

November 2013

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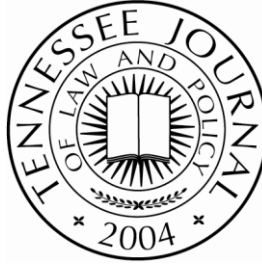
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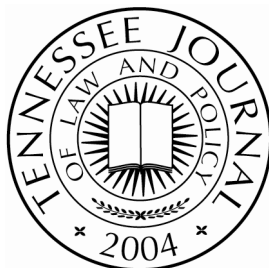
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ARTICLE

**MODELS FOR USE OF MEDIATION IN  
E-DISCOVERY**

*By: Steven C. Bennett\**

Many commentators and courts suggest that cooperative approaches to e-discovery planning hold the key to lower-cost, higher-quality e-discovery processes.<sup>1</sup> Yet, admonitions to cooperate hardly suffice to motivate self-interested parties.<sup>2</sup> Some system to foster cooperation

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\*The author is a partner at Park Jensen Bennett LLP in New York. The views expressed are solely those of the author, and should not be attributed to the author's firm or its clients.

<sup>1</sup> See JAY E. GRENIG & JEFFREY S. KINSLER, HANDBOOK OF FEDERAL CIVIL DISCLOSURE: E-DISCOVERY AND RECORDS § 4.19 (3d. ed. 2013) (noting that cooperative approaches represent a “significant attempt to do something about the rapidly escalating costs of civil litigation”); CAROLE BASRI & MARY MACK, E-DISCOVERY FOR CORPORATE COUNSEL, Foreword (2013) (noting “paradigm shift” in e-discovery process, toward cooperation); Daniel B. Garrie & Edwin A. Machuca, *E-Discovery Mediation And The Art Of Keyword Search*, 13 CARDOZO J. CONFLICT RESOL. 467, 472 (2012) (effective e-discovery requires that “attorneys share their understanding of the case and the technology with opposing counsel”); See also The Sedona Conference Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009); The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 361 (2009) (prisoner's dilemma may break down where “actors involved must repeatedly face the same or similar decisions” and each side “must evaluate the risk of the other side responding with similar conduct during a subsequent ‘round’”).

<sup>2</sup> See Hon. David J. Waxse, *Cooperation—What Is It and Why Do It?*, 18 RICH J.L. & TECH. 8, 15 (2012) (despite Sedona Cooperation Proclamation and “numerous [judicial] opinions,” it appears that “cooperation is not being used enough”); Hon. Nora Barry Fischer & Richard N. Lettieri, *Creating the Criteria and the Process for Selection of E-Discovery Special Masters in Federal Court*, 58:2 THE FED. LAWYER 36, 37 (2011) (where not addressed early, ESI issues “often

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beyond the parties themselves appears essential.<sup>3</sup> One system proposed as a means to promote e-discovery cooperation involves the use of mediation.<sup>4</sup> This Article outlines an array of mediation techniques that could be used for that purpose.

### **Mediation Alternatives**

The term “mediation” encompasses a broad array of processes<sup>5</sup> and techniques.<sup>6</sup> In general, mediation is meant

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come up later in the proceedings, causing unnecessary delays and expensive e-discovery motions”); Kathleen P. Browe, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 756 (1994) (lack of cooperation “backs up already overloaded trial dockets,” affecting the “efficiency of the entire judicial process,” and leading to “a decline in public respect for the legal profession”).

<sup>3</sup> See generally Hon. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989) (judges can do little about discovery abuse when parties control the discovery process themselves); John Setear, *The Barrister and the Bomb: The Dynamics Of Cooperation, Nuclear Deterrence And Discovery Abuse*, 69 B.U. L. REV. 569 (1989).

<sup>4</sup> See generally Steven C. Bennett, *Mediation As A Means To Improve E-Discovery Cooperation*, 23:2 ALB. L. J. OF SCI. & TECH. (forthcoming 2014).

<sup>5</sup> See Kyle Beardsley, *Using The Right Tool For the Job: Mediator Leverage And Conflict Resolution*, 2 PENN STATE J. L. & INT’L AFF. 57, 57-58 (2013) (noting that mediation may include functions such as “mere hosting of talks, substantive participation in the negotiations, shuttle diplomacy, or heavy-handed involvement;” mediators must “tailor the level of leverage” applied to “needs of the situation”). See also Thomas Stipanowich & J. Ryan Lamare, *Living With ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, Pepperdine Law Paper No. 2013/16, www.ssrn.com (2013) (noting “diverse array” of dispute resolution options, including mediation, mini-trial, fact-finding, court-annexed non-binding arbitration, and early neutral evaluation); Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371 (2009) (noting “dozens” of dispute resolution processes, including psycho-educational programs, collaborative law, mediation, judicially

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to facilitate communication, promote party-created solutions, and help clarify issues—all with the assistance of a neutral third party.<sup>7</sup> Mediation as a set of tools may serve a variety of goals and adapt to a variety of circumstances.<sup>8</sup> What follows is a sampling of mediation-related techniques, generally arrayed from least intrusive (and least expensive), to more formal (and thus more resource and

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moderated settlement conferences, and high conflict interventions); Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 128 (2009) (suggesting use of multiple processes for dispute resolution, with ability of parties to “loop” back or forward, as necessary, to different systems).

<sup>6</sup> See Susan Nauss Exon, *The Effects That Mediator Styles Impose On Neutrality And Impartiality Requirements Of Mediation*, 42 U.S.F. L. REV. 577, 578 (2008) (most agree that mediation involves “a neutral and impartial third party who assists others in resolving a dispute,” but mediation involves “varying styles, techniques, and orientations”); Kyle C. Beardsley, David M. Quinn, Bidisha Biswas & Jonathan Wilkenfeld, *Mediation Style And Crisis Outcomes*, 50 J. CONFLICT RESOL. 58, 69 (2006) (noting facilitation, formulation and manipulation as among alternative “styles” of mediator activity).

<sup>7</sup> See ABA, Model Standards of Conduct for Mediators, Preamble, AMERICANBAR.ORG (2005), available at [www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf).

(mediation is “a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties;” mediation “serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements”).

<sup>8</sup> See Stephanie Smith & Janet Martinez, *An Analytic Framework For Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 129-30 (2009) (design of system depends on “goals,” which may include efficiency, fairness, satisfaction and other factors); CATHY A. CONSTANTINO & CHRISTINA SICKLES-MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS*, 41 (1996) (system design requires consideration of whether ADR is appropriate, choice of process appropriate to particular problem, and making sure participants have necessary knowledge and skill to use ADR system).

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time intensive).<sup>9</sup> These techniques may also be arrayed on a continuum from “facilitative” to “evaluative” in nature.<sup>10</sup>

(1) **Education:** Despite the long period in which the Internet, e-mail and other technologies have become integrated into daily life, ignorance of best practices in e-discovery remains a problem for the legal profession.<sup>11</sup> Technology savvy mediators can provide an education function for counsel and parties, even without becoming

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<sup>9</sup> This is not to suggest that the spectrum of processes necessarily must flow from “easiest” to “hardest” cases. Simple dispute resolution techniques often work well in some of the most complicated disputes; and the reverse is also true. See William Ury, *Getting Disputes Resolved: Designing Systems To Cut The Costs Of Conflict* (1988) (ease of dispute resolution depends on focus on interests, or rights, or power—in ascending order—to determine degree of difficulty in resolving dispute).

<sup>10</sup> See Dwight Golann, *Variations In Mediation: How—And Why—Legal Mediators Change Styles In The Course Of A Case*, 2000 J. OF DISP. RESOL. 41, 44 (2000) (presenting “grid” of mediation practices, from facilitative to evaluative). See also Leonard L. Riskin, *Decisionmaking In Mediation: The New Old Grid And The New New Grid System*, 79 NOTRE DAME L. REV. 1, 5 (2003) (noting various types of mediation, including evaluative, facilitative and transformative systems); Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

<sup>11</sup> See Mikki Tomlinson, *Attacking eDiscovery Ignorance In 2013*, (Nov. 29, 2012), available at [www.somansatech.com/2013/company/eng\\_news\\_view.php?id=1](http://www.somansatech.com/2013/company/eng_news_view.php?id=1).

(suggesting that poor cooperation efforts in e-discovery “oftentimes boils down to eDiscovery ignorance”); John M. Barkett, *The 7th Circuit E-Discovery Pilot Project: What We Might Learn and Why It Matters to Every Litigant in America*, ABA SECTION OF LITIGATION NEWS (Dec. 2011), available at [www.apps.americanbar.org/litigation/litigationnews/mobile/docs/barkett.t.december11.pdf](http://www.apps.americanbar.org/litigation/litigationnews/mobile/docs/barkett.t.december11.pdf) (“Without better education, e-discovery may not be managed fairly or frugally, and certainly not quickly.”).

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deeply involved in a matter.<sup>12</sup> For example, a court might establish a “hot-line” system with trained court staff or volunteer mediators who are available to answer basic questions about the court’s rules and expectations regarding e-discovery and technology. The system might also provide information about essential forms, such as “clawback” agreements and confidentiality orders,<sup>13</sup> and

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<sup>12</sup> See PATRICIA KUTZA, *NEW SAN FRANCISCO FORUM PROMOTES E-DISCOVERY MEDIATION* (Oct. 23, 2013), *available at* [www.lawtechnologynews.com/id=1202624724121?slreturn=20140224132046](http://www.lawtechnologynews.com/id=1202624724121?slreturn=20140224132046) (mediators can serve as “an antidote for the lack of e-discovery training in law schools”); DANIEL B. GARRIE & SALVATORE SCIBETTA, *WE NEED MEDIATION IN E-DISCOVERY* (June 5, 2013), *available at* [www.law360.com/articles/445869/we-need-mediation-in-e-discovery](http://www.law360.com/articles/445869/we-need-mediation-in-e-discovery) (mediator serves as “listener and translator,” to “translate the technical underpinnings of each party’s systems into actionable discovery efforts that both parties can comprehend”); Daniel B. Garrie & Edwin A. Machuca, *E-Discovery Mediation And The Art Of Keyword Search*, 13 *CARDOZO J. CONFLICT RESOL.* 467, 469-70 (2012) (“technically proficient” neutral may be required where parties and courts are unfamiliar with “latest methods” of searching for and processing electronic information); David Cohen & Claire Covington, *E-Discovery: Liaisons Are Key to Discovery Success*, *INSIDE COUNSEL* (Aug. 7, 2012), [www.insidecounsel.com/2012.com/2012/08/07/e-discovery-liasons-are-key-to-discovery-success](http://www.insidecounsel.com/2012.com/2012/08/07/e-discovery-liasons-are-key-to-discovery-success) (subject matter experts necessary “given that most lawyers and judges have little training in the technical issues surrounding ESI”); Hon. Nora Barry Fischer & Richard N. Lettieri, *Creating the Criteria and the Process for Selection of E-Discovery Special Masters in Federal Court*, 58:2 *THE FED. LAW.* 36 (2011) (Rule 26(f) conferences have “generally remained ineffective where counsel “lack the technical skill and experience necessary to facilitate effective resolution” of ESI issues). See also Richard N. Lettieri, *WHAT IS E-MEDIATION, AND WHY MIGHT I WANT TO RECOMMEND IT TO MY CLIENT?*, (2010), *available at* [www.lettierilaw.com/documents/emediationseptember-2010-Newsletter.pdf](http://www.lettierilaw.com/documents/emediationseptember-2010-Newsletter.pdf). (counsel “unfamiliar with ESI” may benefit from use of mediator).

<sup>13</sup> See Robert B. Yegge, *Divorce Litigants Without Lawyers*, 28:3 *FAM. L.Q.* 407, 415 (Fall 1994) (telephone hotline system can be used on “on-demand” basis to provide information not available from workshops and other public education). Similar systems are often set

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information regarding court-connected mediation services.<sup>14</sup> A courthouse “ombudsman” might provide similar services.<sup>15</sup>

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up as ethics hotlines. See Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731, 737 (2002) (noting bar ethics committees that “field questions over the telephone, including, in some cases, via an ‘ethics hotline’”). See also Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation In A Non-Adversarial Approach To Problem-Solving*, 28 FORDHAM URB. L.J. 935, 950 (2001) (noting that “nearly every bar association has a committee or program focused on the civility of lawyers”).

<sup>14</sup> See Jacqueline Nolan-Haley, *Lawyers, Clients And Mediation*, 73 NOTRE DAME L. REV. 1369, 1373 (1998) (“Many lawyers simply lack a basic understanding of the mediation process, the premises and values which drive it, and the creative outcomes which are possible.”).

<sup>15</sup> Traditionally in European systems, ombudsman programs have focused on government agencies, rather than courts. See Diana Douse, *MEDIATION AND OTHER ALTERNATIVES TO COURT*, www.parliament.uk (June 6, 2013) (noting use of ombudsman as “independent and impartial means of resolving certain disputes outside the courts;” the ombudsman may deal with “complaints” regarding “public bodies and private sector services”); Stephanie Smith & Janet Martinez, *An Analytic Framework For Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 1401, 1447 (2009) (ombudsman system involves “[a] third party within an organization who deals with conflicts on a confidential basis and gives disputants information on how to resolve the problem at issue”). Courts in the U.S., however, have begun to experiment with such programs. See Michele Bertran, *Judiciary Ombudsman: Solving Problems In The Courts*, 29 FORDHAM URBAN L.J. 2099, 2108 (2002) (New Jersey program offers public information, including “educational literature, videos and a website,” and citizen assistance, including “investigation and resolution of complaints”); Robert B. Yegge, *Divorce Litigants Without Lawyers*, JUDGES JNL. 8, 10 (Spr. 1994) (noting use of courthouse ombudsmen, who “distribute self-help form packets,” and conduct workshops to give instruction to groups of litigants). The mediation functions described here generally fit the concept of an ombudsman. See Martin A. Frey, *Alternative Methods Of Dispute Resolution* 5, 12 (2003) (“third party” assistance in dispute resolution may include “ombuds” system; such a system can help parties take “corrective action” before problems become “much more difficult to address”); KARL SLAIKEU & RALPH



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(2) **Needs Assessment**: Cases vary, and so do e-discovery problems; the capacity of parties and counsel to resolve such problems varies as well. A system of assessment—not of the merits of the dispute, or even of the relative positions of the parties regarding e-discovery matters—aimed at determining whether the parties are well prepared to cooperate in the case,<sup>16</sup> and identifying the kinds of resources that would best serve the needs of the parties, might be offered as a form of “triage.”<sup>17</sup> A

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HASSON, CONTROLLING THE COSTS OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION 94 (1998) (ombudsman provides a “neutral, confidential, readily available resource (usually available in person, by telephone, email, or some other direct means) to assist parties in self-help, troubleshooting (via coaching), informal shuttle diplomacy, and sometimes convening of the parties to help them select from options such as informal mediation or other higher resources”); Shirley A. Wiegand, *A Just And Lasting Peace: Supplanting Mediation With The Ombuds Model*, 12 OHIO ST. J. ON DISP. RESOL. 95 (1996) (ombudsman system embodies mediation, with additional capabilities). As a neutral third party, moreover, an ombudsman could help reinforce a culture of civility within the e-discovery process. Cf. Michele Bertran, *Judiciary Ombudsman: Solving Problems In The Courts*, 29 FORDHAM URBAN L.J. 2099, 2103 (2002) (ombudsman investigations may include questions of “discourteous behavior or incivility”).

<sup>16</sup> See John M. Lande, *The Movement Toward Early Case Handling In Courts And Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81, 82 (2008) (“parties may not feel ready to settle, or even work together, right away”); Phillip M. Armstrong, *Why We Still Litigate*, 8 PEPP. DISP. RESOL. L.J. 379, 380-81 (2008) (noting that culture, ego, emotion and other barriers may prevent parties from settling disputes outside court proceedings); Craig A. McEwen, *Employing The Law To Increase The Use Of Mediation And To Encourage Direct And Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 838 (1998) (reviewing factors that may inhibit parties from using mediation early in litigation process); Robert A. Baruch Bush, *What Do We Need a Mediator for? Mediation’s “Value-Added” for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 7-12 (1996) (noting barriers to negotiation that mediation can help manage).

<sup>17</sup> See Salem, *supra* note 5, at 372 (suggesting the use of “triage,” where the “most appropriate” form of ADR service can be identified

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mediator, for example, could help identify gaps in knowledge that, if corrected, could lead to enhanced cooperation<sup>18</sup> and creative solutions.<sup>19</sup> Such a system might require interviews or could be conducted through a written questionnaire, perhaps even an on-line service.<sup>20</sup> The system might also focus on helping parties identify reasonable timetables for discovery<sup>21</sup> and help identify cases with specific forms of e-discovery related case management problems.<sup>22</sup> The neutral might determine that

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“on the front end” of a case, to reduce burden, provide more effective services, and more efficiently use scarce court resources).

<sup>18</sup> See Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in E-Discovery*, 60 MERCER L. REV. 983, 1002 (2008) (that stating discovery abuses often happen because “attorneys do not understand the complex technologies involved,” and “acting out of ignorance and fear, they do not cooperate”).

<sup>19</sup> Garrie & Machuca, *supra* note 1, at 474 (neutral may assist where parties have failed to “secur[e] legal counsel with the requisite technological acumen”); See Mike Hamilton, *E-Discovery Court Pilot Programs: E-Discovery Templates That Legal Teams Should Utilize*, E. DISCOVERY BEAT (Feb. 23, 2012), <http://www.exterro.com/e-discovery-beat/2012/02/23/e-discovery-court-pilot-programs-e-discovery-templates-tht-legal-teams-should-utilize/> (stating that neutral can “provide the necessary skill and expertise to help expedite the e-discovery process by quickly identifying practical and fair solutions”).

<sup>20</sup> Bruce L. Mann, *Smoothing Some Wrinkles In Online Dispute Resolution*, 17 Int’l J. of Law & Info. Tech., no. 1 at 83 (2009) (introducing concept of “expert-peer online assessment” of disputes as means to resolve conflicts). See Salem, *supra* note 5, at 380 (stating that triage system would involve initial screening or interviews by neutral who could help identify the service that will “best meet the needs” of the parties).

<sup>21</sup> See Stephen F. Gates, *Ten Essential Elements Of An Effective Dispute Resolution Program*, 8 PEPP. DISP. RESOL. L.J. 397, 398 (2008) (“Much of the cost of litigation is a function of cycle time from case inception to final resolution, and all steps in the management process should be focused on reducing this cycle time.”).

<sup>22</sup> See Lande, *supra* note 16, at 91 (noting use of systems for “early screening of cases” to provide “early warning of potential case management problems, even before developing a scheduling order”) (quotation omitted). Such a system might also operate through a

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no form of mediation would assist the parties in the case and direct the parties to the normal court processes.<sup>23</sup> As in all mediation, the needs assessment recommendation would be non-binding.<sup>24</sup>

(3) **Facilitating Discussion**: A mediator who concentrates on facilitating discussion between parties,<sup>25</sup> as opposed to evaluating a matter or helping parties structure a

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“differential” case management system, helping to designate cases as “expedited, standard, [or] complex,” for example, *id.* at 94. *See also* Frank E. Sander & Lukasz Rozdeiczer, *Matching Cases And Dispute Resolution Procedures: Detailed Analysis Leading To A Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1 (2006) (proposing framework for matching cases to ADR processes); Frank E.A. Sander & Stephen B. Goldberg, *Fitting The Forum To The Fuss: A User-Friendly Guide To Selecting An ADR Procedure*, 10 NEGOT. J. 49 (1994).

