017) (discussing various studies).

112 *Obergefell*, 135 S. Ct. at 2600.

- 113 *Id.* at 2600-01.
- 114 *Id.* at 2601.
- 115 *Id.*
- 116 *Id.*
- 117 *Id.*
- 118 *Obergefell*, 135 S. Ct. at 2590, 2602.
- 119 *Id.* at 2594 (“[T]he institution [of marriage] has existed for millennia .... It is fair and necessary to say these references were based on the understanding that marriage is the union between two persons of the opposite sex.”).
- 120 *Id.*
- 121 *Id.*
- 122 *Id.* at 2594.
- 123 *Id.* at 2602.
- 124 *Obergefell*, 135 S. Ct. at 2603-04.
- 125 *Id.* at 2608.
- 126 *Id.* at 2611 (Roberts, C.J., dissenting, joined by Justices Scalia and Thomas); *id.* at 2626 (Scalia, J., dissenting, joined by Justice Thomas); *id.* at 2631 (Thomas, J., dissenting, joined by Justice Scalia); *id.* at 2640 (Alito, J., dissenting, joined by Justices Scalia and Thomas).
- 127 *Id.* at 2612 (Roberts, C.J., dissenting).
- 128 *Id.*
- 129 *Id.* at 2616.
- 130 *Obergefell*, 135 S. Ct. at 2618-19. Chief Justice Roberts explained in *Obergefell* that in the sixty years after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty. *Id.* at 2617. In 1963, “the Court recognized its error and vowed not to repeat it.” *Id.* ““The doctrine that ... due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely ... has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws.”” *Id.* (Roberts, C.J., dissenting) (quoting *Ferguson v. Skrupa*, 372 U.S. 726 (1963)).
- 131 *Id.* at 2620.
- 132 *Id.* at 2621 (citations omitted).
- 133 *Id.* at 2622-23. *Cf. Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (“Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”).
- 134 *Obergefell*, 135 S. Ct. at 2624 (Roberts, C.J., dissenting).

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- 135 *Id.* at 2624; *see also* THE FEDERALIST, NO. 78, at 464-65 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (explaining that “the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that ‘there is no liberty, if the power of judging be not separated from the legislative and executive powers’”).
- 136 *Obergefell*, 135 S. Ct. at 2626 (Scalia, J., dissenting).
- 137 *Id.* at 2627.
- 138 *Id.* at 2629.
- 139 *Id.*
- 140 *Id.*
- 141 *Id.* at 2630.
- 142 *Obergefell*, 135 S. Ct. at 2631 (Thomas, J., dissenting).
- 143 *Id.* at 2639.
- 144 *Id.*
- 145 *See id.* at 2594 (“[L]ifelong union of a man and a woman always has promised nobility and dignity to all persons ....”); *id.* at 2596 (“[I]n the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions.”); *id.* at 2597 (“[T]hese liberties extend to certain personal choices central to individual dignity and autonomy ....”); *id.* at 2603 (the historical sex-based classification in marriage have “denied the equal dignity of men and women”); *id.* at 2606 (framing the issue as to whether the state of Tennessee “can deny to one who has served this Nation the basic dignity of recognizing his New York marriage”); *id.* at 2608 (“They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”).
- 146 *Id.* at 2642 (Alito, J., dissenting).
- 147 *Id.* at 2642.
- 148 *Obergefell*, 135 S. Ct. at 2643.
- 149 MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1248 (10th ed. 2001).
- 150 Leff, *Unspeakable Ethics*, *supra* note 1, at 1247 (“We can say all sorts of things, but we cannot say why one is better than any other unless we state some standard by which it definedly is.”).
- 151 *See, e.g.,* *Garcetti v. Ceballos*, 547 U.S. 410, 439 (2006) (academic freedom); *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 38 (1999) (free speech); *Osborne v. Ohio*, 495 U.S. 103, 115 n.12 (1990) (free expression); *Univ. of Pa. v. E.E.O.C.*, 493 U.S. 182, 195-96 (1990) (academic freedom); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 241-42 (1990) (Brennan, J., concurring) (free speech); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (First Amendment imperatives).