<sup>23</sup> *See* William J. McLean, *Beware Masters In E-Discovery*, LAW.COM (Aug. 21, 2008) <http://www.alm.law.com/jsp/article.jsp?id=1202423953864> (noting potential circumstances where “no amount of cajoling could stop the tactical flood of discovery motions”). *See also* FAQ: *How Do I Know When To Use E-Mediation Versus A Special Master?*, ACESIN.COM (2011) <http://www.acezin.com/index.php?q=node/115> (“if there is such [a] breakdown in communication that the parties cannot even agree that the sky is blue, then more likely the parties need a special master to act as referee and ‘make the calls’”).

<sup>24</sup> *See* Nancy A. Welsh, *The Thinning Vision Of Self-Determination In Court-Connected Mediation: The Inevitable Price Of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 16 (2001) (noting importance of “self-determination” as central element of mediation).

<sup>25</sup> *See* Exon, *supra* note 6, at 591 (explaining that facilitator “encourages party attendance, facilitates communication, poses questions to uncover the parties’ underlying needs and interests, helps educate the parties by assisting them to understand the other’s needs and interests, and otherwise attempts to provide a comfortable forum in which the parties can develop their own creative solutions to a problem”).

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resolution, can serve an important purpose.<sup>26</sup> In the discovery context, merely ensuring that parties communicate about essential issues in a courteous manner can aid the process.<sup>27</sup> For example, a mediator whose role in a conference consists of helping with scheduling the conference and ensuring a professional tone in the discussion might require very little preparation regarding the substance of the dispute.<sup>28</sup> A mediator might also encourage parties to bring together their technical

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<sup>26</sup> See Fischer, *supra* note 2, at 37 (suggesting use of “facilitator” to lead discussions on ESI issues, where attorneys are unable or unwilling to proceed with e-discovery conference).

<sup>27</sup> See Daniel B. Garrie, *Redefining The Discovery Terrain: The Need For Mediation In E-Discovery, Part III*, L & FORENSICS (Nov. 28, 2013) <http://www.lawandforensics.com/redefining-discovery-terrain-need-mediation-e-discovery-3/> (function of mediator to “facilitate cooperation” and “open” dialogue); Kutza, *supra* note 12 (stating that mediators can “primarily work on getting the dialogue going,” versus “shuttle diplomacy” of conventional settlement negotiations) (quoting Michael Carbone).

<sup>28</sup> See Ron Kilgard, *Discovery Masters: When They Help—And When They Don't*, ARIZ. ATT., Apr. 2004, at 30, 34 (Apr. 2004) (“the mere fact of having to discuss these issues in person with the master present, and not in angry faxes and e-mails written late at night, has a taming effect on the lawyers”); Allison O. Skinner, *The Role Of Mediation For ESI Disputes*, THE ALA. LAW, Nov. 20, at 425, 426, (Nov. 2009) (“Often, discovery battles can result in an exchange of potentially inflammatory correspondence that may be used as an exhibit to [a] motion to compel or motion for protective order. . . . Mediating the e-discovery dispute allows the litigants to make proposals confidentially.”). See also Angela Garcia, *Dispute Resolution Without Disputing: How The Interactional Organization Of Mediation Hearings Minimizes Argument*, 56 SOC. REV. 818 (1991) (noting that mediation “constrains the presentation of accusations and denials” in negotiation); Lande, *supra* note 16, at 92 (facilitator may help with “reduction of partisan psychology; prevention of conflict escalation; and creation of a mandatory event that overcomes logistical barriers to negotiation”).

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personnel to address creative solutions to e-discovery problems in a case.<sup>29</sup>

**(4) Structuring Negotiations:** A mediator may aid parties by bringing an agenda for discussion to the process.<sup>30</sup> In the e-discovery context, at the outset of a

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<sup>29</sup> See Kenneth J. Withers, *E-Discovery In Commercial Litigation: Finding A Way Out Of Purgatory*, 2 J. CT. INNOV. 13, 22 (2009) (suggesting that, “if you can get the IT people from both parties together in a room, they will often solve problems that the lawyers thought were insurmountable”); Mary Mack, *Litigation Prenups, E-Discovery ADR And The Campaign For Proportionality*, METROPOLITAN CORP. COUNS. (May 3, 2010) <http://www.metrocorpounsel.com/weticles/12510/mary-mack-litigation-prenups-e-discovery-adr-and-campaign-propor+ionality> (“There is a great advantage in having the ‘meet and confer’ take place under the cloak of mediation. It keeps the discussion and the written offers to compromise confidential. Mediation also provides a cloak of confidentiality for the IT people. This makes it possible for the IT people to talk more openly because they are not on the record.”); Peter S. Vogel, *E-Neutrals, E-Mediation And Special Masters: An Introductory Guide*, LEXOLOGY.COM (July 2, 2012), <http://www.lexology.com/library/detail.aspx?g=e5fcfc29-8666-40df-92c0-9ef088102ecc> (suggesting that mediator require parties to indicate who will attend mediation sessions to provide “technical support” concerning ESI issues). The mediator may also remind parties that all mediation discussions are confidential; Allison Skinner & Peter Vogel, *E-Mediation Can Simplify E-Discovery Disputes*, AM. LAW. (Sept. 23, 2013) <http://www.americanlawter.com/id=1202620012101/E-Mediation-Can-Simplify-E-Discovery-Disputes?slreturn=201401214201708> (stating that mediators may work with IT personnel to educate them about their role in the e-discovery process, and use “confidential caucus” to communicate ideas, without an inquiry being “misinterpreted as a weakness”).

<sup>30</sup> See Allison O. Skinner, *How To Prepare An E-Mediation Statement For Resolving E-Discovery Disputes*, (2009) <http://smu-e-commerce.gardere.com/allison%20soskinner%20preparing%20for%20e-mediation%20discovery.pdf> (using pre-mediation submissions, mediator can identify “areas of mutuality” that can be “readily disposed of,” so that parties may thereafter focus on solutions to “more challenging issues”). One very simple task for a mediator would consist

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case, many basic issues (preservation of evidence, search techniques, and privilege protection, to name a few) constitute essential elements for negotiation.<sup>31</sup> Yet, one common phenomenon is the “drive by” Rule 26(f) conference, where counsel “meet and confer” in name only.<sup>32</sup> A mediator might insist on discussion of all essential topics<sup>33</sup> with the aim of creating a comprehensive

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of identifying immediate areas of agreement between the parties. Indeed, online systems have been developed to facilitate these kinds of basic agreements. See Noam Ebner, Bryan Hanson & Arthur Pearlstein, *ODR In North America*, ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE: A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 431, 447 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds. 2012) (describing online system where parties “inform the platform of their real preferences and priorities, beyond what they are willing to share with the opposite party,” where software can “conduct an analysis of the agreement to see if it maximizes each party’s gains” and one can imagine adaptation of such processes to the e-discovery field.)

<sup>31</sup> See Robert A. Cole, *E-Discovery Increases Possibility Of Mediated Resolutions*, DAILY BUS. REV. (Oct. 3, 2012) <http://www.uww-adr.com/zgraph-content/uploads/2012/10/Bob-Cole.pdf> (explaining that outlining an agenda for conducting e-discovery mediation may include crafting agreements on preservation and collection protocols, including sampling and search techniques).

<sup>32</sup> See Craig Ball, *Musings On Meet And Confer*, CRAIG D. BALL, P.C. (2007) [http://www.craigball.com/Musings\\_on\\_Meet\\_and\\_Confer.pdf](http://www.craigball.com/Musings_on_Meet_and_Confer.pdf) (noting phenomenon of “drive-by event with no substantive exchange of information”); Michael Collyard, *E-Discovery: Avoiding Drive By “Meet & Confers,”* INSIDE COUNSEL (Sept. 13, 2011) <http://www.insidecounsel.com/2011/09/13/e-discovery-avoiding-drive-by-meet-confers?> See also Emery G. Lee III & Thomas E. Willging, FED. JUDICIAL CTR., NATIONAL CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 15 (2009) (FJC study indicates that only half of attorney respondents included discussion of ESI in Rule 26(f) conferences, and only one in five court-ordered discovery plans included provisions relating to ESI).

<sup>33</sup> See Peter S. Vogel, *The Role Of e-Mediation In Resolving ESI Disputes*, (Oct. 29, 2012) <http://www.disputingblog.com/guest-post-the-role-of-e-mediation-in-resolving-esi-disputes-in-federal-court->

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e-discovery plan for the case.<sup>34</sup> Where the parties have otherwise agreed on the e-discovery schedule and plan, the mediator might focus on more difficult issues, such as creating a search term protocol.<sup>35</sup> Parties might also agree on a process for resolving future e-discovery disputes.<sup>36</sup>

**(5) Screening Motions:** Litigants are generally must certify that they have “met and conferred” in good

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interview-with-allison-skinner/ (noting that “most meet and confers are ineffective;” mediator may act with “court sanctioned checklist” of issues to discuss); Ronald J. Hedges, *The Sedona Conference Points The Way Toward Control Of The Costs And Burden Of E-Discovery*, 59 FED. LAW. 46, 47 (2012) (suggesting use of mediators and court-appointed experts to assist in “good faith” process of “meet and confer”); Zachary Parkins, *Electronic Discovery: Why The Appointment Of Special Masters In All Large Electronic Discovery Disputes Is Vital To The Process Of American Civil Justice*, AM. J. MEDIATION 97, 104 (2011) (suggesting role for mediator where parties do not prepare for Rule 26(f) conference “in an effective way”).

<sup>34</sup> See Allison O. Skinner, *Alternative Dispute Resolution Expands Into Pre-Trial Practice: An Introduction To The Role Of E-Neutrals*, 13 CARDOZO J. CONFLICT RESOL. 113, 125 (2011) (arguing goal of mediation to create a mediated e-discovery plan). See also, Skinner & Peter Vogel, *supra* note 29 (typically, litigants would agree to e-mediation at the outset of a case, to develop a discovery plan; with the mediator thereafter available to help “break any impasse that may arise”); Robert Hilson, *Neutrals May Ease Anxiety Over Florida’s New E-Discovery Rules*, ACEDS.ORG (Apr. 26, 2012) (neutrals can help “shape discovery plans”) (quoting Lawrence Kolin, mediator); Peter S. Vogel, *Use E-Mediation And Special Masters In E-Discovery Matters*, LAW.COM (July 5, 2010) (“E-mediation is most effective when initiated at the beginning of litigation, at the outset of discovery. . . . [I]f the parties can agree to the initial [mediated e-discovery plan], this will reduce the number of disputes presented to the trial court.”).

<sup>35</sup> See Daniel B. Garrie & Siddhartha Rao, *Using Technology Experts For Electronic Discovery*, 38 LITIG. 13 (2012) (mediator can “expedite” agreement on search terms, and avoid potential that parties might later “complain” about terms used)

<sup>36</sup> See Cole, *supra* note 31 at 10 (parties may “[c]reate a method for resolving any disputes that may arise over the mediated plan”).

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faith before bringing discovery related motions.<sup>37</sup> The “meet and confer” obligation, however, may be as subject to abuse as any other element of the e-discovery process.<sup>38</sup> Thus, a mediator might help confirm that parties truly have met their obligations to confer in good faith before seeking court assistance.<sup>39</sup> On more complicated, longer-lasting matters, a more permanent system of referral to mediation (akin to dispute resolution boards in construction matters)<sup>40</sup>

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<sup>37</sup> See FED. R. CIV. P. 26(c)(1) (requiring party moving for protective order to certify “good faith” effort to confer “in an effort to resolve the dispute without court action”); FED. R. CIV. P. 37(a) (requiring party moving to compel to certify “good faith” effort to confer “in an effort to obtain [disclosure] without court action.”).

<sup>38</sup> See Nicola Faith Sharpe, *Corporate Cooperation Through Cost-Sharing*, 16 MICH. TELECOMM. & TECH. L. REV. 109, 134-35 (2009) (suggesting that “meet-and-confer requirements will simply play out as the rest of the game does,” unless “rules that support cooperation as a favorable strategy” include “penalties” that counter a “strategy of abuse”).

<sup>39</sup> See Skinner, *supra* note 34, at 128. (“[A]n e-mediation conducted in good faith demonstrates [that] the parties have met their Rule 26 obligations.”); Vogel, *supra* note 34 (mediator could “certify to the court that the parties met and conferred in good faith on the enumerated ESI issues”). See also Mack, *supra* note 29 (suggesting that court could “direct all e-discovery disputes to e-mediation before involving the judge,” which would permit a party to “explain in a setting without the judge why the issue arose in the first place and what was being done to rectify it”).

<sup>40</sup> A dispute review board (which could be a single individual) would aim to identify e-discovery problems as they arise and resolve them before they escalate. See Peter Vogel, *Use eMediation To Save Time And Money*, TEX. LAW. (Sept. 2, 2013) (suggesting that use of mediation “as early in the case as possible” permits mediator to “address eDiscovery matters when they first arise”). Construction-related dispute review boards serve similar purposes. See Ming-Lee Chong & Heap-Yih Chong, *Dispute Review Board: Concept And Introduction To Developing Countries*, 2 INTERSCI. MGMT. REV. 6, 6-7 (2010) (dispute resolution boards, first conceived in the 1950s, have been implemented in virtually all construction areas); *id.* at 7 (board typically created at outset of project, with periodic status meetings and site visits; if conflicts arise, the board can provide “informal” opinions



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might be appropriate.<sup>41</sup> Discussions with a mediator may help sharpen the focus of the parties for presentation to the court of any unresolved issues.<sup>42</sup>

**(6) Neutral Evaluation:** Traditionally, the concept of mediation has not involved evaluation of disputes, but rather facilitation of discussion to resolve disputes.<sup>43</sup> Increasingly, however, the notion of non-

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to help resolve disputes); Smith, *supra* note 5, at 167 (dispute resolution board generally formed at start of construction project, and “meets regularly to follow work progress and to provide guidance to the parties on differences before they become disputes”). The purpose of a dispute review board is to “[create] an atmosphere of trust and cooperation,” James Denning, *More Than An Underground Success*, 63 CIV. ENG. 42 (1993), with the aim of preventing disputes from escalating. See Colleen A. Libbey, *Working Together While “Waltzing In A Mine”*: *Successful Government Construction Contract Dispute Resolution With Partnering And Dispute Review Boards*, 15 OHIO ST. J. ON DISP. RESOL. 825 (2000). See also Kathleen M.J. Harmon, *Effectiveness Of Dispute Review Boards*, 129 J. OF CONSTRUCTION ENG. & MGMT. 674, 676 (2003) (statistics suggesting high levels of success with dispute review boards, resolving disputes before project completion).

<sup>41</sup> See Skinner, *supra* note 34, at 127 (parties may use mediator on “issue-by-issue” basis, “as needed,” where mediator is “familiar with pre-trial activities” in the case and able to address specific issues as they arise).

<sup>42</sup> See Losey, *supra* note 18, at 997 (cooperation means “refinement of disputes and avoidance when possible;” some discovery disputes “may still arise,” but “the issues presented for adjudication will be much more focused and refined”); Hon. W. Royal Furgeson, Jr., Karl Bayer & Elizabeth L. Graham, *E-Discovery And The Use Of Special Masters*, DISPUTING BLOG (2011) (even if not all disputes are resolved, mediation process “provides parties with a better understanding of the key disputes which must be presented to the court”); Skinner, *supra* note 28, at 425 (even if not all conflicts are resolved, mediation permits parties to “illuminate the key disputes to be presented to the court,” without “inflammatory” communications).

<sup>43</sup> See Kimberlee K. Kovach & Lela P. Love, *“Evaluative” Mediation Is An Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not*

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binding evaluations as a part of mediation<sup>44</sup> has taken hold.<sup>45</sup> The neutral evaluation process generally involves each side in litigation presenting a summary of its position, with the neutral evaluator offering an evaluation of the strengths and weaknesses of each party's case.<sup>46</sup> Such an

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*Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997) (analyzing why evaluations do not comport with mediator's essential role).

<sup>44</sup> Some commentators suggest that some degree of evaluation is inherent in the mediation process. See Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying The False Dichotomy: Twenty-First Century Mediation In An Eclectic Regime*, 2000 J. DISP. RESOL. 371, 377 (2000) (noting "continuum," from facilitative to evaluative, for forms of mediation, based on "key determinants" of the needs of the parties, based on their past and current relations, and other factors.); Ellen A. Waldman, *The Evaluative-Facilitative Debate In Mediation: Applying The Lens Of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155, 157 (1998) ("much of what goes by the name of mediation today involves some evaluative activity by the mediator; to construct a definition that excludes most of what the practitioner and lay communities understand to be mediation would spawn needless confusion").

<sup>45</sup> See Robert B. Moberly, *Mediator Gag Rules: Is It Ethical For Mediators To Evaluate Or Advise?*, 38 S. TEX. L. REV. 669, 675 (1997) (suggesting that "mediator evaluation can assist the parties in their self-determination efforts"); Benjamin F. Tennille, Lee Applebaum & Anne Tucker Nees, *Getting To Yes In Specialized Courts: The Unique Role Of ADR In Business Court Cases*, 11 PEPP. DISP. RESOL. L.J. 35, 48 (2010) (mediation may combine "evaluative and facilitative practices to get the best results"); Stipanowich & Lamare, *supra* note 5, at 44 (noting that, in "lawyered" cases, a mode of mediation where "sooner or later, there is some kind of evaluation by a mediator with [a] background as a legal advocate or judge—predominates").

<sup>46</sup> See Daniel B. Garrie, *supra* note 27, part II (mediator may help "educate each party about the reality of their demands"); Smith & Martinez, *supra* note 5, at 166 (neutral case evaluation generally involves a lawyer who "provides an advisory opinion to the parties as to their respective case strengths, weaknesses, and value"); Brian Jarren, *The Future Of Mediation: A Sociological Perspective*, 2009 J. OF DISPUTE RESOL. 49, 50 (2009) (mediator can serve as "agent of reality" when parties reach impasse); Frey, *supra* note 15, at 12 (neutral evaluation "provides the parties and their attorneys with the opportunity

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evaluation may lead to resolution of the conflict or may simply assist with case planning<sup>47</sup> (helping the parties understand the nature of the issues, for example).<sup>48</sup>

(7) **Mediator Facilitated Search**: In some instances,<sup>49</sup> parties and counsel might agree to permit a mediator with substantial technology skills to conduct or supervise a search for responsive records.<sup>50</sup> The mediator's recommendations regarding production of materials to opposing parties, however, would not bind the producing

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to visualize the case from a third party's perspective;" by having "preview of what might happen," parties achieve a "clearer understanding" of settlement issues).