- 152 *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 580-81 (1990) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*379).
- 153 *Gannett Co. v. DePasquale*, 443 U.S. 368, 433 n.13 (1979).
- 154 *Rubin v. United States*, 119 S. Ct. 461, 462 (1998) (Breyer, J., dissenting).
- 155 *Jaffee v. Redmond*, 518 U.S. 1, 11-12 (1996).

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- 156 [Maryland v. Craig](#), 497 U.S. 836, 855 (1990).
- 157 *See, e.g.*, [Great-West Life & Annuity Ins. Co. v. Knudson](#), 534 U.S. 204, 228 (2002); [Ford Motor Co. v. E.E.O.C.](#), 458 U.S. 219, 227 (1982).
- 158 [Wainwright v. Witt](#), 469 U.S. 412, 463 (1985) (Brennan, J., dissenting).
- 159 [Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.](#), 472 U.S. 749, 767 (1985) (White, J., concurring).
- 160 [Alden v. Maine](#), 527 U.S. 706, 802 (1999) (Souter, J., dissenting) (citation omitted).
- 161 [Edward v. Aguillard](#), 482 U.S. 578, 598-99 (1987) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY).
- 162 THE FEDERALIST NO. 43, at 275-76 (James Madison).
- 163 Titus, *supra* note 23, at 338, 340-41 (“[T]rue liberty in the civil realm must conform to the will, the word, and the plan of God.”).
- 164 Leff, *Unspeakable Ethics*, *supra* note 1, at 1238.
- 165 *Id.* at 1245-48.
- 166 MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1248 (10th ed. 2010).
- 167 AM. HUMANIST ASS'N, HUMANIST MANIFESTO II, [http://americanhumanist.org/humanism/humanist\\_manifesto\\_ii](http://americanhumanist.org/humanism/humanist_manifesto_ii); *see also* AM. HUMANIST ASS'N, HUMANIST MANIFESTO I (“Humanism asserts that the nature of the universe depicted by modern science makes unacceptable any supernatural or cosmic guarantees of human values. Obviously humanism does not deny the possibility of realities as yet undiscovered, but it does insist that the way to determine the existence and value of any and all realities is by means of intelligent inquiry and by the assessment of their relations to human needs.”).
- 168 U.S. CONST. amend. VIII.
- 169 [Weems v. United States](#), 217 U.S. 349, 367 (1910).
- 170 [Trop v. Dulles](#), 356 U.S. 86, 101 (1958); *see also* [Kennedy v. Louisiana](#), 554 U.S. 407, 420 (2008) (repeating the evolving standards of decency as the prevailing standard).
- 171 [Kennedy](#), 128 S. Ct. at 2642 (quoting [Roper v. Simmons](#), 543 U.S. 551, 563 (2005)).
- 172 *Id.* at 2649 (quoting [Furman v. Georgia](#), 408 U.S. 238, 382 (1972)).
- 173 *Id.* at 2650. The fact that the Court admittedly interprets the Eighth Amendment according to its own value judgments about the validity of the punishment raises separation of powers concerns. When any court substitutes its own policy judgment for that of the legislature, it improperly usurps legislative powers. The Utah Supreme Court has explained, As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another. The responsibility for drawing lines in a society as complex as ours--of identifying priorities, weighing the relevant considerations and choosing between competing alternatives--is the Legislature's, not the judiciary's. [Jones v. Barlow](#), 154 P.3d 808, 817 (Utah 2007) (quoting [Van v. Zahorik](#), 597 N.W.2d 15, 18 (Mich. 1999)).
- 174 [Lawrence v. Texas](#), 539 U.S. 558, 597 (2003) (referring to an “emerging awareness” about same-sex relations).
- 175 [Bowers v. Hardwick](#), 478 U.S. 186, 190-91 (1983).
- 176 *Id.* at 196.

- 177 *Lawrence*, 539 U.S. at 571-72.
- 178 *Id.* at 559.
- 179 *Id.* at 572 (citing MODEL PENAL CODE § 213.2, cmt. 2 (AM. LAW INST. 1980)). *Cf.* JUDITH REISMAN, STOLEN HONOR STOLEN INNOCENCE (4th ed. 2013) (explaining how Kinsey's research, which involved sexual exploitation of hundreds of infants and children, lays at the foundation of the changes to the Model Penal Code).
- 180 *Id.* at 572.
- 181 *See id.* at 567-68 (relying on a decision from the European Court of Human Rights and a change in several states post-Bowers to repeal bans on same-sex sexual conduct).
- 182 *Id.* at 572.
- 183 *Lawrence*, 539 U.S. at 573-75.
- 184 *See infra* n.229-43 & accompanying text (discussing the importance of the separation of powers to the rule of law); *see also* Leff, *Unspeakable Ethics*, *supra* note 1, at 1233 (“[A]ll normative statements are evaluations of actions ... an evaluation entails an evaluator ... and in the presumed absence of God, the only evaluators are people ....” So the question is “*who* ultimately gets to play the role of ultimate unquestionable evaluator ...?”).
- 185 *See generally* Leff, *Book Review*, *supra* note 1.
- 186 *Id.* at 882.
- 187 Leff, *Unspeakable Ethics*, *supra* note 1, at 1246.
- 188 Leff, *Book Review*, *supra* note 1, at 887-88.
- 189 *Id.* at 888-89.
- 190 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).
- 191 *Id.* at para. 32.
- 192 *Id.* at para. 2. Later in the paragraph, the signers explained that it is the *duty* of the people to throw off a government that has pursued a long train of abuses and usurpations against its people, evincing a design to reduce them under “absolute Despotism ....” *Id.*
- 193 DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 141-42 (1988).
- 194 JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION: THE FAITH OF OUR FOUNDING FATHERS 56 (1987).
- 195 2 WILLIAM BLACKSTONE, COMMENTARIES \*44-46.
- 196 *Id.* at \*39.
- 197 EIDSMOE, *supra* note 194, at 57-58 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES \*40); *see also* ROBERTO UNGER, LAW IN MODERN SOCIETY 79 (1976) (describing natural law as “a normative order that transcends society altogether”); Herbert W. Titus, *The Bible and American Law*, 2 LIBERTY U. L. REV. 305, 324-25 (2008).
- 198 EIDSMOE, *supra* note 194, at 58.
- 199 *Id.*

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- 200 *Id.* at 54 (quoting Montesquieu).
- 201 *Id.*
- 202 *Id.* at 55 (quoting Montesquieu).
- 203 *Id.* at 61.
- 204 EIDSMOE, *supra* note 194, at 62 (quoting JOHN LOCKE, OF CIVIL GOVERNMENT, BOOK Two XI:136n).
- 205 LUTZ, *supra* note 193, at 142.
- 206 EIDSMOE, *supra* note 194, at 63.
- 207 *Id.* at 58; *see also* Romans 2:15 (“[S]ince they show that the requirements of the law are written on their hearts, their consciences also bearing witness, and their thoughts now accusing, now even defending them.”); Patrick N. Leduc, *Christianity and the Framers: The True Intent of the Establishment Clause*, 5 LIBERTY U. L. REV. 201, 218-19 (2011); *see generally* MARK A. BELILES AND DOUGLAS S. ANDERSON, CONTENDING FOR THE CONSTITUTION, RECALLING THE CHRISTIAN INFLUENCE ON THE WRITING OF THE CONSTITUTION AND THE BIBLICAL BASIS OF AMERICAN LAW AND LIBERTY (2005).
- 208 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2639 (Thomas, J., dissenting).