<sup>47</sup> See Gates, *supra* note 21, at 400 (evaluator may be "very helpful in eliminating the 'emotional attachment' that a party may develop in its case and lead to serious negotiations"); Julie Macfarlane, *Culture Change? A Tale Of Two Cities And Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 266 (2002) (mediator may provide parties with "reality check," useful in negotiation). See also Lande, *supra* note 16, at 99 The Wayne D. Brazil, *Early Neutral Evaluation Or Mediation? When Might ENE Deliver More Value?*, 14 DISP. RESOL. MAG. 10 (2007).

<sup>48</sup> See Riskin & Welsh, *supra* note 15, at 892 n. 44 (noting that, in some forms of mediation, it is "common" to have a separate stage [where] the mediator conducts a 'conflict analysis,' and 'reports to the parties 'what the conflict is''') (quoting Interview with mediator Howard Bellman, in Dedham, Mass. (June 18, 2006)).

<sup>49</sup> See Garrie & Rao, *supra* note 35 (suggesting that, in some cases, "[c]ooperative efforts and the expeditious selection of keywords are hampered" by "adversarial zeal" of attorneys).

<sup>50</sup> See Garrie & Rao, *supra* note 35 (mediator may conduct search, or may simply "ensure that appropriate documents are produced at a reasonable price respective to the underlying issue"); Marian Riedy, Suman Beros & Kim Sperduto, *Mediated Investigative E-Discovery*, 2010 FED. CTS. L. REV. 79, 79-81 (2010) (outlining process for neutral with skills of "trained digital investigator" to "search and retrieve relevant information," in a manner similar to an "in-house expert," but with both parties sharing the expense).

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party.<sup>51</sup> In essence, the mediator would simply come to learn more about the circumstances of the parties' data systems and records, which could improve the mediator's ability to make competent recommendations.<sup>52</sup> Whether this relatively intrusive process constitutes "mediation" is debatable.<sup>53</sup> Certainly, a specific agreed-upon protocol for the endeavor would be essential.<sup>54</sup>

## **Conclusion**

Mediation constitutes a generally accepted mechanism for dispute resolution.<sup>55</sup> Mediation processes are regularly incorporated into court-annexed ADR systems<sup>56</sup> and are often chosen by parties as a means for

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<sup>51</sup> See Marian Riedy, Suman Beros & Sperduto, *supra* note 50, at 98-99 (system proposed would prevent mediator from producing information if party does not agree to produce).

<sup>52</sup> See Marian Riedy, Suman Beros Sperduto, *supra* note 50, at 97 (suggesting that the "standard" mediation process does not suffice, "because the mediator is only aware of the information the parties voluntarily disclose").

<sup>53</sup> See Skinner, *supra* note 34, at 128 n. 69 (rejecting notion that "mediated investigative e-discovery" is actual mediation, given that mediator may lack neutrality after conducting investigation).

<sup>54</sup> See Nolan-Haley, *supra* note 14, at 1371 ("[Mediation] is an informal process based on principles of individual sovereignty and self-determination.").

<sup>55</sup> See Stipanowich & Lamare, *supra* note 5 (noting that in survey, 87% of respondents report some use of mediation); Jennifer Reynolds, *The Lawyer With The ADR Tattoo*, 14 CARDOZO J. CONFLICT RESOL. 395, 397 (2013) ("even the most traditional lawyers use ADR techniques and processes all the time, from client counseling to negotiation to mediation to arbitration"); Richard S. Weil, *Mediation In A Litigation Culture: The Surprising Growth Of Mediation In New York*, 17 DISP. RESOL. MAG. 8, 8 (2011) (in survey of litigators, 90% expressed a positive view of mediation).

<sup>56</sup> See Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation And Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISPUTE RESOL. 271, 272 (2011) (noting that judicial settlement conferences and court-connected mediation have become

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resolving their disputes.<sup>57</sup> The mediation process is flexible, meant to adapt to the needs of the parties and the circumstances of the case.<sup>58</sup>

Courts continue to experiment with mediation forms,<sup>59</sup> however, and evidence on the relative effectiveness of various systems remains difficult to assess.<sup>60</sup> Cutting-edge systems of dispute resolution, such as online mediation,<sup>61</sup> offer interesting possibilities, but

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“commonplace” parts of court systems); Carrie Menkel-Meadow, *Ethics In ADR: The Many “Cs” Of Professional Responsibility And Dispute Resolution*, 28 FORDHAM URBAN L.J. 979, 990 (2001) (“Virtually every state and federal court requires some form of ADR at least to be considered by the lawyers in a litigation matter, and, increasingly, transactions and contracts contain ADR clauses.”).

<sup>57</sup> See Stipanowich & Lamare, *supra* note 5, at 30 (noting extensive use of mediation in commercial, employment and personal injury disputes); Thomas J. Stipanowich, *ADR And The “Vanishing Trial”: The Growth And Impact Of “Alternative Dispute Resolution,”* 1 J. OF EMPIRICAL LEG. STUDIES 843, 848-49 (2004) (“By far the predominant process choice [in ADR] is mediation, with its much-touted potential benefits of flexibility, party control, confidentiality, relatively low cost, and minor risk.”).

<sup>58</sup> See Simeon H. Baum, *Mediation And Discovery*, in DISPUTE RESOLUTION AND E-DISCOVERY § 3.1 at 51 (Daniel B. Garrie & Yoav M. Griver eds. 2012) (unique features of mediation include “freedom and creativity that infuses” the process).

<sup>59</sup> See Brian Jarren, *supra* note 46, at 64 (courts still “experimenting” with mediation as an aspect of case management).

<sup>60</sup> See Michael Heise, *Why ADR Programs Aren’t More Appealing: An Empirical Perspective*, SCHOLARSHIP@CORNELLLAW: A DIGITAL DEPOSITORY (2008) [www.scholarship.law.cornell.edu](http://www.scholarship.law.cornell.edu) (noting “mixed” evidence on effectiveness of ADR programs). See also Baum, *supra* note 58, at 72 (“Mediation is no panacea.”).

<sup>61</sup> See Mann, *supra* note 20, at 89 (suggesting that online dispute resolution processes “can play various roles in consensus building”); Ethan *supra* note 30, (describing online system that allows software to “clarify and highlight both the parties’ disagreements and their desired solutions;” suggesting that system can help by “assisting the parties to identify common interests”); Joseph W. Goodman, *The Pros And Cons Of Online Dispute Resolution: An Assessment Of Cyber-Mediation Websites*, 2003 DUKE L. & TECH. REV. 4 (2003) (noting potential for

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have not yet received attention from court administrators.<sup>62</sup> The systems outlined in this Article, although grounded in well-recognized mediation techniques, certainly cannot be considered “tried and tested” in the e-discovery sphere.<sup>63</sup> The mediation process, moreover, can be abused in some instances.<sup>64</sup>

Nonetheless, judicial administrators and dispute resolution system designers must start somewhere.<sup>65</sup> The notion of multiple “doors” to dispute resolution is firmly embedded in our legal culture.<sup>66</sup> Courts can and should consider ways to open doors to expand the use of mediation-related techniques into the e-discovery process. Court-connected pilot projects and study programs, already

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use of “traditional” dispute resolution mechanisms, supplemented by online technologies, which may include “fully automated” systems or systems that include a human neutral).

<sup>62</sup> See Ebner, Hanson & Pearlstein, *supra* note 30 (no court-annexed online dispute resolution systems currently). See also Julio Cesar Betancourt & Elina Zlatanska, *Online Dispute Resolution (ODR): What Is It, And Is It The Way Forward?*, 79 ARBITRATION 256, 263 (2013) (“still too early to predict” future of online dispute resolution).

<sup>63</sup> One of the earliest references to mediation of e-discovery disputes is less than five years old. See Skinner, *supra* note 28, at 425.

<sup>64</sup> See John Lande, *Using Dispute System Design Methods To Promote Good-Faith Participation In Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 71 (2002) (noting that “some lawyers use mediation to make misleading statements, ‘smoke the other side out,’ gain leverage for later negotiations, drag out litigation, increase opponents’ costs, and generally wear down the opposition”). See also Kimberlee K. Kovach, *The Vanishing Trial: Land Mine On The Mediation Landscape Or Opportunity For Evolution: Ruminations On The Future Of Mediation Practice*, 7 CARDOZO J. OF CONFLICT. RESOL. 27, 29 (2005) (noting that mediation can become a “curse” of “hoops to jump through” in litigation, rather than a “process expansion” leading to dispute resolution).

<sup>65</sup> See generally Slaikeu & Hasson, *supra* note 15.

<sup>66</sup> See Thomas J. Stipanowich, *The Multi-Door Contract And Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303 (1998); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution And Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995).

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underway in many jurisdictions,<sup>67</sup> should be encouraged in this area.<sup>68</sup>

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<sup>67</sup> See Hamilton, *supra* note 19. See also Daniel Garrie Instructs 7th Circuit's Pilot e-Mediation Program, E-DISCOVERY BEAT (May 14, 2013) [www.lawandforensics.com/e-discovery-beat/2012/02/23/e-discovery/court/pilot/programs-e-discovery-templates-that-legal-teams-should-utilize](http://www.lawandforensics.com/e-discovery-beat/2012/02/23/e-discovery/court/pilot/programs-e-discovery-templates-that-legal-teams-should-utilize) (“first of its kind” program to train mediators, who “agreed to volunteer their time for cases with heavy discovery loads, but comparatively small monetary returns”); Principles Relating To The Discovery Of Electronically Stored Information, [www.ediscoverypilot.com](http://www.ediscoverypilot.com) (Aug. 1, 2010).

<sup>68</sup> See Wissler, *supra* note 56 at 274 (lawyers tend to view mediation with court staff mediators “more favorably than mediation with volunteer mediators”).

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ARTICLE

**A CHRISTIAN VISION OF FREEDOM AND  
DEMOCRACY: NEUTRALITY AS AN OBSTACLE  
TO FREEDOM**

*By: Karen Jordan*

**Abstract**

This article presents the underlying vision for the argument that principles of liberal neutrality pose a genuine obstacle to freedom in democratic society. There is a growing concern that liberty and justice are unattainable in modern democratic societies that are grounded in neutrality, including the United States. Experience has demonstrated significant shortcomings of the modern freedom movements grounded in political theories, which—along with the theory of neutrality—reject the need for core substantive values to guide law and policy. The underlying basis of such theories is a particular modern conception of freedom. But a well-grounded and reasoned alternative vision of human freedom exists: a distinctively Christian vision of human freedom as understood in light of the philosophical and theological study of God’s revelation to man. A comprehensive treatment of the Christian vision of human freedom can be gleaned from the scholarly work of Cardinal Joseph Ratzinger, currently Pope Emeritus Benedict XVI. From this alternative perspective, freedom is promoted and safeguarded only when core substantive values and moral insights are respected as the point of reference for law and justice in society, a condition which posits a role for the State in prudently fostering respect for those values and insights. Because this alternative vision is often misunderstood, the purpose of this article is to present a concise but in-depth synthesis of the writings of

Ratzinger bearing on human freedom and democracy and to thereby encourage dialogue leading to a more moderate use of neutrality principles.

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**A Christian Vision of Freedom and Democracy:  
Neutrality as an Obstacle to Freedom**

*“A confused ideology of liberty leads to a dogmatism that is proving ever more hostile to real liberty.”<sup>1</sup>*

Freedom has been a defining mark of modern and postmodern thought. In the areas of science and technology, as well as the arenas of politics and sociology, freedom has been the objective. But what is freedom? What is the best way to think about freedom? In the modern era, the goals of science and technology have been to dominate nature, and the political goals have been to eliminate oppressive governing regimes and to end injustice and unjust discrimination based on differences in race, class, and other categorizations. Undoubtedly, many good things have resulted from these goals. But overall, the modern freedom movements have proved unsatisfactory. In European societies, Marxist-based political and social theories led to tyranny and human devastation. In the United States, the “unitedness” promised and envisioned has dissipated. And to many, liberty and justice are no longer perceived as possible because lawmaking and policy-making have been reduced to rule by the strongest. The general direction of the modern quest for freedom surely must be right. An

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<sup>1</sup> JOSEPH RATZINGER, CHRISTIANITY AND THE CRISIS OF CULTURES 36 (2006). In this book, Ratzinger emphasizes that the main divide in contemporary society rests on the question of the existence of God. *Id.* at 40-45. On the one side lies the great historical and religious cultures of humanity; on the other side lies a perspective reflecting humanity’s emancipation from God. In its conclusion, this article affirms that this divide lies at the heart of the controversy regarding use of the neutrality principle. The underlying premise of neutrality is a vision of freedom that, in essence, views family, morality, and God as antitheses to freedom. These ideas will be discussed in Part I & Part IV(A) of this paper.

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important question is why the modern approaches to freedom have gone awry.

To many, the crux of the problem is society's reliance on the idea of neutrality, a doctrine central to legal and political philosophy in the United States today.<sup>2</sup> Modern ideas of liberal neutrality rest on the premise that the state should not express preferences regarding substantive values or competing conceptions of good or, more specifically, the end toward which citizens should strive.<sup>3</sup> This is because, in the liberal tradition, judgments

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<sup>2</sup> See, e.g., JAMES KALB, *THE TYRANNY OF LIBERALISM: UNDERSTANDING AND OVERCOMING ADMINISTERED FREEDOM, INQUISITORIAL TOLERANCE, AND EQUALITY BY COMMAND* (2d ed. 2008); ROBERT H. DIERKER JR., *THE TYRANNY OF TOLERANCE: A SITTING JUDGE BREAKS THE CODE OF SILENCE TO EXPOSE THE LIBERAL JUDICIAL ASSAULT* (2006). See also CATHOLICISM, LIBERALISM, AND COMMUNITARIANISM (Kenneth L. Grasso, Gerard V. Bradley & Robert P. Hunt eds. 1995).

<sup>3</sup> See, e.g., John M. Breen, *Neutrality in Liberal Legal Theory and Catholic Social Thought*, 32 HARV. J.L. & PUB. POL'Y 513, 513-97 (2009) (providing a comparative analysis of neutrality and Catholic social teaching). Breen explains that neutrality is widely considered a defining feature and virtue of that strand of American political philosophy referred to as liberalism; and that liberalism has provided the intellectual foundation for much of the American legal system. *Id.* at 514-15 & 517 (citing and quoting a number of influential works). See also WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991). In America, the neutrality approach is perhaps most properly attributable to John Rawls. Rawls rejected the idea that a "general moral conception" can provide the basis for a "public conception of justice" in a democratic society. He advocated instead for an approach that rests on the "overlapping consensus" of a particular culture. See John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 225 (1985), available at <http://philosophyfaculty.ucsd.edu/faculty/rarneson/Courses/RawlsJustice.pdf> In his mind, this was because "we – we modern inheritors of the traditions of religious tolerance and constitutional government – put liberty ahead of perfection." See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

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concerning what is good, the ends in life worthy of pursuit, are subjective; no conception of what is good exists that would warrant attempts to coerce dissenters.<sup>4</sup> Being neutral means that all values and viewpoints are regarded as equal.<sup>5</sup> Scholars have pointed out deficiencies associated with the principle of neutrality. For example, they say that it is unworkable and illusory to the point of being deceptive.<sup>6</sup> But this creates a new question: if society needs substantive values to guide policy-making, what values should be selected? This is the stumbling block for many people.

In the United States, significant support exists for the idea that core Christian values should provide the foundation for law and justice. Indeed, for much of the history of the United States, Christian values *were* the foundation for society. It is only because of the neutrality principle—especially as imposed by the United States Supreme Court in the arena of Establishment Clause jurisprudence<sup>7</sup>—that the idea has been increasingly quashed. In a recent Establishment Clause case, Justice

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<sup>4</sup> Breen, *supra* note 3, at 525-26 (drawing on ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990)). Breen notes that “because the nature of the good is unsettled, contested, and always open to dispute, liberalism holds that it is never appropriate to use the coercive power of the state to mandate a particular theory of the good.” *Id.* at 526.

<sup>5</sup> See Steven D. Smith, *The Restoration of Tolerance*, 78 CALIF. L. REV. 305, 311-12 (1990) (explaining neutrality as advocated in Bruce Ackerman’s theory of liberal justice and Ronald Dworkin’s theory of rights).

<sup>6</sup> See, e.g., *id.* As explained by Dean Steven Smith, neutrality is illusory and impotent. It cannot guide public policy; cannot garner respect of citizens; and, in fact, operates in a way that is deceptive to the public. *Id.* at 313-29. Cf. Galston, *supra* note 3, at 3-21. The citations in footnote 2 above also address this idea.

<sup>7</sup> See, e.g., *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1 (1947) (landmark case in which the Supreme Court adopted the neutrality principle in the context of the Establishment Clause).

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O'Connor, an advocate of the view that it is impermissible for state action to give rise to even a subtle feeling of exclusion (i.e., to make a person aware that his or her religious views might be out of sync with more mainstream religious views), suggested that reconsidering use of the neutrality principle was unthinkable. After noting the existence of strong religious sentiments in the United States, which she attributes to judicial enforcement of the form of neutrality that cabins religious views to the private realm, Justice O'Connor essentially stated: "Why would we want any other approach?"<sup>8</sup>

Importantly, however, if the principle of neutrality itself is misguided—if "unitedness" has been lost and democratic government has been reduced to rule by the strongest—the idea that core Christian values should provide a foundation for law and justice should be rejected only for sound substantive reasons. A key purpose of this article is to explain why acceptance of core Christian values as guideposts can better safeguard liberty and justice. A sound argument exists that liberty and justice in society depend on state recognition of, and prudent use of, core Christian values in policy-making.<sup>9</sup> In response to

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<sup>8</sup> See *McCreary Cnty. v. Am. Civil Liberties Union*, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring). Justice O'Connor had pointed to violence in other areas of the world resulting from "assumption of religious authority by government." She then states: "Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?" *Id.* Her line of reasoning suggests a failure to appreciate that moving away from neutrality does not mean "assumption of religious authority by government." Rather, it would entail government respect for a source of moral authority beyond the state, which means that it would be beyond the majority vote.

<sup>9</sup> This would not necessarily mean a return to state practices struck down by the Court due to Establishment Clause concerns. Past reliance on Christian values in fashioning laws may not always have been "prudent" and may have involved values beyond the realm

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Justice O'Connor's question, society should want another approach because, in the quest for freedom, *how* humans live does matter.

Notably, the case for a more tempered use of neutrality has been persuasively presented in the work of Cardinal Joseph Ratzinger, currently Pope Emeritus Benedict XVI.<sup>10</sup> In addressing freedom and democracy, Ratzinger's focus has mainly been on the situation in Europe.<sup>11</sup> But his message is relevant to any society hoping to maintain a pluralistic democracy where liberty and justice are possible. The crux of Ratzinger's message is that freedom is promoted and safeguarded only when core Christian moral insights are respected as the foundation and point of reference for law and justice. Regarding the interaction between Christianity and political authority in a pluralistic democracy, Ratzinger's philosophy perhaps is best captured by the statement that democracy must be lived "on the basis of Christianity and Christianity on the basis of the free democratic state."<sup>12</sup>

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appropriately considered "core values." Cf. JOSEPH RATZINGER, *VALUES IN A TIME OF UPHEAVAL* 21-22 (2006) (noting that Christians have at times in the past expected too much from the "earthly city").