- 209 *See* Mike Maharrey, *You Don't Have Constitutional Rights*, TENTH AMENDMENT CTR., <http://tenthamendmentcenter.com/2011/12/13/you-dont-have-constitutional-rights/> (last visited Mar. 22, 2017).
- 210 For example, a proper reliance on the God-given dignity of all human beings would have prevented the Court's decisions in *Buck v. Bell*, 274 U.S. 200, 207 (1927) (denying the inherent worth and dignity of all humans in affirming forced sterilization of those the state deemed “manifestly unfit from continuing their kind”) and *Dred Scott v. Sanford*, 60 U.S. 393, 406 (1856) (ignoring the biblical truth that all people are created in God's image, concluding that those born of African descent were not “people” under the United States Constitution).
- 211 *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 406-407 (Pa. 1824).
- 212 AM. HUMANIST ASS'N, HUMANIST MANIFESTO II (1973), [http://americanhumanist.org/humanism/humanist\\_manifesto\\_ii](http://americanhumanist.org/humanism/humanist_manifesto_ii) (“[M]oral values derive their source from human experience.”).
- 213 *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917).
- 214 *Id.* at 222. The dissenting justices in *Griswold v. Connecticut*, 381 U.S. 479 (1965), staked out a position in direct conflict with the notion that the court is to find new rights and proclaim them to be a part of the Constitution. Justice Black explained that the majority opinion was incorrectly premised on the belief that the Court was vested with the “power to invalidate all state laws that it consider[s] to be arbitrary, capricious, unreasonable, or oppressive .... The power to make such decisions is of course that of a legislative body.” *Griswold*, 381 U.S. at 511-12. Justice Stewart similarly explained that “it is not the function of this Court to decide cases on the basis of community standards.” *Id.* at 530.
- 215 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it .... But when a long train of abuses and usurpations, pursuing invariably the same object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government ....”).
- 216 *Romans* 13:1.

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- 217 *Romans* 13:4; see also Benjamin S. Walton, *The Authoritativeness and Usefulness of the Principles of God's Old Covenant Law for the New Covenant Church and State*, 5 LIBERTY U.L. REV. 419, 447 (2011).
- 218 HERMAN BELZ, CONSTITUTIONALISM AND THE RULE OF LAW IN AMERICA 7 (2009).
- 219 Jeffrey Tuomala, *Marbury v. Madison and the Foundation of Law*, 4 LIBERTY U. L. REV. 297, 306 & n. 53 (2010) (citing sources for the proposition that the bylaws must be read in conjunction with the principles set forth in the articles of incorporation).
- 220 1A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 139 (“In order to determine the purpose for which a corporation was created, courts will primarily refer to the stated purpose in the articles of incorporation.”).
- 221 8 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4166 (“Bylaws are the rules and regulations or private laws enacted by the corporation to regulate, govern and control its own actions, affairs and concerns and its shareholders or members and its directors and officers with relation to each other and among themselves in their relation to the corporation.”).
- 222 See *Scotts African Union Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 98 F.3d 78, 95 (3d Cir. 1996) (“[P]rovisions of a corporation's charter or articles of incorporation enjoy priority over contradictory or inconsistent by-laws.”); *Essential Enters. Corp. v. Automatic Steel Prod., Inc.*, 159 A.2d 288, 289 (Del. Ch. 1960) (“We start from the premise that a by-law which is in conflict with a provision in a certificate of incorporation is invalid.”); see also DEL. CODE ANN. tit. 8, § 109(b) (“The by-laws may contain any provision, not inconsistent with the law or with the certificate of incorporation.”); 8 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4171 (“[C]orporations have the power to make and alter bylaws, not inconsistent with its articles of incorporation.”).
- 223 *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 160 (1897).
- 224 See, e.g., DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION (2000); MARK A. BELILES AND DOUGLAS S. ANDERSON, CONTENDING FOR THE CONSTITUTION (2005); DANIEL DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2003); JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION: THE FAITH OF OUR FOUNDING FATHERS (1987); WILLIAM J. FEDERER, THE ORIGINAL 13: A DOCUMENTARY HISTORY OF RELIGION IN AMERICA'S FIRST THIRTEEN STATES (2007); MARK R. LEVIN, LIBERTY AND TYRANNY: A CONSERVATIVE MANIFESTO (2009); CHATHERINE MILLARD, THE REWRITING OF AMERICA'S HISTORY (1991).
- 225 BELILES & ANDERSON, *supra* note 207, at 27 (quoting JAMES MADISON'S NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 209-10 (1987)).
- 226 President George Washington, First Inaugural Address (April 30, 1789), [http://www.archives.gov/exhibits/american\\_originals/inaugt.txt.html](http://www.archives.gov/exhibits/american_originals/inaugt.txt.html).
- 227 *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).
- 228 James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), <https://founders.archives.gov/documents/Madison/01-08-02-0163>.
- 229 Harry S. Truman, *Proclamation 2978* National Day of Prayer (June 17, 1952), <http://www.presidency.ucsb.edu/ws/?pid=87332>.



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- 230 See, e.g., *Romans* 5:12 (“Therefore, just as sin entered the world through one man, and death through sin, and in this way death came to all men, because all sinned.”); *Romans* 3:23 (“For all have sinned, and come short of the glory of God.”).
- 231 THE FEDERALIST No. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).
- 232 *Buckley v. Valeo*, 424 U.S. 1, 124 (1976).
- 233 *INS v. Chadha*, 462 U.S. 919, 960 (1983) (quoting THE FEDERALIST NO. 47, at 324 (James Madison) (J. Cooke ed., 1961)).
- 234 *Loving v. United States*, 517 U.S. 748, 757 (1996).
- 235 *Id.* at 758.
- 236 Brutus XV (Oct. 18, 1787), reprinted in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES at 304 (Ralph Ketcham ed., 2003).
- 237 *Id.* at 305.
- 238 Brutus XI (Jan. 31, 1788), reprinted in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES at 298 (Ralph Ketcham ed., 2003).
- 239 *Id.* (“When the courts will have a precedent before them of a court which extended its jurisdiction in opposition to an act of the legislature, is it not to be expected that they will extend theirs, especially when there is nothing in the constitution expressly against it? and they are authorised to construe its meaning, and are not under any control? This power in the judicial, will enable them to mould the government, into almost any shape they please.”).
- 240 Brutus XV (Oct. 18, 1787), *supra* note 236, at 308 (emphasis added).
- 241 THE FEDERALIST NO. 81, at 481 (Alexander Hamilton) (Clinton Rossiter ed., 2003).
- 242 *Id.*
- 243 *Id.* at 483-84.
- 244 *Id.* at 484.
- 245 THE FEDERALIST NO. 78, at 481 (Alexander Hamilton) (Clinton Rossiter ed., 2003). Hamilton later wrote, “It proves incontestably that the judiciary is beyond comparison the weakest of three departments of power.” *Id.*
- 246 *Id.* at 467.
- 247 *Id.* at 465.
- 248 *Id.* at 464-65.
- 249 BELILES & ANDERSON, *supra* note 207, at 138.
- 250 *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833, 1001 (1992) (Scalia, J., dissenting); see also Keith E. Whittington, *How to Read the Constitution: Self-Government and the Jurisprudence of Originalism*, HERITAGE FOUNDATION: FIRST PRINCIPLES SERIES NO. 5, <http://www.heritage.org/research/reports/2006/05/how-to-read-the-constitution-self-government-and-the-jurisprudence-of-originalism> (“Temporary delusions, prejudices, excitements, and objects have irresistible influence in mere questions of policy. And the policy of one age may ill suit the wishes or the policy of another. The constitution is not subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and for ever.”).

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- 251 See, e.g., Douglas McElvy, *No Greater Gift*, 66 ALA. L. 252, 252 (2005) (“If you paint a portrait of America's national character, the Rule of Law would be a dominant image.”).