<sup>10</sup> Because the bulk of the writings considered in this article were written by Joseph Cardinal Ratzinger before he was elected Pope, this paper uses the name Ratzinger in both the text of the paper and in citations.

<sup>11</sup> See, e.g., JOSEPH RATZINGER, *EUROPE TODAY AND TOMORROW: ADDRESSING THE FUNDAMENTAL ISSUES* (Michael J. Miller trans., Ignatius Press 2d ed. 2007) (2004). See also JOSEPH RATZINGER AND MARCELLO PERA, *WITHOUT ROOTS: THE WEST, RELATIVISM, CHRISTIANITY, ISLAM* (2007); JOSEPH RATZINGER, *A TURNING POINT FOR EUROPE? THE CHURCH IN THE MODERN WORLD: ASSESSMENT AND FORECAST* (Brian McNeil trans., Ignatius Press, 2d ed. 1994) (1991) [hereinafter Ratzinger, *A Turning Point*].

<sup>12</sup> JOSEPH RATZINGER, *A Christian Orientation in a Pluralistic Democracy?: The Indispensability of Christianity in the Modern Age*, in *CHURCH, ECUMENISM & POLITICS: NEW ESSAYS IN ECCLESIOLOGY* 204, 215 (Robert Nowell trans., Crossroad Pub. Co. 1st Am. Ed. 1988) (1987) [hereinafter Ratzinger, *A Christian Orientation*].

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The first half of this statement of course meets strong resistance in today's culture. Nonetheless, Ratzinger has been adamant that, although the distinct spheres of Church and State must be respected,<sup>13</sup> a society electing a democratic government must recognize as inviolable a certain basic set of values and those values having a Christian foundation.<sup>14</sup> To Ratzinger, the existence of these values was a precondition for democracy, and adherence to these values is necessary for the survival of democracy.<sup>15</sup>

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<sup>13</sup> See, e.g., JOSEPH RATZINGER, *Theology and the Church's Political Stance*, in CHURCH, ECUMENISM & POLITICS: NEW ESSAYS IN ECCLESIOLOGY, *supra* note 12, at 152, 161-62 [hereinafter Ratzinger, *Political Stance*] (noting that where the Church itself becomes the state, freedom becomes lost; but, also, that freedom is lost when the Church is precluded from being a public and publically relevant authority). Ratzinger has also acknowledged that, in the past, the Church has at times overstepped its bounds. The Church at times has expected too much from civil society in terms of the Christian norms it expected to be recognized by the state and, at times, has over-asserted its claim to public legal status. See, e.g., Ratzinger, *A Christian Orientation*, *supra* note 12, at 212-13.

<sup>14</sup> Ratzinger explains that Christianity provides the rational foundation for ethics; ethics remains rational only when reason is purified by faith; and a Christian foundation "is imperative precisely if [the state] is to remain the state and pluralist." Ratzinger, *A Christian Orientation*, *supra* note 12, at 216-18. The necessary purification of reason by faith (and vice versa) occurs within the context of Christianity and the Church. See Ratzinger, *Political Stance*, *supra* note 13, at 158-60. As explained below, truth exists in the world because it is a product of the Eternal Reason that is Love, also known as God. Humans have access to the truth, but only with the assistance of revelation from God. The Church, understood in its fullness, is the "place where [Truth] is perceived." *Id.* at 160.

<sup>15</sup> "The state must recognize that a basic framework of values with a Christian foundation is the precondition for its existence. It must in this sense as it were simply recognize its historical place, the ground from which it cannot completely free itself without collapsing. It must learn that there is a continued existence of truth which is not subject to consensus but which precedes it and makes it possible." Ratzinger, *A Christian Orientation*, *supra* note 12, at 219. Ratzinger also stresses that democracy was formulated precisely to preserve inviolable values



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Because it is largely a matter of historical fact that Christian values were a precondition for democracy,<sup>16</sup> the more controversial assertion is the claim that moral insights from the Christian tradition are necessary for the *survival* of democracy. Indeed, this perspective may be incomprehensible to persons influenced by the pervasively secular culture present in contemporary society. But the perspective is challenging to understand even for Christians and others who would be open to the idea.

For that reason, in this article I strive to help make this perspective of freedom and democracy comprehensible and, in particular, to do so largely using the work of Cardinal Ratzinger.<sup>17</sup> It is useful and appropriate to focus on Ratzinger's scholarly writings for a number of reasons. Ratzinger is recognized for his strong intellectual capabilities and his ability to communicate his ideas clearly and succinctly.<sup>18</sup> His writings also reveal a genuine attempt

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and rights. See JOSEPH RATZINGER, *What is Truth, in VALUES IN A TIME OF UPHEAVAL* 55 (2006).

<sup>16</sup> Ratzinger, *A Christian Orientation*, *supra* note 12, at 215 n. 11 (While democracy is a product of the fusion of Greek and Christian heritage, it was, more specifically, "formed under the particular conditions of the American Congregationalist pattern;" it is not a product of the so-called Enlightenment era, nor of the European Reformation movement).

<sup>17</sup> Ratzinger's ideas and teaching on human freedom and democratic society are fully consistent with Catholic teaching generally, especially as presented in important papal encyclicals and instructions addressing Catholic social doctrine. See, e.g., J. BRIAN BENESTAD, *CHURCH, STATE, AND SOCIETY: AN INTRODUCTION TO CATHOLIC SOCIAL DOCTRINE* (2011) (presenting Catholic social doctrine, but also usefully integrating the particular contributions of various popes, including Pope Benedict XVI). See generally *MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES & INTERPRETATIONS*, (Kenneth R. Himes et al. eds., 2005).

<sup>18</sup> See, e.g., D. VINCENT TWOMEY, *THE ESSENTIAL POPE BENEDICT XVI: HIS CENTRAL WRITINGS AND SPEECHES xvii-xix* (John F. Thornton & Susan B. Varenne eds., HarperOne reprint ed. 2008) (commenting on the "breathtaking scope" of Ratzinger's corpus of

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to understand and address opposing positions.<sup>19</sup> Additionally, Ratzinger addressed issues bearing on the foundations of political and social order in a somewhat systematic way throughout his career. Because his work represents an impressive integration and synthesis of theology, philosophy and politics, he has gained respect as a profound political thinker whose ideas are rich and coherent.<sup>20</sup>

Accordingly, this article first frames the issue as one of properly understanding human freedom and then presents the basic Christian vision. Next, the article presents a synthesis of Ratzinger's writings bearing on human freedom to help flesh out the deeper philosophical and theological foundation for the Christian vision; namely, its grounding in the existence of a personal God and the perceptions and conceptions arising from deep reflection on the Trinity and the Incarnation. Such study reveals intelligibility in creation that must be respected. Specifically, it reveals that within each human being there exists an existential capacity designed to reach beyond the self and toward God and others, a capacity fulfilled by re-union with God and others. Freedom, then, is living one's life in a manner that helps one to achieve that union, and Christian values—which are consistent with the intelligibility in creation—thereby promote human freedom. Ratzinger's work presents a strong argument that

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intellectual work, on its originality, creativity, and consistency, and on Ratzinger's attention to the ideas of "the great thinkers of humanity, theologians and otherwise").

<sup>19</sup> *Id.* at xix (noting that all of Ratzinger's writings reveal his "courage to face any question or objection because of the confidence he has in the Truth revealed in Jesus Christ and handed on by the church's apostolic tradition").

<sup>20</sup> See, e.g., THOMAS R. ROURKE, THE SOCIAL AND POLITICAL THOUGHT OF BENEDICT XVI 3-4 (2011), 3-4 (explaining that Benedict's social thought merits considerably more attention than it has received).

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foundational judgments concerning the ends in life worthy of pursuit are not solely subjective. Rather, freedom is an integral aspect of the human person, and thus, *how* freedom is used matters—and matters beyond the personal or private, subjective sphere.

Furthermore, because survival of democracy hinges on sufficient unity among the citizens regarding the values deemed inviolable,<sup>21</sup> Ratzinger advocates that the state has a role in prudently fostering respect for those values, including expecting reverence and respect for God and holy things, and encouraging serious study of questions such as the existence of and nature of God.<sup>22</sup> Again, this

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<sup>21</sup> See JOSEPH RATZINGER, *Freedom and Constraint in the Church*, in CHURCH, ECUMENISM & POLITICS: NEW ESSAYS IN ECCLESIOLOGY, *supra* note 12, at 183, 188 [hereinafter Ratzinger, *Freedom and Constraint*] (“Ultimately, the democratic system can function only if certain fundamental values . . . are recognized as valid by everyone.” “[T]here must be an ethos which is jointly accepted and maintained even if its rational basis cannot be established absolutely and conclusively.”). See also Ratzinger, *A Christian Orientation*, *supra* note 12, at 205 (“Pluralist democracy, in itself, does not “unite[] its citizens in a fundamental assent to the state. . . .For its foundations, it depends on other powers and forces outside of itself.”); JOSEPH RATZINGER, *Luther and the Unity of the Churches*, in CHURCH, ECUMENISM & POLITICS: NEW ESSAYS IN ECCLESIOLOGY, *supra* note 12, at 99, 131 [hereinafter Ratzinger, *Luther*] (noting that “[a] formal unity without clear content is fundamentally no unity at all.” Unity based on common skepticism and not knowledge is, in essence, based on capitulation).

<sup>22</sup> See, e.g., Ratzinger, *A Christian Orientation*, *supra* note 12, at 218-20. Ratzinger is clear, however, in placing the primary responsibility for cultivating the spiritual foundation of society on the Church and Christians. *Id.* See also JOSEPH RATZINGER, *Freedom, Law, and the Good*, in VALUES IN A TIME OF UPHEAVAL 52 (2006) (emphasizing the public task of Christian churches: they must be free to “address the freedom of all human beings so that the moral forces of history may remain forces in the present”); JOSEPH RATZINGER, *Biblical Aspects of the Question of Faith and Politics*, in CHURCH, ECUMENISM & POLITICS: NEW ESSAYS IN ECCLESIOLOGY, *supra* note 12, at 147, 151 (explaining that the core responsible political activity is to nurture

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perspective is at odds with the neutrality principle imposed by the American judiciary, at least since the 1950s.<sup>23</sup> Thus, this article also clarifies how Ratzinger's vision of human freedom renders his approach to Church-State issues fully consistent with vigorous respect for religious freedom or freedom of conscience. The bottom-line is that personal choices about how to live matter, and it is permissible for the state to foster a culture in which persons can more readily live in a genuinely human way—not through heavy-handed or unnecessary measures, but through prudent adherence to a limited number of core values.

## V. The Overarching Issue: Properly Understanding Human Freedom

In discussing democracy's need for grounding itself in Christian moral insights and values, Ratzinger generally supports his message with a two-pronged approach. Under the first prong, he points to and explains why prevalent political theories of the modern era have failed. Under the second prong, he presents, in a variety of ways, his vision for safeguarding genuine human freedom. This article focuses primarily on the second prong of his argument, but this section also briefly introduces Ratzinger's perspective on the failures of modern political philosophies.

In his writings, Ratzinger has demonstrated that political theories following the trajectory initiated by Rousseau-type thinkers are grounded in a radical philosophy of freedom and what he has labeled as the "secular trinity of ideas;" the three ideas are progress, absolutism of scientific technology, and political

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public acceptance of the validity of morality and God's commandments).

<sup>23</sup> In *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947), the Supreme Court adopted the neutrality principle in the context of the Establishment Clause.

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messianism.<sup>24</sup> Ratzinger characterizes the radical philosophy of freedom as encompassing the individualistic ideology that was a component of all Enlightenment thought, the anarchic tendencies flowing from Rousseau's vision of human nature and the social contract where no right order exists and human will is the sole norm of human action,<sup>25</sup> and the Marxist tendency to rely on structures and

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<sup>24</sup> Ratzinger discusses two good examples of failures of modern philosophies. See Ratzinger, *A Turning Point*, *supra* note 11, at 25-133; JOSEPH RATZINGER, *Freedom and Liberation: The Anthropological Vision of the 1986 Instruction Libertatis Conscientia*, in CHURCH, ECUMENISM & POLITICS, *supra* note 12, at 255, 256-265 [hereinafter Ratzinger, *Freedom and Liberation*].

<sup>25</sup> Rousseau's essay on the social contract was written in 1762. See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT OR: PRINCIPLES OF POLITICAL RIGHT*, (1762), available at <http://www.constitution.org/jjr/socon.htm> [hereinafter Rousseau, *Social Contract*]. To Rousseau, the "sacred right" of the social order is built upon conventions, see *id.*, Bk. I, ch. I., conventions that flow from Rousseau's view of human nature. See *id.* at Bk. I, ch. II. To Rousseau, human beings differ from animals in only two respects: they can rise above instincts by an act of freedom or free will, and they have a faculty of self-preservation that develops all other faculties. See JEAN-JACQUES ROUSSEAU, *DISCOURSE ON THE ORIGIN OF INEQUALITY* 25 (Donald A. Cress trans., Hackett Pub. Co. 1992) (1755)).

Rousseau's notion of the social compact reflects these dual and limited aspects of human nature. In his theory of the social contract, because humans cannot know what justice is, nothing exists to delimit the majority vote. See Rousseau, *Social Contract*, *supra*, at Bk II, ch. VI. His concept of the "general will" is, in the end, the only limit on government, and persons are entitled to reclaim their natural rights and liberties when law and government fail to reflect the general will. But Rousseau does not see the general will as being subject to any absolute measure.

Rousseau's philosophy stands in stark contrast to that of John Locke. See JOHN LOCKE, *AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT* (1690), available at <http://jim.com/2ndtreat.htm> (also known as Locke's *Second Treatise on Government*). The second essay on civil government was drafted between 1685-1688. See JOHN LOCKE, *TREATISE OF CIVIL GOVERNMENT AND LETTER CONCERNING TOLERATION*, (Sterling P.

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systems to bring about justice.<sup>26</sup> From this perspective, freedom generally is understood as:

the possibility of doing  
everything one wants to do  
and of doing only what one  
would like to do oneself.  
Freedom understood in this  
way is a matter of doing what

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Lamprecht ed. 1937) [hereinafter Locke, *Second Treatise*]. Locke's theory of the social contract rests solidly on an absolute measure that operates as a genuine limit on the "one will" that gives rise to political laws and acts of government. To Locke, the nature of the social compact is inescapably tied to limits on human action existing in the state of nature before societies have consented to be governed: the law of God and the law of nature. To Locke, this law stands as "an eternal rule to all men, legislators as well as others." See Locke, *Second Treatise*, *id.* at #135.

Both Locke and Rousseau recognized consent of the people as the source of authority in civil society, namely, the consent arising upon agreement to be part of the society. Both also propose that legitimate laws made within society will be grounded in the consent of the body politic, as determined by majority vote, and delimited by the notion of the common good of the community. The key difference between Locke and Rousseau lies in the operation of and limits upon that "one will." Whereas in Rousseau's theory the legislative power becomes, in essence, the *source* of the laws governing society, in Locke's theory the legislative power *serves* a higher law, by making the law of God and the law of nature better known and fostering a more effective operation of the law for the general good of all. Further, the majority vote in Locke's theory serves only as a means to ensure that laws reflect the consent of society. The majority vote remains subordinate to the law of God and the law of nature. A majority vote inconsistent with the Eternal law would constitute a sign that the agreement has been breached, thereby legitimizing resort to the natural liberty to form a new society.

<sup>26</sup> JOSEPH RATZINGER, *Truth and Freedom*, in THE ESSENTIAL POPE BENEDICT XVI: HIS CENTRAL WRITINGS & SPEECHES 336, 343 (New York: HarperOne, 2007) (John F. Thornton & Susan B. Varenne eds., HarperOne reprint ed. 2008) [hereinafter Ratzinger, *Truth and Freedom*].

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one likes, of arbitrary whim. . . . From this point of view liberation consists in throwing off constraints and obligations. Every obligation appears as a shackle that restricts freedom; every obligation that is thrown off becomes a step forward on the road to freedom. It is clear that from this kind of point of view the family, the Church, morality, and God must appear antitheses to freedom. God obliges men and women; morality is a basic form in which this obligation to him is expressed. . . . Even the state, declared to be the ruler of man over man, becomes an opponent of freedom.<sup>27</sup>

Ratzinger has noted that this perspective is grounded in a definite understanding of human nature, an understanding expressed most completely in the philosophy of Sarte:

For Sarte man is pure existence without essence. There is no certainty about what he or she is or how he or she should be. One must discover anew what it is to be human from the nothingness of an empty freedom. The idea

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<sup>27</sup> Ratzinger, *Freedom and Liberation*, *supra* note 24, at 259-60.

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of freedom is here pushed to its ultimate radical position, no longer merely emancipation from tradition and authority but emancipation from his or her own nature and essence, a state of complete indeterminacy which is open to anything.<sup>28</sup>

To Ratzinger, history has shown that in reality these perspectives lead to the opposite of freedom and to human dissatisfaction. The dissolution of traditional links and obligations, the dependence on large anonymous systems, and the alienation resulting when societal practices break down traditional structures such as family and Church have, in fact, “turned out more and more to be the precondition for total dictatorship and totalitarian enforcement of conformity.”<sup>29</sup>

Similar negative results flow from the interplay of the secular trinity of ideas of progress, absolutism of scientific technology, and political messianism. Ratzinger has explained that the union of these ideas was most consistently developed in Marxism, emerging as a “political myth of almost irresistible power.” But the union of these ideas also exists today, albeit in weaker forms, in Western society.<sup>30</sup> These ideas also represent the exclusion

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<sup>28</sup> Ratzinger, *Freedom and Constraint*, *supra* note 21, at 191. The perspective is also thoroughly theological: “Behind all this there stands a programme which must ultimately be labeled theological: God is no longer recognized as a reality standing over against man, but instead man may himself or herself become what he or she imagines a divinity would be if it existed. . . .” Ratzinger, *Freedom and Liberation*, *supra* note 24, at 260.

<sup>29</sup> Ratzinger, *Freedom and Liberation*, *supra* note 24, at 262.

<sup>30</sup> See Ratzinger, *A Turning Point*, *supra* note 11, at 129-30.



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of God from the shaping of history and human life.<sup>31</sup> Ideas of progress and absolutism of scientific technology are grounded in a self-limitation of reason: a narrowing down of reason to the perception of what is quantitative and, thus, omits the insights common to almost the whole of mankind before the modern period. In particular, this omits the conviction that morality is not created by man on the basis of calculation of expediency. But, rather, man “finds it already present in the essence of things.”<sup>32</sup> Without substantive values for guidance, “progress” becomes any new approach and any new technology necessarily is a good.<sup>33</sup> Messianic approaches to governance place reliance on systems and structures and political and economic activity, rather than on ethical efforts of citizens. These ideas reflect materialism and its program.<sup>34</sup> As explained by Ratzinger, this brand of liberation depends on abdication of ethical principles and behavior and, therefore, abdication of responsibility and ultimately of conscience.<sup>35</sup> And destruction or loss of conscience is “the precondition for totalitarian obedience and totalitarian domination.”<sup>36</sup> The ultimate result of adhering to these political theories thus is not freedom but, rather, a type of slavery.<sup>37</sup>

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<sup>31</sup> *Id.* at 130 (noting that, in essence, this trinity of ideas replaces and thus excludes the concept of God).