- 252 ABA Division for Public Education, *Part I: What is the Rule of Law*, at 4, <http://www.americanbar.org/content/dam/aba/migrated/publiced/features/PartIDialogueROL.authcheckdam.pdf> (ABA Paper).
- 253 JAMES MCCLELLAN, LIBERTY, ORDER, AND JUSTICE: AN INTRODUCTION TO THE CONSTITUTIONAL PRINCIPLES OF AMERICAN GOVERNMENT 296 (2000).
- 254 *Id.* at 253, 350 (“Under God, said the exponents of the rule of law, the law governs us; it is not by mere men that we ought to be governed; we can appeal from the whims and vagaries of human rulers to the unchanging law.”).
- 255 McElvy, *supra* note 251, at 252; see also BELZ, *supra* note 218, at vii.
- 256 BLACK'S LAW DICTIONARY 1448 (9th ed. 2009).
- 257 BLACK'S LAW DICTIONARY 1332 (6th ed. 1990); see also MCCLELLAN, *supra* note 253, at 350 (“The test is not what the rule is called, but whether the rule is general, known, and certain.”).
- 258 Sidney B. Brooks, *Building Blocks for a Rule of Law*, 36 COLO. L. 19, 19-20 (2007).
- 259 ABA Paper, *supra* note 252, at 4; see also Stacy Pepper, *The Defenseless Marriage Act: The Legitimacy of President Obama's Refusal to Defend DOMA § 3*, 24 STAN. L. & POL'Y REV. 1, 12 (2013) (recognizing that “a President free to disregard the will of the Court and Congress is dangerously tantamount to a king”).
- 260 ABA Paper, *supra* note 252, at 4; see also Stephen S. Trott, *The Two-Sided Guarantee of Religious Freedom Commencement Address: Albertson College May 31, 2003*, 46 OCT ADVOCATE (IDAHO) 34, 35 (2003) (“[T]he Founders made it crystal clear in drafting our Constitution that our government would be with the consent of the governed, and that we would be guided not by the whim of self-anointed leaders, but by the rule of law.”).
- 261 ABA Paper, *supra* note 252, at 5. Elizabeth Cady Stanton is quoted as stating that “[i]t is very important in a republic, that people should respect the laws, for if we throw them to the winds, what becomes of civil government?” *Id.*
- 262 *Id.* “If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny.” *United States v. United Mine Workers*, 330 U.S. 258, 312 (1947) (Frankfurter, J.); see also Curt A. Levey & Kenneth A. Klukowski, *Take Care Now: Stare Decisis and the President's Duty to Defend Acts of Congress*, 37 HARV. J. L & PUB. POL'Y 377, 380 (2014) (leaving the enforcement or defense of laws to the subjective whim of each administration is a “recipe for chaos”).
- 263 ABA Paper, *supra* note 252, at 5. The ABA paper quoted U.S. Court of Appeals Judge Diane Wood. See Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 457 (2003).
- 264 ABA Paper, *supra* note 252, at 5.
- 265 *Id.*
- 266 *Id.* at 6.
- 267 D. Brooks Smith, *Promoting the Rule of Law and Respecting the Separation of Powers: The Legitimate Role of the American Judiciary Abroad*, 7 AVE MARIA L. REV. 1, 1 (2008) (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 284 (Peter Laslett ed., 1988)).
- 268 MCCLELLAN, *supra* note 253, at 353 (“[T]he Constitution rested on the proposition that all constitutional government is by definition limited government.”).

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- 269 See LUTZ, *supra* note 193, at 15; see also McClellan, *supra* note 253, at 353.
- 270 THE FEDERALIST NO. 51, at 318-19 (James Madison) (Clinton Rossiter ed., 2003).
- 271 THE FEDERALIST NO. 48, at 298 (James Madison) (Clinton Rossiter ed., 2003).
- 272 MCCLELLAN, *supra* note 253, at 353.