<sup>32</sup> *See id.*, 34. *See also* JOSEPH RATZINGER, CHRISTIANITY AND THE CRISIS OF CULTURES, 39-45 (2006).

<sup>33</sup> *See* JOSEPH RATZINGER, CHRISTIANITY AND THE CRISIS OF CULTURES 41-42 (2006) (“[T]he guiding principle is that man’s capability determines what he does. If you know how to do something, then you are also permitted to do it. . . . But man knows how to do many things, and this knowledge increases all the time. If this knowledge does not find its criterion in a moral norm, it becomes a power for destruction. . . .”).

<sup>34</sup> *See* Ratzinger, *A Christian Orientation*, *supra* note 12, at 205-08.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* *See also* Ratzinger, *Political Stance*, *supra* note 13, at 165.

<sup>37</sup> *See* Ratzinger, *A Christian Orientation*, *supra* note 12, at 205-11 (emphasizing also the break down of the rule of law and a loss of the

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Ratzinger's attention to and analysis of these shortcomings and failures is crucial. If political philosophies divorced from substantive values or divorced from core Christian values were producing good results, his message would be moot. But modern societies keep stumbling. Even in the United States the situation seems precarious. A prevalent sentiment exists that government, particularly at the federal level, is not working. In each branch of government, law and policy is being made on the basis of power. Even citizens unfamiliar with political philosophies generally, or the doctrine of neutrality in particular, likely would agree that a key problem is the much divided nature of the electorate—a dividedness arising in large part because of the absence of societal consensus on core values.<sup>38</sup>

After highlighting modern governments' failures to achieve freedom, the second prong in Ratzinger's approach explains that genuine human freedom is safeguarded only when democratic government and the majority vote are limited by inviolable moral standards and, more specifically, standards grounded in core Christian values.

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sense of transcendence that causes people to search for ways to escape society). See also CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION ON CHRISTIAN FREEDOM (March 22, 1986), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19860322\\_freedom-liberation\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19860322_freedom-liberation_en.html), at #10-19 (noting, *inter alia*, the new forms of oppression arising from unrestrained use of technology, modern acts of terrorism, and collectivist approaches that quash human aspirations for the transcendent).

<sup>38</sup> From Ratzinger's perspective, the increasing dividedness in society is due in large measure to the overarching clash between those believing in dependence on God and those seeking emancipation from God: "The real antagonism typical of today's world is not that between diverse religious cultures; rather, it is the antagonism between the radical emancipation of man from God, from the roots of life, on the one hand, and the great religious cultures, on the other." JOSEPH RATZINGER, CHRISTIANITY AND THE CRISIS OF CULTURES 44 (2006).

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The importance of democratic government and the majority vote being delimited by inviolable moral standards should be fairly obvious. As Ratzinger has emphasized, the history of the twentieth century has readily demonstrated that the majority can err—and err seriously.<sup>39</sup> Those adhering to the neutrality principle tend to believe that the gross abuses that have occurred elsewhere will not happen in the United States.<sup>40</sup> Frankly, that belief has no logical basis. Nonetheless, another valid reason exists for holding the view that inviolable moral standards must exist to delimit the majority. The idea of inviolable rights and standards was a key premise of the founding generation. The premise was part and parcel of the prevailing philosophies of the founding era and is spelled out in the

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<sup>39</sup> The multiple instances of state sanctioned genocide is a prime example. See, e.g., JOSEPH RATZINGER, *Freedom, Law, and the Good*, in VALUES IN A TIME OF UPHEAVAL 45-52 (2006) (pointing to the twentieth century totalitarian states). Ratzinger also has often explained that failure to identify values to limit and guide the majority vote leads to radical relativism. See, e.g., *id.* at 47, 56 (discussing Richard Rorty’s “utopia of banality” wherein a freedom without substance dissolves into meaninglessness). See also Ratzinger, *Luther*, *supra* note 21, at 131 (noting that authority based on skepticism becomes arbitrary). The basic idea is simply that, without inviolable standards to delimit majority vote, law becomes nothing other than a mirror of whatever happens to be the predominant views or opinions of the moment—however egregious those may be.

<sup>40</sup> See, e.g., RICHARD RORTY, TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS (1998); RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS (1991). Rorty adheres to the view that a certain “intuition” provides sufficient safeguards against egregious government acts. Ratzinger compares Rorty’s views to certain seventeenth century ideas; namely the idea that there was a single, universal morality which was a true and clear light that could be perceived by all humans if they would but open their eyes. Ratzinger explains that reliance on mere intuition is unworkable in contemporary society because the “evidential character” of moral principles no longer exists. See JOSEPH RATZINGER, *Freedom, Law, and the Good*, in VALUES IN A TIME OF UPHEAVAL 50-51 (2006).

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founding documents of the United States.<sup>41</sup> Therefore, the more challenging position for many is why the inviolable values should be—or must be—informed by traditional Christian insights.<sup>42</sup>

To that question, Ratzinger spells out a rationale that is more sophisticated than the one typically provided by advocates for Christian values. The answer gleaned from the corpus of Ratzinger's writings is that Christian values have their origin from the transcendent and, more specifically, from the Creator of humanity and the world. Therefore, these values necessarily are consistent with the meaning or intelligibility *in* creation and will thereby promote genuine human freedom. This answer is grounded in a certain understanding of human freedom: an understanding of freedom that is readily distinguishable from the radical philosophy of freedom described at the outset of this section. Whether to reconsider use of the

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<sup>41</sup> See THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776). Ratzinger notes that de Tocqueville recognized that democracy in America was made possible by the precondition of a basic moral conviction. See JOSEPH RATZINGER, *Freedom, Law, and the Good, in VALUES IN A TIME OF UPHEAVAL* 51 (2006). Indeed, basic social contract doctrine is premised on the idea that the society consenting to government agrees on basic ideas about rights and liberties: otherwise, joining together and consenting to be governed and to be bound by laws of the society makes little sense.

<sup>42</sup> For example, although Professor Steven Smith presents persuasive reasons why the modern concept of liberal neutrality is illusory and ineffective (indeed, deceptive), and, in-turn, argues for the need for a set of substantive beliefs and values upon which public decisions can be based (and also for a return to a proper understanding of toleration). He suggests that the content of the substantive values does not matter: "Legislatures and courts must make decisions, and decisions require choices among beliefs and values. . . . Thus, every regime must have its orthodoxy. *The orthodoxy might not constitute a cohesive ideology or theology, it might not be read into the official constitution, and it might vary from year to year or even, to some degree, from locale to locale.* But a set of substantive beliefs and values . . . must exist." Smith, *supra* note 5, at 332 (emphasis added).

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neutrality principle, then, ultimately rests on the extent to which this alternative view of freedom is deemed credible.

As explained, a primary goal of this article is to provide a comprehensive yet comprehensible explanation of this alternate vision of human freedom through a synthesis of Ratzinger's writings.<sup>43</sup> Ratzinger's work makes clear that this is a well-reasoned alternative view. It grounds freedom in a vision of humanity; its history and destiny as understood in light of philosophical and theological scrutiny; and the development of God's revelation to man. It is a vision intimately bound up with belief in God. But it is no more theologically based than neutrality itself and the radical philosophies of freedom, which are bound up with denial of the existence of God.

## II. A Christian View of Human Freedom

Ratzinger's comprehensive vision of human freedom can be understood only by studying a number of sources. These sources include two documents issued by the Congregation for the Doctrine of the Faith: *Instruction on Certain Aspects of the "Theology of Liberation,"* issued August 6, 1984 ("ICATL"), and *Instruction on Christian Freedom and Liberation*, issued March 22, 1986 ("ICFL").<sup>44</sup> It is useful to begin with an analysis of these

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<sup>43</sup> Although this vision of freedom is absolutely central to understanding how to live out Christian faith, this author was unable to identify a good source providing a comprehensive and comprehensible explanation.

<sup>44</sup> Ratzinger served as prefect of the Congregation for the Doctrine of Faith from 1981 until he was elected pope in 2005. THE CONGREGATION FOR THE DOCTRINE OF FAITH, INSTRUCTION ON CHRISTIAN FREEDOM AND LIBERATION (Mar. 22, 1986), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19860322\\_freedom-liberation\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19860322_freedom-liberation_en.html) [hereinafter ICFL] is the more comprehensive of the two documents. But the CONGREGATION FOR THE DOCTRINE OF FAITH, INSTRUCTION ON

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documents because they present the basic outline of the alternative vision of freedom—namely, the Christian understanding of freedom as liberation from sin and freedom to follow the commandments of God.

In presenting this vision of human freedom, the two Instructions rely predominantly on the biblical witness to God’s historical encounters with humanity.<sup>45</sup> The ICFL makes clear its reliance on revelation—and its approach to interpreting revelation—by noting at the outset that it is through the “mystery of the Incarnate Word and Redeemer of the world” that the Church “possesses the truth regarding the Father and his love for us, and also the truth concerning man and his freedom.”<sup>46</sup> That is, it is only by revelation interpreted in light of Jesus Christ as the fullness of revelation that a proper conception of human freedom can be grasped.

The ICFL points out that the yearning for freedom central to the modern era has its source in the Christian heritage, as captured by the witness of Holy Scripture in both the Old and New Testaments.<sup>47</sup> The key liberating event testified to in the Old Testament is the Exodus: God’s

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CERTAIN ASPECTS OF THE “THEOLOGY OF LIBERATION” (Aug. 6, 1984), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19840806\\_theology-liberation\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19840806_theology-liberation_en.html) [hereinafter ICATL] makes certain key points more directly and clearly.

<sup>45</sup> Again, this is likely due to the Congregation for the Doctrine of Faith’s (“CDF”) primary concern with addressing liberation theologies, which tended to reverse the relationship between the Old and New Testaments. See Ratzinger, *Freedom and Liberation*, *supra* note 24, at 265 (noting that, in liberation theology, “baptism is [] understood on the basis of the exodus,” and “it is the symbol of a political process of liberation to which” the oppressed are called; and “Jesus is interpreted by reference back to Moses, while Moses is interpreted in anticipation by reference to Marx.”). As explained by Ratzinger, the Instructions take the traditional path of seeking the internal logic of the basic pattern of biblical testimony to understand God, the world and man. *Id.* at 266.

<sup>46</sup> ICFL, *supra* note 44, at #3.

<sup>47</sup> *Id.* at #5.

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action in rescuing his People from their bondage in Egypt, an event preceded by—and later re-enacted through—the paschal sacrifice and meal.<sup>48</sup> The ICFL recognizes the Exodus as providing a model for freedom and liberation. The event, however, must be properly understood. The ICFL thus explains that, in this event, freedom from economic, political and cultural slavery is attained, but it is attained part and parcel with God’s action in entering into a covenant with Israel. Liberty is thus linked to communion or a relationship with God.<sup>49</sup>

Further, as part of the covenant, God provides to Israel its Law, which included both the moral precepts of the Decalogue and religious and civil norms to govern the life of the people chosen by God to be his witness among the nations.<sup>50</sup> Because the core of this collection of laws is love of God above all things and of neighbor as oneself, the pattern reflected by the Exodus event is freedom to live in a society “centered upon worship of the Lord and based upon justice and law inspired by love.”<sup>51</sup> The ICFL also explains

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<sup>48</sup> As clarified by Ratzinger in *Freedom and Liberation*, the fact of the exodus was possible “through a religious event, the sacrifice of the pasch, which is an anticipated core-element of the Torah.” See Ratzinger, *Freedom and Liberation*, *supra* note 24, at 268.

<sup>49</sup> ICFL, *supra* note 44, at #44.

<sup>50</sup> *Id.* at #45.

<sup>51</sup> *Id.* As explained by Ratzinger in *Freedom and Liberation*, the goal of exodus includes discovery of a law that “provides justice and thus builds up the right relationships of men and women between each other and with the whole of creation.” See Ratzinger, *Freedom and Liberation*, *supra* note 24, at 267. “These relationships . . . depend however on the covenant, indeed they are the covenant; they cannot be devised and shaped by men and women alone, they depend on the fundamental relationship with regulates all other relationships, the relationship with God.” *Id.* at 267. Indeed, “the really liberating element in the exodus is represented by the inauguration of the covenant between God and man, the covenant which is made actual in the Torah, that is in regulations of justice that are the shape of freedom.” *Id.* at 268.

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that the Psalms and the testimony of the Prophets suggest that injustice within this society occurs from transgressions of the law caused by “hardened hearts,” and that those suffering from injustice (the poor and the needy) learn to place their trust in the Lord: “the ‘poor of Yahweh’ know that communion with him is the most precious treasure and the one in which man finds his true freedom.”<sup>52</sup>

Thus, as stated perhaps more directly in the previously issued ICATL, the Old Testament portrays salvation and healing from injustice as essentially a religious experience. For example, whatever form suffering may take on the part of those who are faithful to the God of the Covenant (poverty, political oppression, hostility of enemies, injustice, failure, or death), it is from God alone that one can expect salvation and healing.<sup>53</sup> Further, freedom is linked to covenant with God and bound up with law and norms addressing relationships with God and others.

The witness provided by the New Testament clarifies this pattern of freedom. As expressed in the ICFL: “The Exodus, the Covenant, the Law, the voices of the Prophets and the spirituality of the ‘poor of Yahweh’ only achieve their full significance in Christ.”<sup>54</sup> It is by the power of the Paschal Mystery of Jesus Christ that humanity has been set free: “Through his perfect obedience on the Cross and through the glory of his Resurrection, the Lamb of God has taken away the sin of the world and opened for us the way to definitive liberation.”<sup>55</sup>

More specifically, the ICFL explains that the Paschal Mystery enabled an outpouring of grace. The heart of Christian freedom therefore lies in the action of grace, received through faith and the Church’s sacraments. Grace

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<sup>52</sup> ICFL, *supra* note 44, at #46-47.

<sup>53</sup> ICATL, *supra* note 44, at ch. IV, #5.

<sup>54</sup> ICFL, *supra* note 44, at #49.

<sup>55</sup> *Id.* at #51.



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frees humanity from sin and places humanity in communion with God.<sup>56</sup> That is, through Christ's Death and Resurrection, humanity is offered the opportunity to be reconciled with God, and the human experience of reconciliation is possible through the action of the Holy Spirit.<sup>57</sup> The essence of the freedom attributable to grace and the work of the Holy Spirit is a capacity which sin had impaired—a capacity inherent within human beings to love God above all things and to remain in communion with him—a capacity that is constantly challenged or affected by the mystery of iniquity still at work in the world.<sup>58</sup> As a consequence, Christian life is one of perseverance: human existence is a “spiritual struggle to live according to the Gospel and is waged with the weapons of God.”<sup>59</sup>

Grace, thus, is the source of true freedom.<sup>60</sup> And freedom itself is an enhancement or magnification of the capacity to love. It is moving away from sin and being brought into a closer union with God. It is the breaking down of barriers separating humanity from God.<sup>61</sup> Again, the ICATL perhaps is more clear and direct: “Freedom is a new life in love.”<sup>62</sup>

The Instructions therefore make clear that the Old and New Testaments are consistent in revealing that true

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<sup>56</sup> *Id.* at #52.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at #53.

<sup>59</sup> *Id.* at #53 (citing Eph 6, 11-17).

<sup>60</sup> *Id.* at #54.

<sup>61</sup> *Cf. id.* at #52 (“In Christ, we can conquer sin, and death no longer separates us from God”); *Id.* at #53 (“For freedom Christ has set us free” (Gal 5:1).); *Id.* at #58 (“[P]ossessing the pledge of the Spirit, the People of God is led towards the fullness of freedom. The new Jerusalem which we fervently await is rightly called the city of freedom in the highest sense.”); *Id.* at #63 (“Through the word of God and the Sacraments, man is freed in the first place from the power of sin and the power of the Evil One which oppress him; and he is brought into a communion of love with God”).

<sup>62</sup> ICATL, *supra* note 44, at ch. IV, #2.

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liberation depends on God's action in helping humanity to avoid hardness of heart, to avoid transgression and sin, and thus to more fully conform with God's law or command of love.<sup>63</sup> God calls man to freedom,<sup>64</sup> and genuine freedom is freedom from sin and being with God. Communion with God is made possible through grace, and communion with God is linked in some way with how one lives. Living in accordance with the Gospel brings man and society closer to God. Rejecting God's gift of grace results in pursuing the inherent human need for the transcendent—the infinite—in *finite* things. Worship of created things—rather than God—disrupts relationships and causes disorders that affect the sphere of family and society.<sup>65</sup> Thus, liberation from sin is what will alleviate the evils, oppressions, and suffering in the world.

### V. The Deeper Philosophical & Theological Foundation for Human Freedom

As noted, the ICFL explains that the Church possesses the truth concerning man and his freedom through the Mystery of Jesus Christ. “From him, who is ‘the way, the truth, and the life’ (Jn 14:6), the Church receives all that she has to offer mankind.”<sup>66</sup> The ICATL similarly emphasizes that authentic human progress and liberation rests on three “indispensable pillars” of truth: the

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<sup>63</sup> Notably, in light of revelation in Jesus Christ, the law of the Old Testament has been transformed: love is now a “response to the gift of love with which God draws near to us.” Letter from Benedict XVI, Supreme Pontiff, to the Bishops, Priests, and Deacons; Men and Women Religious; and all the Lay Faithful on Christian Love, (Dec. 25, 2005) (on file with author), *available at* [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20051225\\_deus-caritas-est\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html), at #1.

<sup>64</sup> ICFL, *supra* note 44, at #37.

<sup>65</sup> *Id.* at #39.

<sup>66</sup> *Id.* at #3.

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truth about Jesus, the Savior from human sin; the truth about the Church; and the truth about man and his dignity.<sup>67</sup> The documents explore most deeply the truth that genuine human liberation is salvific: it is freedom from sin.

Yet, the overarching theme of the Instructions is that truth and freedom are inseparably linked, and that understanding human freedom also hinges on coming to understand the truth about man. The ICFL states that, by revealing to man “his condition as a free person called to enter into communion with God,” the Gospel of Jesus Christ prompted an awareness of “hitherto unsuspected depths of human freedom.”<sup>68</sup> Similarly, the ICATL notes that the radical philosophies of freedom which aim to create a new man through social control and social structures “leads to the denial of the meaning of the person and his transcendence” and, at the same time, destroys the foundation of ethics, namely, the absolute character of the distinction between good and evil.<sup>69</sup> In both instances, the CDF is emphasizing the importance of properly understanding the meaning of the human person. Understanding the truth about man and the human person clarifies what sin is, which in turn clarifies what constitutes liberation.

The Instructions, however, do not explore in any depth the concept of the human person or the truth about man. The ICFL rejects the modern concept of the subject of freedom as “an individual who is fully self-sufficient and whose finality is the satisfaction of his own interests in the enjoyment of earthly goods.”<sup>70</sup> It states that “every individual is oriented toward other people” and that genuine freedom exists only where “reciprocal bonds,

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<sup>67</sup> ICATL, *supra* note 44, at ch. XI, #5.

<sup>68</sup> ICFL, *supra* note 44, at #5.

<sup>69</sup> ICATL, *supra* note 44, ch. IV, #15.

<sup>70</sup> ICFL, *supra* note 44, at #13.

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governed by truth and justice, link people to one another.”<sup>71</sup> It also states that “God did not create man as a ‘solitary being’ but wished him to be a ‘social being,’” and, thus, man “can only grow and realize his vocation in relation with others.”<sup>72</sup> Sin, breaking away from God in acts of total autonomy and self-sufficiency, constitutes a denial of self.<sup>73</sup> The freedom possible with the assistance of grace is a restored capacity to love God and remain in communion with him.<sup>74</sup> Love of God, Christian love, takes the form of fraternal love.<sup>75</sup> And, as stated in the ICATL, “[t]he recognition of the true relationship of human beings to God constitutes the foundation of justice to the extent that it rules the relationships between people.”<sup>76</sup>

But what is the basis for these propositions? In what way does the truth about man and his destiny or about the true relationship of human beings to God *undermine* ideas of autonomy and self-sufficiency or, on the contrary, *support* the idea that human aspirations for freedom hinge on relationships between people? Again, it is by careful reflection on Jesus Christ as the fullness of revelation that truth emerges. In other writings, Cardinal Ratzinger has tried to flesh out the truth about man emerging from philosophical and theological reflection on Jesus Christ.

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<sup>71</sup> *Id.* at #26.

<sup>72</sup> *Id.* at #32.

<sup>73</sup> *Id.* at ##37-38. See also ICATL, *supra* note 44, at ch. IV, #12 (stating that sin “strikes man in the heart of his personality”). Sin, breaking away from God, disturbs man’s internal order and balance and the order and balance in society. Sin also disrupts man’s aspiration to the infinite, and distorted attachment to finite created things leaves him “always searching for an impossible peace.” ICFL, *supra* note 44, at #40.

<sup>74</sup> ICFL, *supra* note 44, at #53.

<sup>75</sup> *Id.* at ##56-57. Fraternal love encompasses the “direct and imperative requirement of respect for all human beings in their rights to life and to dignity.” *Id.*

<sup>76</sup> ICATL, *supra* note 44, at ch. XI, #6. See also ICFL, *supra* note 44, at #60.

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The short answer is that the Christian perspective of human freedom is fully supported when it is understood that man is made in God's image precisely insofar as being "from," "with," and "for" constitutes the fundamental anthropological pattern. It is this pattern that constitutes the essence of the human person. Moreover, human freedom is a collective endeavor and attaining freedom depends on following the way opened up by Jesus Christ. The cornerstone supporting these basic principles is the idea of a personal God.

**A. Freedom Grounded in a Logos that is Love**

A comprehensive vision of Christian freedom is more understandable and compelling when viewed within the bigger picture of the existence of "being" in the world. Explaining how Christianity in general fits into the larger philosophical realm was part of Ratzinger's objective in his book *Introduction to Christianity*. In this book, Ratzinger was not addressing freedom specifically, but, nonetheless, made many points in the book that are relevant to understanding the Christian vision of human freedom. Ratzinger explains that, when considering the existence of being in the world, the overarching question is: "In all the variety of individual things, what is, so to speak, the common stuff of being – what is the one being behind the many 'things', which nevertheless all 'exist.'"<sup>77</sup> He notes that the endless variety of philosophies attempting to think out "being" can, broadly speaking, be reduced to two basic possibilities: the materialist solution or the idealistic solution. He then explains Christianity's tie to the idealistic solution.

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<sup>77</sup> JOSEPH RATZINGER, INTRODUCTION TO CHRISTIANITY 156 (J.R. Foster trans., Ignatius Press 2d ed. 2004) (1968) [hereinafter Ratzinger, *Introduction*].

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The materialistic solution sees everything encountered in the world as mere matter. Matter is the only thing that “always remains as demonstrable reality and, consequently, represents the real being of all that exists.”<sup>78</sup> Matter is the raw tangible stuff that constitutes or comprises *things and beings* in the world. From a philosophical perspective, matter is a being that does not comprehend being in that it “‘is’ but does not understand itself.”<sup>79</sup> Thus, if matter is the being of all that exists, the logical implication is that any capacity to “understand being” that may exist in the cosmos arises only as a secondary, chance product during the course of development.<sup>80</sup> Therefore, the fact that human beings can understand things, or find meaning in things, is a mere accident. Materialism, then, accords primacy to the irrational.<sup>81</sup>

Christianity rejects the materialist solution in favor of a modified idealistic solution.<sup>82</sup> The idealistic solution

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<sup>78</sup> *Id.* at 156.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Ratzinger had highlighted this important point in a number of writings. See, e.g., JOSEPH RATZINGER, CHRISTIANITY AND THE CRISIS OF CULTURES 49 (2006) (noting that whether the world comes from an irrational source is a fundamental issue: “A reason that has its origin in the irrational and is itself ultimately irrational does not offer a solution to our problems. Only that creative reason which has manifested itself as love in the crucified God can truly show us what life is.”).

<sup>82</sup> Ratzinger has explained that all great cultures have recognized the idealistic solution, namely, the doctrine of objective values expressed in the Being of the world, and the conviction that man’s Being contains an imperative; he does not invent morality on the basis of expediency but rather finds it already present in the essence of things. He notes that this common insight presents itself as the primal evidential character of human life, and that modern thinkers drew the “simple conclusion” that moralities of mankind constitute but human constructions. To Ratzinger, “this diagnosis is extremely superficial. . . .” See JOSEPH RATZINGER, *Faith’s Answer to the Crisis of Values*, IN A TURNING POINT FOR EUROPE: THE CHURCH IN THE MODERN WORLD:

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posits that the scrutiny of things in the cosmos shows that *things and beings* are “being-thought.” That is, all being is a product of thought. Thinking is prior to matter, and, specifically, thinking by a subjective mind.<sup>83</sup> In non-Christian versions of idealism, all being is the being-thought of one single consciousness, and all being is unified in the identity of the one consciousness. Any appearance of independence proves to be mere appearance.<sup>84</sup> The Christian understanding is different because the thinking being whose thought produces is not just thought or Eternal Reason but, rather, the being is also Love.

The person of Jesus brought this point to light in a powerful way. But there was an understanding that existed before Christ as a result of God’s encounters with Israel that revealed him as a personal God. As Ratzinger explains, the *shema* of Israel—“Hear, O Israel. He is our God. He is One.”—is the real core of the believer’s

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ASSESSMENT AND FORECAST, *supra* note 11, at 35-36. Ratzinger has also explained that belief in Creation is reasonable, and, further, that “even from the perspective of the data of the natural sciences it is the ‘better hypothesis,’ offering a fuller and better explanation than any of the other theories.” See Joseph Ratzinger, *God the Creator*, in *IN THE BEGINNING. . . : A CATHOLIC UNDERSTANDING OF THE STORY OF THE CREATION AND THE FALL* 17 (Boniface Ramsey trans., Wm. B. Eerdmans Pub. Co. 1995) (1986) [hereinafter Ratzinger, *God the Creator*]. In the second homily Ratzinger explains that the scientific-based theories hinge on the entire ensemble of nature arising out of errors and dissonances and that some scientists acknowledge the absurdness of the theories, but, nonetheless, cannot break out of the scientific mindset because “the scientific method demands that a question not be permitted to which the answer would have to be God.” JOSEPH RATZINGER, *The Meaning of the Biblical Creation Accounts*, in *IN THE BEGINNING. . . : A CATHOLIC UNDERSTANDING OF THE STORY OF THE CREATION AND THE FALL*, *supra*, at 22-25 [hereinafter Ratzinger, *The Meaning*].

<sup>83</sup> Ratzinger, *Introduction*, *supra* note 77, at 156-57.

<sup>84</sup> *Id.* at 157.

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identity and is grounded in the fact that God loves and wants a relationship with his creation.

The believing Jew dies reciting this profession; the Jewish martyrs breathed their last declaring it and gave their lives for it. . . . The fact that this God now shows us his face in Jesus Christ (Jn 14:9) – a face that Moses was not allowed to see (Ex 33:20) – does not alter this profession in the least and changes nothing essential in this identity. Of course, the fact that God is personal is not mentioned in the Bible using that term, but it is apparent nevertheless, inasmuch as there is a name of God. A name implies the ability to be called on, to speak, to hear, to answer. This is essential for the biblical God, and if this is taken away, the faith of the Bible has been abandoned. . . . But what is actually meant, then, by God's name, by his being personal? Precisely this: Not only can we experience him, beyond all [earthly] experience, but also



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he can express and  
communicate himself.<sup>85</sup>

God has revealed to humanity that he wants to communicate with humans. He *has* communicated himself to humanity in history because he desires a relationship with humanity. And he has welcomed prayer from humans.<sup>86</sup> God's desire and the nature of the relationship is revealed most fully through Jesus Christ, but Scripture reveals that God has been in relationship with humanity since the dawn of creation. The first step in understanding human freedom as communal with God—involving a reality internal to the human being, or a capacity to be in union with God, involves considering the issue from the perspective of Christian idealism—namely, the understanding of God as Reason and Love.

Ratzinger has stressed in many forums the importance of the decision by the early Christians to explicitly recognize that the God of the philosophers—the Logos, the divine presence that can be perceived by the rational analysis of reality—is one and the same as the

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<sup>85</sup> *Id.* at 22-23 (preface to the 2000 edition).

<sup>86</sup> In *Spe Salvi*, Pope Benedict XVI explains that outside Christianity, a God to whom one could pray did not exist, and that the idea of a personal God radically changed the prevailing world-view that, in a different way, is prominent today. “It is not the elemental spirits of the universe, the laws of matter, which ultimately govern the world and mankind, but a personal God governs the stars, that is, the universe; it is not the laws of matter and of evolution that have the final say, but reason, will, love – a Person. And if we know this Person and he knows us, then truly the inexorable power of material elements no longer has the last word; we are not slaves of the universe and its laws, we are free.” Letter from Benedict XVI, Supreme Pontiff, to Bishops, Priests, and Deacons; Men and Women Religious; and all the Lay Faithful on Christian Love (Nov., 30 2007) (on file with author), *available* *at*  
[http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20071130\\_spe-salvi\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20071130_spe-salvi_en.html), at #5.

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personal God who has entered history.<sup>87</sup> To Christians, the Logos is not just Eternal Reason. It is not an anonymous, neutral consciousness. The Christian God is not simply a “first cause.” Rather, in Christianity the Logos loves. The Logos *is* Love.<sup>88</sup>

A Logos that is Love fundamentally alters idealism. The consciousness that is the ultimate being is not a mere craftsman, but rather, is creative mind.<sup>89</sup> Indeed, Eternal Reason is creative because it is Love. Freedom is also a consequence of Love. In creating or thinking, the Logos that is Love gives freedom to its creation. As explained by Ratzinger, the creative consciousness that is Love releases what has been thought into the freedom of its own, independent existence. Being-thought of the Logos that is Love has more than a mere appearance of being: being-thought is true being itself.<sup>90</sup>

In *Introduction to Christianity*, Ratzinger highlighted several key implications flowing from this understanding of Logos as creating and loving that are relevant to understanding freedom. First, each human being is not merely an individual “reproduction” or secondary thing—the result of idea being diffused into matter. Rather, each human being is a definite being, a true being, unique and unrepeatable. “The highest is not the

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<sup>87</sup> Ratzinger, *Introduction*, *supra* note 77, at 138.

<sup>88</sup> Ratzinger gives an extensive treatment to the concept that God is Love. See Letter from Benedict XVI, Supreme Pontiff, to the Bishops, Priests, and Deacons; Men and Women Religious; and all the Lay Faithful on Christian Love, (Dec. 25, 2005) (on file with author), *available at* [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20051225\\_deus-caritas-est\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html), at #1.

<sup>89</sup> Ratzinger, *Introduction*, *supra* note 77, at 157. Ratzinger has noted that the revelation that existence is Creation was itself a decisive moment of Enlightenment. See Ratzinger, *God the Creator*, *supra* note 82, at 14.

<sup>90</sup> Ratzinger, *Introduction*, *supra* note 77, at 157.

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most universal but, precisely, the particular, and the Christian faith is thus above all also the option for man as the irreducible, infinity-oriented being.”<sup>91</sup> Each human being exists because of being thought by God and, thus, is known by and loved by God.

Second, the existence of any being created by the Logos that is Love is, essentially, freedom. Therefore, freedom is the structural form of all being.<sup>92</sup> Stated another way, it can be said that life itself is freedom. This has positive and negative aspects. Because freedom is the structure of creation, incomprehensibility is part and parcel of the cosmos. The world cannot be reduced to mathematics, and the mystery of the demonic exists: “As the arena of love [the world] is also the playground of freedom and also incurs the risk of evil.” But the mystery of darkness can be seen as an acceptable tradeoff for the greater positives of freedom and love.<sup>93</sup> Each human being is a distinct being set free by God because of God’s love.

Third, all being is intelligible and meaningful because pure intellect made it and He made it by thinking it. The intelligibility *in* things, in being-thought that is true being, is the expression of creative pre-mediation. Human thinking, then, is “re-thinking,” and it is right or true when it is in conformity with the thought of the Creator.<sup>94</sup> As explained by Ratzinger: “Man can rethink the *logos*, the meaning of being, because his own *logos*, his own reason, is *logos* of the one *logos*, thought of the original thought, of the creative spirit that permeates and governs his being.”<sup>95</sup> This means that the conception of man and the way man

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<sup>91</sup> *Id.* at 158. The Supreme Being can care for humans precisely because His consciousness does not have limits – He can embrace the whole. *Id.* at 146. From this perspective, love is higher than thought. *Id.* at 147.

<sup>92</sup> *Id.* at 157.

<sup>93</sup> *Id.* at 159-60.

<sup>94</sup> *Id.* at 59.

<sup>95</sup> *Id.*

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should live is correct and true when in conformity with God's idea of man. Knowing what it means to be human means coming to know the "Idea" of the Creative being.

If Eternal Reason and Creative Love are one and the same, the measure of human action is Truth. This was the message of Jesus: "The truth will make you free" (Jn 8:32). But humanity can only know the Truth with God's help and Truth that comes from God has its center in Jesus Christ.<sup>96</sup> This is the real essence of Christian faith. Faith is the encounter with Jesus. Faith is the Word coming from the transcendent. Faith is reception of what cannot be thought out.<sup>97</sup> In God's encounters with mankind throughout history, God is seeking a relationship that hinges on mankind understanding God's Idea for humanity. Creation and Covenant go hand in hand.<sup>98</sup> Jesus Christ is the key to understanding God's Idea for humanity. Jesus Christ is essential to human freedom because he brought knowledge and understanding—the fullness of revelation—to assist human reasoning. But this is not all. It is his presence and

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<sup>96</sup> ICFL, *supra* note 44, at #3.

<sup>97</sup> See JOSEPH RATZINGER, *The Ecclesiology of the Second Vatican Council*, in CHURCH, ECUMENISM & POLITICS: NEW ESSAYS IN ECCLESIOLOGY, *supra* note 12, at 3, 10 ("Faith is the encounter with what I cannot think up myself or bring about by my own efforts but what must come to encounter me"); Ratzinger, *Luther*, *supra* note 21, at 126-27 (Christian faith is sharing in knowledge with Jesus Christ).

<sup>98</sup> To Ratzinger, this point is crucial. Materialism, as it shows up in its many philosophical forms, rejects creation because it implies a dependence that deprives the world its power and that ultimately is perceived as the real barrier to freedom; it will not entrust itself to a world already created, but only to world still to be created. The Christian option is the opposite. Human beings are dependent. But it is a dependence that takes the form of love and, thus, does not involve diminishment of self, but, rather, leads to freedom. See JOSEPH RATZINGER, *The Consequences of Faith in Creation*, in "In the Beginning. . .: A CATHOLIC UNDERSTANDING OF THE STORY OF CREATION AND THE FALL," *supra* note 82, at 98-100.

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the presence of the Holy Spirit that enable human union with God.

## **B. Trinitarian Insights into Freedom**

The Christian vision of freedom as explained by Ratzinger partially rests on the principle that “man is God’s image precisely insofar as being ‘from,’ ‘with,’ and ‘for’ constitute the fundamental anthropological pattern.”<sup>99</sup> It is this pattern that constitutes the essence of the human person. Ratzinger’s understanding of this pattern rests on the concept of the human person as revealed by Jesus Christ and, more specifically, by knowledge of God as “one being in three persons” and knowledge of Jesus Christ as having “two natures and one person.” Therefore, it is a concept with meaning because of the Christian doctrine of the Trinity.

### **1) The Concept of Person**

The concept of person that emerged from the development of the doctrine of the Trinity, and the process of developing the concept, were explored by Ratzinger in *Retrieving the Tradition: Concerning the Notion of Person in Theology*, published in 1990.<sup>100</sup> In this article, Ratzinger points out that early Christian philosophers latched onto a philosophically insignificant concept—the literary use of dialogue or roles, *persona*, to depict the action occurring in dramatic events—and transformed the concept in a radical way. “The ‘role’ truly exists; it is . . . the face, the person

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<sup>99</sup> Ratzinger highlighted this point. See Ratzinger, *Truth and Freedom*, *supra* note 26, at 346-47.

<sup>100</sup> Joseph Ratzinger, *Retrieving the Tradition: Concerning the Notion of Person in Theology*, 17 COMMUNIO 439 (1990) [hereinafter Ratzinger, *Retrieving the Tradition*].

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of the Logos.”<sup>101</sup> Jesus’s words and actions support the concept of the Trinity, but what helps make the concept of the Trinity comprehensible? The early Christian philosophers used the transformed concept of *persona* to help explain the reality of the intra-divine dialogue found throughout Scripture and the ontological reality of being emphasized by St. John in writing his Gospel.

Foremost, the concept of “person” was understood as a dialogical reality whose essence is action. But what is the nature of this reality?<sup>102</sup> To the early Christian philosophers, the nature of reality fell into one of two categories: substance (the sustaining form or real essence of a thing) or matter with its accidents (the chance circumstances of being). God is wholly spirit with no accidents. The crux of the question, then, was whether the persons of God were substance. The philosophers knew this could not be the case since the essence of God’s being

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<sup>101</sup> *Id.* at 439, 442. In interpreting poems or narratives, ancient literary scholars would uncover the *prosopon* or *persona* used by the author. In studying Scripture, Christian philosophers noticed a similar use of dialogue in that God speaks to himself and God speaks through the Prophets. The philosophers spoke in terms of the “sacred writers” introducing “different *prosopa*, different roles,” but the Christian philosophers recognized a radical difference: “The roles introduced by the sacred writer are realities, they are dialogical realities.” *Id.* at 441.

<sup>102</sup> The question whether the three persons were in fact realities was, itself, a challenging philosophical and theological question. Therefore, does the “triplicity” genuinely inform humanity about what God is like in himself or only about how man can relate to God or the mode in which God relates to man? The Church settled on the understanding that “God *is* as he *shows* himself; God does not show himself in a way in which he is not.” Ratzinger, *Introduction*, *supra* note 77, at 165 (emphasis in original). Or, as explained by Ratzinger, “[a]lthough it is true that we only know God as he is reflected in human thought, the Christian faith held firmly to the view that in this reflection it is *him* that we know. Even if we are not capable of breaking *out* of the narrow bounds of our consciousness, God can nevertheless break *into* this consciousness and show himself in it.” *Id.* at 167 (emphasis in original).