- 273 *Id.* In Federalist No. 51, Madison explained the basis of the fear that people in power, if left unrestrained and unchecked, would abuse their authority. THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003). “If men were angels no government would be necessary.” *Id.* Men (and women) are not angels and, thus, we must “enable the government to control the governed, and in the next place oblige itself to control itself.” *Id.*
- 274 Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL’Y 1, 6 (1993). Another important component of limited government is that there are limits on governments even when they are acting within their delegated sphere because all law is subject to a higher law. LUTZ, *supra* note 193, at 15. For example, the Declaration of Independence recognizes that certain rights are inalienable and thus cannot be taken away by government. *Id.* Martin Luther King, Jr., in his Letter from the Birmingham Jail echoed this same truth when he stated that “there are two types of laws: There are *just* and there are *unjust* laws.” Martin Luther King, Jr., *Letter from Birmingham City Jail* 7 (1963), [http://okra.stanford.edu/transcription/document\\_images/undecided/630416-019.pdf](http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf). He explained that a “just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law.” *Id.*
- 275 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).
- 276 *Genesis* 1:27.
- 277 *Psalms* 139:13.
- 278 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., dissenting).
- 279 *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007) (“The Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb.”).
- 280 *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833, 913 (1992) (Stevens, J., concurring) (“After analyzing the usage of ‘person’ in the Constitution, the Court concluded that that word ‘has application only postnatally.’”); *id.* at 913 (“Thus, as a matter of federal constitutional law, a developing organism that is not yet a ‘person’ does not have what is sometimes described as a ‘right to life.’”).
- 281 *Id.* at 846.
- 282 *Id.* (“These principles do not contradict one another ....”).
- 283 *Ecclesiastes* 11:5 (English Standard) (“As you do not know the way the spirit comes to the bones in the womb of a woman with child, so you do not know the work of God who makes everything.”); see also *Genesis* 9:6 (English Standard) (“Whoever sheds the blood of man, by man shall his blood be shed, for God made man in his own image.”).
- 284 See, e.g., *Job* 31:15; *Psalms* 139:13; *Isaiah* 44:2, 24; *Isaiah* 49:5; *Jeremiah* 1:4.
- 285 *Casey*, 505 U.S. at 858-59, 869.
- 286 *Roe v. Wade*, 410 U.S. 113, 159 (1973).

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- 287 *Id.* at 159 (“We need not resolve the difficult question of when life begins.”).
- 288 *Fetal Homicide Laws*, NATIONAL CONFERENCE OF STATE LEGISLATORS (Mar. 2015), <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>. Cf. *Hamilton v. Scott*, 97 So. 3d 728, 738 (Ala. 2012) (Parker, J., concurring) (noting that as of 2010, “[a]t least 38 states have enacted fetal-homicide statutes, and 28 of those states protect life from conception”); *State v. Courchesne*, 296 Conn. 622, 733 (2010) (affirming conviction under fetal-homicide statute); *State v. Bauer*, 471 N.W.2d 363 (Minn. Ct. App. 1991) (upholding constitutionality of fetal-homicide statute).
- 289 *Hamilton*, 97 So. 3d at 738.
- 290 *Fetal Homicide Laws*, NATIONAL CONFERENCE OF STATE LEGISLATORS (Mar. 2015), <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>.
- 291 *Ex parte Ankron*, 152 So. 3d 397, 401 (Ala. 2013); *In re Unborn Child*, 683 N.Y.S.2d 366, 370 (N.Y. Fam. Ct. 1998). *But see* *State v. Stegall*, 838 N.W.2d 526 (N.D. 2013) (holding that an unborn child is not protected by child endangerment statutes); *State v. Wade*, 232 S.W.3d 663 (Md. Ct. App. 2007) (refusing to treat unborn child as person for child endangerment statutes).
- 292 *In re Unborn Child*, 683 N.Y.S.2d at 370.
- 293 *Job* 10:18-19; *Jeremiah* 20:17.
- 294 *Hosea* 12:3.
- 295 *Luke* 1:41-45.