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is oneness. Scripture also made clear the idea of “relation” between the persons of God: the Father and the Son. Philosophy traditionally considered “relation” an aspect of accidents, or a characteristic of matter (a thing is between, beside, above, etc.), as opposed to form. The logical solution was thus to conceive of relation differently: as a reality within being and distinct from substance and accident. Person is relation. Relation *is* the person, and the person exists only *as* relation. Father, Son, and the Holy Spirit are real existing relations, and nothing besides.<sup>103</sup> Further, they are pure act. The idea that the Father begets the Son means that the Father *is* self-donation: pure reality of act, pure act-being.<sup>104</sup> In Ratzinger’s words, “[i]n God, person is the pure relativity of being turned toward the other; . . . [it lies] on the level of dialogical reality, of relativity toward other.”<sup>105</sup>

Ratzinger recognizes the interplay between philosophy and theology that led to this original concept of person as pure relativity toward others. But he also emphasizes that Scripture confirms and deepens this understanding. He explains that statements such as “The Son cannot do anything of himself” (John 5:19) or “I and the Father are one” (John 10:30) mean that Jesus “has nothing of himself alone,” that he “does not place himself as a delimited substance next to the Father;” and that Jesus “constitutes nothing but relativity toward [the Father] that

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<sup>103</sup> Ratzinger, *Retrieving the Tradition*, *supra* note 100 at 444.

<sup>104</sup> *Id.* at 444.

<sup>105</sup> *Id.* Ratzinger emphasizes the novelty and value of this Christian contribution to human thought: “Again we encounter the Christian newness of the personalistic idea in all its sharpness and clarity. The contribution offered by faith to human thought becomes especially clear and palpable here. It was faith that gave birth to this idea of pure act, of pure relativity, which does *not* lie on the level of substance and does not touch or divide substance; and it was faith that thereby brought the personal phenomenon into view.” *Id.* at 445 (emphasis in original).

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does not delimit a precinct of what is merely and properly its own.”<sup>106</sup> Ratzinger also sees other Scriptural themes as reinforcing the idea of person or relation as encompassing “openness,” specifically, the theology of mission and the doctrine of the Logos. In both the Old and New Testaments, the emissary is one with the sender. Christ is the genuine emissary who is in his entire nature “the one sent.” As “the one sent” Jesus stands in complete relativity of existence towards the one who sent him. Thus, the “content of Jesus’ existence is ‘being from someone and toward someone,’ the absolute openness of existence without any reservation of what is merely and properly one’s own.”<sup>107</sup> The doctrine of the Logos is consistent. The term Logos has rich significance in terms of eternal rationality. But, in addition, Ratzinger points out that the Logos, as Word, “is essentially from someone else and toward someone else; word is existence that is completely path and openness.”<sup>108</sup>

Moreover, Ratzinger points out that Scripture itself suggests that this idea of person should be transferred to humans. Jesus tells his disciples that “Without me you can do nothing” (John 15:5), and prays that “they may be one as we are one” (John 17:11).<sup>109</sup> The idea of emissary, similarly, is transferred to the disciples when Jesus states, “As the Father has sent me, so I am sending you” (John 20:21). Ratzinger thus notes:

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<sup>106</sup> *Id.* at 445.

<sup>107</sup> *Id.* at 446.

<sup>108</sup> *Id.*

<sup>109</sup> Ratzinger thus notes: “It is thus part of the existence even of the disciples that man does not posit the reservation of what is merely and properly his own, does not strive to form the substance of the closed self, but enters into pure relativity toward the other and toward God. It is in this way that he truly come to himself and into the fullness of his own, because he enters into unity with the one to whom he is related.” *Id.* at 445.



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I believe a profound illumination of God as well as man occurs here, the decisive illumination of what person must mean in terms of Scripture: *not* a substance that closes itself in itself, but the phenomenon of complete relativity, which is, of course, realized in its entirety only in the one who is God, but which indicates the direction of all personal being.”<sup>110</sup>

Theological and philosophical reflection on the knowledge of God as the Trinity, as three persons in one being, thus provides a solid foundation for the idea that “relativity, being turned toward other” is a distinct aspect of the human person and thus of human existence.

In *Retrieving the Tradition*, Ratzinger also discusses how reflection on knowledge of Christ reinforces this vision of the human person. In trying to grasp the meaning of Christ, theologians again focused on the word *persona*. The formula is as follows: Christ has two natures—a divine and human nature—but only one divine person. Ratzinger notes that, as to the meaning of “person” reflected in this formula, the early theologians worked out what the person is *not*, but did not clarify with the same precision what the concept means positively. In the many battles over the question of “who and what is this Christ,” it was clarified that the formula and its use of the phrase “divine person” does not in any way indicate that anything was lacking in the humanity of Christ.<sup>111</sup> Therefore, the phrase “divine person” cannot be thought of as indicating

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<sup>110</sup> *Id.* (emphasis in original).

<sup>111</sup> *Id.* at 448.

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that the reality of person, the reality of relativity, does not reach Jesus's humanity. Rather, the concept of person is an essential aspect of the entire existence of Jesus, his divinity and humanity. Beyond this, however, Ratzinger only identifies "hints that point out the direction" for Christological and, in turn, anthropological reflection. Yet these hints are powerful and well grounded.

Ratzinger points out that Boethius's concept of person, which prevailed in Western philosophy as "the individual substance of a rational nature," is erroneous and unhelpful in the context of the Trinity and Christology because it puts the idea of "person" on the level of substance.<sup>112</sup> Reflection on God as three persons has placed "person" in an arena of being distinct from both substance and accident or matter. Further, person is an aspect of the spirit, and in Jesus, would be an aspect of his divinity and humanity. In humanity, this spirit is embodied.

Ratzinger then engages in philosophical reflection on the nature of spirit to make a key point about the human person. First, in contrast to matter that "is what is," the spirit is that "which is not only there, but is itself in transcending itself, in looking toward the other and in looking back upon itself."<sup>113</sup> Because openness—relatedness to the whole—is thus the essence of spirit, it is in reaching beyond itself, by being *with other*, that spirit comes to itself. Second, spirit is that being which is able to think about itself, about being in general, and about the wholly other, namely, the transcendent God. Indeed, Ratzinger points out that the ability to reflect on the concept of God is the mark that truly distinguishes the

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<sup>112</sup> *Id.* at 448. (In other contexts, Boethius's concept can provide a springboard for reflection about the concept of person. See, e.g., John Paul II's work on the acting-person.)

<sup>113</sup> *Id.* at 451 (quoting HEDWIG CONRAD-MARTIUS, *DAS SEIN* 133 (1957)).

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human spirit from other forms of consciousness found in animals.<sup>114</sup> Third, the other through which the spirit ultimately comes to itself must be God. He concludes that if the person is itself the more it is with the other, “then the person is all the more itself the more it is with the wholly other, with God.”<sup>115</sup> Or, stated another way: the “human person is the event or being of relativity” and the “more the person’s relativity aims totally and directly at its final goal, at transcendence, the more the person is itself.”<sup>116</sup>

Integrating this point with knowledge of Christ, Ratzinger sees two main ideas emerge. In Christ, “being with other” is radically realized. Relativity toward other is *always* the foundation of his consciousness and existence. But this does not cancel out the “being with” that is inherent to his human nature. “In Christ, in the man who is completely with God, human existence is not canceled, but comes to its highest possibility, which consists in transcending itself into the absolute and in the integration of its own relativity into the absoluteness of divine love.”<sup>117</sup> Ratzinger’s first point is that this implies that the human person in history is “being on the way” towards integration into divine love.<sup>118</sup>

His second point flows from the fact that knowledge of Christ “adds the idea of ‘we’ to the idea of ‘I’ and ‘you.’” Ratzinger notes that Scripture depicts Christ as the “all-encompassing space in which the ‘we’ of human beings gathers on the way to the Father.”<sup>119</sup> Therefore, Christ, the one divine person, is the “we” into which Love, the Holy Spirit, gathers humanity. Similarly, Scripture

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<sup>114</sup> *Id.* at 451.

<sup>115</sup> *Id.* at 451-52.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* Ratzinger does not emphasize the point in this article, but this fact is also the reason why, or the mechanism through which, the persons of collective humanity are able to integrate with God.

<sup>119</sup> *Id.* at 452-53.

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shows God as the “we” of Father, Son, and Holy Spirit. Thus, the dialogical principle in Christianity is not simply an “I-Thou” relationship. Rather, on both sides of the dialogue, the “I” is integrated into the greater “we.”<sup>120</sup> Thus, the true character of dialogue with the Father—integration of the human relativity with Divine Love—is properly reflected in the liturgical formula “through Christ in the Holy Spirit to the Father.”<sup>121</sup> To Ratzinger, this proper understanding of the human person’s relationship with God totally undermines a Christian view that emphasizes only an individualized relationship with God.<sup>122</sup> Individuals should strive for a deep and personally heartfelt relationship with God, but each person’s relationship with God is necessarily intertwined with and part of God’s relationship with humanity as a whole.

## 2) Freedom as Transcendence towards Other

Understanding the concept of the human person, and integrating it with the cornerstone idea of a personal God, clarifies the following: The human being is a unity, a spirit-in-body. An essential aspect of this unity is an existential component: a reality encompassed by the term person, a component that is pure relativity that knows of God and is striving for integration with or union with God.

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<sup>120</sup> *Id.* at 453.

<sup>121</sup> *Id.*

<sup>122</sup> He also notes that the typical individualized “I”–“You” perspective contributed to the eventual loss of the “You.” *Id.* at 453 (noting that in Kant’s transcendental philosophy the “you” is no longer found). At the same time, Ratzinger acknowledges that this collective vision of integration or union with God was obscured by the manner in which both Augustine and Thomas Aquinas presented certain aspects of the Trinity. *Id.* at 454. *See also id.* at 449. But, the existential approach had been introduced by the beginning of the Middle Ages by Richard of St. Victor. *See id.* at 449.

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This existential component is integral to each human being by virtue of being a creature of a personal God, a Logos that is Love, and a God whose essence of oneness includes a dialogical reality that is pure relativity of being turned toward other. Indeed, for a Logos that is Love—a personal God—this reality that is pure relativity necessarily exists. It is the essence of Love. And it is this Love that is an integral part of each human being and an inherent aspect of human nature.<sup>123</sup> It is this Love that is the person and the relativity of each human. The love or relativity within each human being is completed only by re-union with God. Union or integration occurs on the level or plane of relation, or Love, and union with God depends on thinking and acting with God. Union or integration of this love in each human being with Divine Love is possible in and through Jesus Christ and, thus, occurs collectively with other human beings.

These insights into the essence of the concept of person clarify the nature of sin and thus why genuine liberation is freedom from sin. Man does not come to himself through autonomy and self-sufficiency. Rather, the human person strives towards transcendence. “It is in this way that he truly comes to himself and into the fullness of his own, because he enters into unity with the one to whom he is related.”<sup>124</sup> This involves turning toward others. The fundamental figure of human existence thus is a being “from,” “with,” and “for,” and sin thus consists in human

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<sup>123</sup> The magisterium uses the phrase “nature of a being” to refer to what constitutes the being as such, with the dynamism of its tendencies toward its proper ends; “It is from God that natures possess what they are, as well as their proper ends.” Beings are created and “impregnated with a significance in which man, as the image of God, is capable of discerning the creating hand of God.” INTERNATIONAL THEOLOGICAL COMMISSION, FAITH AND INCULTURATION ch. I, #1 (1988), *available* [http://www.vatican.va/roman\\_curia/congregations/cfaith/cti\\_documents/rc\\_cti\\_1988\\_fede-inculturazione\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1988_fede-inculturazione_en.html) (internal quotations omitted)

<sup>124</sup> Ratzinger, *Retrieving the Tradition*, *supra* note 100, at 445.

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actions that interfere with this pattern and with union with God. Further, because the person is more himself or herself the more the person's relativity aims totally and directly at its final goal and at transcendence, freedom necessarily consists in liberation from sin.

**C. The Incarnation: Freedom as Fulfillment of the Divine Idea**

The revelation brought by Jesus Christ opened a whole new dimension to humanity's knowledge of God and, in turn, humanity's knowledge of man. While this article has discussed much of that insight bearing on human freedom, Ratzinger's writing fleshes out an even deeper dimension of human freedom. A dimension grounded in the unity of humanity and relating to how Jesus Christ enables human union with God. This perspective of human freedom only comes to light with the fullness of the message of Christ. A fullness that is still unfolding but that was rendered substantially comprehensible in the first several centuries of Christianity by Christian philosophers working with the Church and from within the faith.

In working out the implications of the doctrine of the Trinity, along with the implications of understanding the Logos as Love, the meaning of liberation from sin began to come to light. Jesus brought liberation from sin. It is *in* Christ that humanity has been set free. Freedom is thinking and acting with God, such that union with God occurs on the level or plane of relation, or Love. But, the question arises: How, more specifically, does Jesus enable humanity to achieve God's objective? Ratzinger has addressed this more particular aspect of the Mystery of the Incarnation and the Trinity.

As explained, the doctrine of the Trinity posits God as three Persons in One Being. Each Person is a reality or an act of relativity. God is Father only in relation to his

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Son, only in “being for” the other. He *is* the act of giving himself. Similarly, Christ is Son only in relation to Father. He has nothing of his own and can do nothing on his own. He stands in the Father and constantly is one with him. Son is “being from” another. But since he also is one with the Father, he is a “being for.” The Son *is* being “for others.” This is the essence of the revelation of Jesus’s life and work: the whole being of Jesus is a function of the “for us.”<sup>125</sup> Jesus is thus absolute openness of existence, from and for. This existence is a complete path and openness. The Holy Spirit is God facing outward, the means through which Jesus Christ—in all his openness and breadth and freedom—remains present in the history of the world.<sup>126</sup> The Holy Spirit is the gift of Love and the constituting principle of the new man in Christ.<sup>127</sup>

Ratzinger notes in *Introduction to Christianity* that, in addition to other radical insights, the triple relativity of these Persons in the one Being of God brought about a profound break-through relating to unity and plurality in

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<sup>125</sup> Ratzinger, *Introduction*, *supra* note 77, at 204. Indeed, Christians understand that it is only “to him who died on the Cross, to him who renounced all earthly power . . . to him who laid aside the sword and . . . went to his death for others, to him who saw the meaning of human existence, not in power and self-assertion, but in existing utterly for others – who indeed was, as the Cross shows, existence for others – to him and him alone God has said “You are my son, today I have begotten you.” *Id.* at 219. Love of God and neighbor, which devolves to service to others is, of course, the crux of the Jesus’s teaching. But, what is important is not that Jesus left behind a body of teaching. What is important is that Jesus *is* his teaching. *Id.* at 205, 226. As explained by Ratzinger, “his *being* itself is service” and for this reason “it is sonship.” *Id.* at 226.

<sup>126</sup> *Id.* at 332-34.

<sup>127</sup> *Id.* at 337. The Holy Spirit is “God’s gift to history in the community of those who believe in Christ,” *id.* at 331, a gift accessible largely through baptism, penance, and the Eucharist. *Id.* at 336. The center of the Spirit’s activity in the world is thus the Church. *Id.* at 335.

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the philosophy of being. To ancient thought, only unity or oneness could be divine, and plurality was conceived as a disintegration of divine.<sup>128</sup> However, if the highest Being no longer is understood as a detached Being, existing closed in on himself in his oneness, divinity is not mere unity. Plurality too has its inner ground in God. “Plurality is not just disintegration that sets in outside the divinity. . . . it is not the result of the dualism of two opposing powers; it corresponds to the creative fullness of God, who himself stands above plurality and unity, encompassing both.”<sup>129</sup> Ratzinger explains that the “multi-unity that grows in love is a more radical, truer unity than the unity of the ‘atom.’”<sup>130</sup> Thus, the “three persons” who exist in God do not impair the unity or oneness of God but, rather, *fills-out* that oneness.<sup>131</sup>

The idea that plurality can enhance unity makes comprehensible the idea of collective freedom in and through Jesus. Notably, Ratzinger explains in *Introduction to Christianity* that this fuller message of Christian liberation from sin has been obscured in recent centuries due to an emphasis on “theologies of the cross” and St. Anselm’s “satisfaction theory.”<sup>132</sup> While these theories have elements of truth, Ratzinger argues that a truer picture exists. This picture rests more heavily on a theology of the Incarnation and the Logos as Love. As explained, the Logos that is Love creates being that can understand itself and desires. That being does understand itself and that it thereby comes to itself. The Incarnation is essential to this objective. For humanity, the Incarnation was a crucial step in the process of coming to know itself. Further, for the

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<sup>128</sup> *Id.* at 178.

<sup>129</sup> *Id.* at 179.

<sup>130</sup> *Id.*

<sup>131</sup> “[P]ure oneness can only occur in the spirit and embraces the relatedness of love.” *Id.* at 188.

<sup>132</sup> *Id.* at 231-32.



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Logos that is Love, the Incarnation simply is part and parcel of the divine Idea “man.”

The doctrine of the Incarnation focuses on the fact of God’s assuming human nature: the fact that the Word became flesh. Although this paper has not yet focused on it, one other important aspect of the philosophical and theological debates concerning the doctrine of the Trinity is the key question whether Jesus was both fully divine and fully human. In fact, the issue is *the* most fundamental one because if Jesus was not fully divine and fully human, there would be no need to delve into the issue of what it means that there exist “three Persons in one Being.” Despite the many theories proffered with other answers, however, Christian philosophers working with the Church and from within the faith adhered to the central conviction that Jesus’s two natures, human and divine, were both complete. Only in this way would his mediation be true mediation. If he were some type of intermediate being his presence would guide humanity not toward God, but away from God, resulting in separation rather than mediation.<sup>133</sup> As explained by Ratzinger, “[o]nly if he was really a man like us can he be our mediator, and only if he is really God, like God, does the mediation reach its goal.”<sup>134</sup>

In Incarnation theologies, being mediator (or pathway) is an essential aspect of Christ’s liberation of humanity. Ratzinger explains the theory as follows: Jesus is the exemplary man, the Second Adam.<sup>135</sup> The first Adam, the moment when God’s Idea of man first took shape, was but a first step in man’s process of becoming man.<sup>136</sup> The first step involved the transition from mere life to mind. The second step, accomplished in Jesus, the

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<sup>133</sup> *Id.* at 163.

<sup>134</sup> *Id.* at 166.

<sup>135</sup> Holy Scripture refers to Jesus as the Second Adam. *See id.* at 236.

<sup>136</sup> Ratzinger explains that, in the Bible, the word “Adam” expresses the unity of the whole creature “man.” *Id.* at 236.

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Second Adam, involved a more intense contact between humanity and God.