- 296 *Exodus* 20:13; *Psalms* 106:37-38 (New American Standard) (“They mingled with the nations and learned their practices .... They sacrificed their sons and their daughters to [ ] demons, and shed innocent blood, the blood of their sons and their daughters, whom they sacrificed to the idols of Canaan; And the land was polluted with blood.”).
- 297 *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833, 851 (1992).
- 298 See Justice Thomas' dissent in *Obergefell* for a discussion of an originalist interpretation of the liberty guarantee. He explains that it was to protect against improper physical restraints, not to protect the right of people to define the mystery of human life. *Obergefell v. Hodges*, 135 S. Ct. 2554, 2631-37 (2015) (Thomas, J., dissenting). Similarly, Justice Roberts' dissent discusses how the *Obergefell* majority usurped legislative powers. *Id.* at 2611-12 (Roberts, J., dissenting).
- 299 *Liberty*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828).
- 300 *Id.* (emphasis added).
- 301 See *supra* notes 170-73 & accompanying text.
- 302 Titus, *supra* note 23, at 328-29.
- 303 *Obergefell*, 135 S. Ct. at 2607-08; *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).
- 304 *John* 8:1-11. The Pharisees had caught a woman in adultery and wanted to stone her to death. *Id.* Jesus forgave the woman and admonished her to sin no more--implying through the grant of forgiveness and admonition that adultery constituted sinful conduct. *Id.*
- 305 See, e.g., *Deuteronomy* 22:13-28 (New American Standard) (stating that sexual relations before marriage was referred to as “an act of folly” and constituted a capital offense); *1 Corinthians* 6:9 (New International) (“Neither the sexually immoral nor idolaters nor adulterers ... will inherit the kingdom of God.”); *2 Corinthians* 12:21 (New International) (“I will be grieved over many who have sinned earlier and have not repented of the impurity, sexual sin and debauchery in which they have indulged.”); *Galatians* 5:9 (New International) (“The acts of the sinful nature are obvious: sexual immorality, impurity ....”);

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- Hebrews* 13:4 (New International) (“Marriage should be honored by all, and the marriage bed kept pure, for God will judge the adulterer and all the sexually immoral.”).
- 306 *Romans* 1:26.
- 307 *Romans* 1:25-27.
- 308 See *Genesis* 2:24 (New International) (“[A] man leaves his father and mother and is united to his wife, and they become one flesh.”). Jesus reaffirmed this in *Matthew* 19:3-5, expressly referring back to the Genesis account when answering the Pharisees’ question about divorce.
- 309 John Piper, *A Metaphor of Christ and the Church*, DESIRING GOD (February 12, 1984), <http://www.desiringgod.org/articles/a-metaphor-of-christ-and-the-church>.
- 310 Gary Galles, *Lord Acton on Liberty and Government*, MISES INSTITUTE (NOV.. 5, 2002), <https://mises.org/library/lord-acton-liberty-and-government>; Alan Keyes, *Freedom Means Having the Choice, Liberty Means Using it to Do Right*, THE DAILY CALLER (Feb. 26, 2015), <http://dailycaller.com/2015/02/26/freedom-means-having-the-choice-liberty-means-using-it-to-do-right/2/>.
- 311 *Obergefell v. Hodges*, 135 S. Ct. 2554, 2601 (2015).
- 312 *Id.* at 2602.
- 313 *Id.* at 2594, 2599.
- 314 *Id.* at 2602.
- 315 *Id.* at 2604.
- 316 *Id.* at 2597.
- 317 *Obergefell*, 135 S. Ct. at 2631 (Thomas, J., dissenting) (referring to the Declaration of Independence for his assertion that “human dignity is innate”).
- 318 *Id.* at 2627 (Scalia, J., dissenting).
- 319 See Dana Bell, *A Republic if You Can Keep It*, LIBRARY OF CONGRESS (Sept. 8, 2016), <https://blogs.loc.gov/teachers/2016/09/a-republic-if-you-can-keep-it/>.

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