Man came into existence out of the “clay” at the moment when a creature was no longer merely “there” but, over and above just being there and filling his needs, was aware of the whole. But this step, through which *logos*, understanding, mind, first came into this world, is only completed when the *Logos* itself, the whole creative meaning, and man merge into each other. Man’s full “hominization” presupposes God’s becoming man; only by this event is the Rubicon dividing the “animal” from the “logical” finally crossed for ever and the highest possible development accorded to the process [of humanity’s creation].”<sup>137</sup>

It is in Jesus Christ, then, that humanity has reached its goal.<sup>138</sup> It is openness to the infinite that is the true mark of man, and man is most complete when he is one with the infinite. Jesus is “true man” because the person that is part and parcel of his human nature is one with God.

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<sup>137</sup> *Id.* at 235.

<sup>138</sup> As Ratzinger has stated elsewhere: “We can say that God created the universe in order to enter into a history of love with humankind.” Ratzinger, *The Meaning*, *supra* note 82, at 30.

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It is important to appreciate two distinct aspects of this Incarnation theory. First, it is grounded in the understanding that there is one Divine Idea “man” that is fulfilled in Jesus Christ.<sup>139</sup> This key point was uniformly held and taught by important and influential early Christian thinkers.<sup>140</sup> Ratzinger explicitly made this point in a 1981 Lenten homily entitled *The Creation of the Human Being*.<sup>141</sup> In that homily, Ratzinger explains that, in the biblical account of Creation, God reveals much insight about this Divine Idea:

- Humanity is one Creation from God’s one Good Earth.
- The human being comes into existence after God has breathed his breath into the body, when divine reality enters humanity—when God enters into his Creation.
- Because divine reality is in humanity, each human being is known and loved by God, is willed, and is made in his image.

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<sup>139</sup> Ratzinger makes this point only in passing in Ratzinger, *Truth and Freedom*, *supra* note 26, at 351.

<sup>140</sup> See HENRI DE LUBAC, CATHOLICISM: CHRIST AND THE COMMON DESTINY OF MAN (Lacelot C. Sheppard & Sister Elizabeth Englund trans., Ignatius Press 1988) (1947) (citing and extensively quoting from the work of the Church Fathers and early Christian philosophers). Notably, Lubac’s work greatly influenced Ratzinger’s approach to faith and theology.

<sup>141</sup> JOSEPH RATZINGER, *The Creation of the Human Being*, in IN THE BEGINNING . . . : A CATHOLIC UNDERSTANDING OF THE STORY OF CREATION AND THE FALL, *supra* note 82, at 41-58 [hereinafter Ratzinger, *The Creation*].

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- Each human being realizes the One project of God, and has his or her origin in the same Creative Idea of God.
- To be the image of God implies an inherent capacity for relationship and capacity for God.
- The distinctive mark of the human being is the capability to think and to pray; humans are beings of word and love—beings moving toward Another.<sup>142</sup>

Jesus is the exemplary man or Last Adam because, in Jesus, the person inherent to his human nature is integrated with his divinity and is completely open to God. God's one Idea "man" has thus achieved the goal of being completely open to God.

This tells us about God's goal for each human being. The "true man"—the man conforming with the Divine Idea "man"—is a person in union with God in a manner akin to Jesus, but in a manner that is only possible in and through Jesus. And this leads to the second important aspect of the Incarnation theory. It helps clarify how it is that Jesus Christ enables humanity to achieve God's goal.

In the article *Retrieving the Tradition*, Ratzinger points out that in integrating knowledge about the human person with knowledge of Christ, two main ideas emerge. One is the idea that the human person in history is "being on the way" towards fuller integration into Divine Love. The second idea has bearing on how Jesus enables

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<sup>142</sup> *Id.* at 44-48.

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humanity, as a unity, to achieve God's goal. Jesus Christ is the all-encompassing space in which the "we" of human beings gather on the way to the Father, into which the Holy Spirit, Love, gathers humanity.<sup>143</sup>

The vision, then, is one in which the Holy Spirit (the means through which Jesus Christ remains present in history) is *within* human beings, enabling and enhancing the inherent human capacity to love God and the inherent relativity (Love) within human beings. In turn, that Love within human beings is held together in unity and in the space, openness, or path that *is* Jesus Christ, thereby linking united human love with God's love.

As pointed out by Ratzinger, this vision necessarily implies the collective nature of man's union with God. Love of God and love of neighbor are thus inherently and inextricably intertwined. Within the human being there is a reality consisting of relativity, Love. This relativity is ultimately reaching for God. But it is affected by interactions with others. Actions of "being-with" or "being-for" others enhances the movement towards God and vice versa. The collective nature of humanity's union with God means that the action of any one person affects the union of others with God. Actions of "being-with" or "being-for" by any individual enhance the overall movement towards God; negative actions by any individual have a negative effect on the whole of humanity's movement towards God.

In humanity, then, from the beginning, heaven and earth touch. In Jesus Christ the creation of humanity is brought to completion. The pathway between heaven and earth is fully opened, and all integration or union between God and humanity—the one Divine Idea—will be by way of the divine person Jesus. Thus, Jesus is "the way, and the truth, and the life" (Jn 14:6). Jesus is the pathway that each

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<sup>143</sup> See *supra* notes 113 to 122 and accompanying text.

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human being must endeavor to follow during his or her lifetime in history. By following Jesus Christ in one's lifetime, one becomes, in reality, encompassed within Jesus's one saving action.<sup>144</sup> Each individual is saved only within the context of the whole. Moreover, by virtue of being integrated with God, the plurality within the human unity—a multi-unity in Love—contributes to the fullness of the oneness of God.

#### D. Reprise of the Vision

As demonstrated by the foregoing subsection, the Christian vision of freedom has layers of complexity. The deeper the reflection is pushed—the more one uses human reasoning to assist in understanding God's revelation—the more it becomes apparent that *how* freedom is used is important. The Christian vision is based on an understanding of humanity and its history and destiny as revealed by God. Human freedom depends on God and is freedom from sin. This is so because the Creator of humanity is Reason and Love. Each human being is a distinct being set free by the Creative Logos that is Love. Human life—the living out the freedom given by God—should be a response to God. That response is guided by and made possible by God, both by virtue of inherent capacities within the human person and by virtue of God's

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<sup>144</sup> In discussing Christian worship, which encompasses the entirety of one's life, Ratzinger explains: "The fundamental principle of Christian worship is consequently this movement of exodus with its two-in-one direction toward God and fellowman. By carrying humanity to God, Christ incorporates it in his salvation. . . . [H]e who was crucified has smelted the body of humanity into the Yes of worship. [Christian sacrifice] is completely 'anthropocentric', entirely related to man, because it was radical theocentricity, delivery of the 'I' and therefore of the creature man to God. . . . The fundamental principle of sacrifice is not destruction but love." Ratzinger, *Introduction*, *supra* note 77, at 289.

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revelation, especially the fullness of revelation in Jesus Christ.

In particular, love is a capacity, an existential capacity that is itself a reality. Love is a transcendent character within humans designed to reach beyond self, especially towards God but also towards other human beings. The purpose and goal of this capacity in the human person is re-union with God, which depends on acting in accord with God, which means acting in accord with the truth at both the individual and collective levels. It is this union with the transcendent that the human spirit is striving for and that gives rise to the human yearning for freedom. It is this inherent capacity to seek God that is the truly distinguishing characteristic of humanity.

Union with the Creator depends on thinking and acting in conformity with Eternal Reason and Love. In practice, this means being receptive to God and other and acting in conformity with the fundamental anthropological pattern: being-from, being-with, and being-for. This is the meaning or intelligibility *within* man, and it is acting consistently with the meaning internal to man that constitutes genuine human freedom.<sup>145</sup> The inviolable standards necessary for democratic society must be standards that safeguard genuine human freedom. Christian values provide just this type of standard. They are values that have their origin from the Creator of humanity and the world and are fully consistent with the

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<sup>145</sup> Because human freedom depends on grace, the Church and its sacraments, especially baptism and penance and the Eucharist, generally are crucial to attaining freedom. The capacity to love God and remain in communion with him is dramatically enhanced by reception of grace through the sacraments. For example, Ratzinger has described the Eucharistic community as a “holy thing” granted to the Church as the “real bond of unity.” See Ratzinger, *Introduction, supra* note 77, at 334. Further, the Church is to be understood as the “center of the Spirit’s activity in the world.” *Id.* at 335-36.

pattern of love, the pattern of being-from, being-with, and being-for.

## **V. Ordering Freedom in Accord with the Human Spirit and Democratic Ideals**

The well-reasoned alternative vision of human freedom presented by Ratzinger clarifies the argument that freedom is promoted and safeguarded only when core Christian moral insights provide the point of reference for law and justice. As noted at the outset, Ratzinger has supplemented his argument with analysis of why prevalent political theories of the modern era have failed. Part I of this article presented part of Ratzinger's assessment of the shortcomings of modernity's radical notion of human freedom. This part of the article highlights another aspect of the assessment, namely, that modernity's typical approach to freedom has missed its mark precisely because of its failure to be guided by the fundamental pattern of love imprinted within every human being. It then briefly discusses certain aspects of how use of fundamental Christian insights can be fully consistent with key ideals held in a pluralistic democratic society.

### **A. Modern Ideas of Freedom Are in Opposition to the Essence of the Human Person**

In *Truth and Freedom*,<sup>146</sup> published in 1996, Ratzinger identifies fundamental elements of modern approaches to freedom<sup>147</sup> and shows that these elements

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<sup>146</sup> Ratzinger, *Truth and Freedom*, *supra* note 26, at 337-53.

<sup>147</sup> Ratzinger traces the evolution from Luther's struggle for freedom of conscience in the religious sphere; to the middle phrase characterized by Kant's call to use "pure reason," and where two distinct approaches emerged: a natural rights orientation grounded in a metaphysical idea, and a radical anarchic approach wherein no right order exists in nature



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tend to allow humans to act in opposition to the internal striving of the human spirit. Ratzinger's analysis supports the vision that freedom is inherently linked to truth and, specifically, the truth regarding the essence of human existence. He shows that modernity's anarchical conception of freedom cannot be correct because it allows humans to regard the "fundamental figure of human existence" as itself an attack on freedom.

Ratzinger's analysis is based on the principle that the fundamental pattern of human existence is a being "from," "with," and "for" another.<sup>148</sup> Ratzinger points out

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(arising from Rousseau's ideas); to the later Marxist approaches. *Id.* at 340-43. He concludes that the widespread view of freedom today is characterized by the individualistic ideology which was a component of all Enlightenment thought by anarchic tendencies (human will is the sole norm of human action) and by the Marxist tendency to rely on structures and systems to bring about justice. *Id.* at 342-43. Despite failures to bring about a sense of justice, Ratzinger notes that the radical current of Enlightenment has not lost its appeal. Fascination for the grand promise of emancipation made at the inception of modernity remains. *Id.* at 344. To Ratzinger, then, the question "What is freedom?" cannot be avoided and involves issues of "what man is and how he can live rightly both individually and collectively." *Id.* at 338-40, 344.

<sup>148</sup> *Id.* at 346. Notably, the philosophical or theological basis for understanding human beings as "beings from, with, and for" is suggested only in passing in *Truth and Freedom*. Ratzinger points to the "hidden theological core" underlying the modern, anarchic conception of freedom: the desire to be "like a god who depends on nothing and no one, whose own freedom is not restricted by that of another." *Id.* at 347. But he also points to the theological error. In this ideology the divinity is conceived as a pure egoism, which is the extreme opposite of the real essence of God as revealed by God in Jesus Christ. In Jesus, God has revealed himself as relational: "by his very nature he is entirely being-for (Father), being-from (Son), and being-with (Holy Spirit)." *Id.* at 347. For Ratzinger, this is the reason why the essence of human existence follows the pattern. Resisting the pattern leads to dehumanization, which will result in the destruction of the human being through the destruction of the truth of the human being. *Id.* at 347.

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that this fundamental anthropological pattern is most starkly presented by the unborn child. The being of the unborn child is only from and through the mother and can survive only by physically being with the mother. The “being-with” of the child prompts the being of the mother to become a “being for.” Importantly, the pattern remains after the child is born. The outward form of the “being-from and -with” may change as the child matures. The child nonetheless remains dependent; and although the mother may assign the care of the child to another, there remains “a ‘from’ that demands a ‘for.’”<sup>149</sup> Furthermore, Ratzinger points out that this pattern remains even in adults: “Even the adult can exist only with and from another, and is thus continually thrown back on that being-for which is the very thing he would like to shut out.”<sup>150</sup>

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<sup>149</sup> *Id.* at 346.

<sup>150</sup> *Id.* at 346. Notably, this important point—the all-encompassing nature of the “from” and “for” pattern—is illustrated more thoroughly by Ratzinger in other writings. Ratzinger links the pattern to humanity’s corporality, i.e., his being “spirit in body.” See Ratzinger, *Introduction*, *supra* note 77. Corporality necessitates physical dependence on those immediately surrounding a human being (including both parentage and mutual daily care); but this dependence extends to needs of the spirit in man and, as well, extends to dependence on the past and future of mankind. By way of example, he points to the human need for language (to which the whole of history has contributed); for culture (the “web of history that impinges on the individual through speech and social communication”); and for a future (“man is a being who lives for the future, who continually takes care to plan ahead beyond the passing moment and could no longer exist if he suddenly found himself without a future”). *Id.* at 245-48.

Another important insight on the human need for other was made by Ratzinger in a 1981 Lenten homily: “Human beings have their selves not only in themselves but also outside of themselves: they live in those whom they love and in those who love them and to whom they are ‘present.’” See JOSEPH RATZINGER, *Sin and Salvation*, in *IN THE BEGINNING . . . : A CATHOLIC UNDERSTANDING OF THE STORY OF CREATION AND THE FALL*, *supra* note 82, at 72.

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Ratzinger then focuses on the fact that man in contemporary society mightily resists this fundamental pattern. “[M]an quite spontaneously takes for granted the being-for of others in the form of today’s network of service systems, yet if he had his way he would prefer not to be forced to participate in such a “from” and “for,” but would like to become wholly independent, and to be able to do and not to do just what he pleases.”<sup>151</sup> Ratzinger notes that it is this modern attitude or demand for freedom that is reflected in society’s acceptance of abortion. “[A]bortion appears as a right of freedom.” The woman “must have the power to make decisions about her own life, and no one else can – so we are told – impose from the outside any ultimately binding norm.”<sup>152</sup> Ratzinger’s point of emphasis is that, from the modern perspective of freedom, requiring a woman to act in accord with the basic anthropologic pattern is perceived as an attack on freedom.<sup>153</sup> This example supports Ratzinger’s key argument that a conception of freedom that demands liberation from the very essence of what it means to be human simply cannot be correct. As he states, “exactly what sort of freedom has the right to annul another’s freedom as soon as it begins?”<sup>154</sup>

Genuine human freedom, therefore, cannot rest on the individualistic model of radical autonomy and self-sufficiency. The complex weave of human dependencies does not allow this approach. Rather, Ratzinger explains, “Man’s freedom is shared freedom, freedom in the conjoint existence of liberties that limit and thus sustain one

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<sup>151</sup> Ratzinger, *Truth and Freedom*, *supra* note 26, at 346-47.

<sup>152</sup> *Id.* at 346.

<sup>153</sup> *Id.* at 347.

<sup>154</sup> That society would allow real but secondary interests to prevail over the fundamental right to life also shows that modernity’s decision to restrict reason results in reason being used to justify the irrational. JOSEPH RATZINGER, *CHRISTIANITY AND THE CRISIS OF CULTURES* 63 (2006).

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another.”<sup>155</sup> This conception of freedom thus necessarily requires a right or just ordering of rights and relationships: an “ordered communion of freedoms.”<sup>156</sup> This sort of “right ordering” requires laws in society that are grounded in standards or values that foster human action consistent with the truth regarding the essence of human existence. This reference to “right ordering” in *Truth and Freedom* is very similar to a statement expressed in the *Instruction on Christian Freedom and Liberation* issued by the Congregation for the Doctrine of the Faith:

Truth and justice are therefore the measure of true freedom. . . . Far from being achieved in total self-sufficiency and an absence of relationships, freedom only truly exists where reciprocal bonds, governed by truth and justice, link people to one another. But for such bonds to be possible, each person must live in the truth.<sup>157</sup>

This is, then, but another way of saying that each person must live in conformity with the intelligibility within man, the pattern of “being-from,” “being-with,” and “being-for.”

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<sup>155</sup> Ratzinger, *Truth and Freedom*, *supra* note 26, at 348.

<sup>156</sup> *Id.* at 352.

<sup>157</sup> ICFL, *supra* note 44, at #26. In *Truth and Freedom*, Ratzinger shows that freedom is enhanced by heightened awareness of responsibility and acceptance of ever greater fraternal bonds and that responsibility, living in response to what the human being is in truth, entails being guided by the Decalogue, unfolded in rational understanding. Ratzinger, *Truth and Freedom*, *supra* note 26, at 349-51.

## **B. Ordering Freedom in Love Is Consistent with Democratic Ideals**

Ratzinger's vision for protecting freedom in society rests on three points. First, freedom is safeguarded only when democratic government and the majority vote are limited by inviolable moral standards. Second, safeguarding genuine freedom—freedom consistent with the internal yearning for the transcendent—requires that the inviolable standards be consistent with the intelligibility within man—the “being-from,” “being-with,” and “being-for” pattern impressed on the human spirit by virtue of being a creature of God. Third, core Christian insights and values properly used to inform the ordering of relationships in society can achieve this requisite conformity to Eternal Reason and Love. As noted, this “right ordering” requires laws in society that are grounded in standards or values that foster human action consistent with the truth. Further, although Ratzinger agrees with the idea of a secular state, he advocates that the State has a role in prudently fostering respect for those values, including expecting reverence and respect for God and holy things, and encouraging serious study of questions such as the existence of and nature of God.<sup>158</sup> This vision remains consistent with key

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<sup>158</sup> See, e.g., Ratzinger, *A Christian Orientation*, *supra* note 12, at 218-20. A key reason for this type of state action is the need for sufficient unity among the citizens regarding the values deemed inviolable. See Ratzinger, *Freedom and Constraint*, *supra* note 21, at 188 (“Ultimately, the democratic system can only function if certain fundamental values . . . are recognized as valid by everyone . . . an ethos which is jointly accepted and maintained even if its rational basis cannot be established absolutely and conclusively”). See also Ratzinger, *A Christian Orientation*, *supra* note 12, at 205 (“[Pluralist democracy, in itself, does not] unite[] its citizens in a fundamental assent to the state;” for its foundations, it depends on other powers and forces outside of itself); Ratzinger, *Luther*, *supra* note 21, at 131 (noting that “a formal unity without clear content is fundamentally no

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democratic ideals. It is beyond the scope of this article to discuss this point in detail, but it is important to recognize that Ratzinger has addressed this concern.

From a practical perspective, Ratzinger recognizes the need to adhere to two key principles in carrying out the exchange between politics and faith. First, he readily acknowledges the need to maintain the properly distinct and delimited spheres of Church and State.<sup>159</sup> Ratzinger notes that the Christian faith brought about the secular state, a society in which the political realm is limited and provides space for freedom of conscience.<sup>160</sup> The State is responsible for peace and justice, and governs on the basis

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unity at all; unity based on common skepticism and not knowledge is, in essence, based on capitulation).

Ratzinger is clear, however, in placing the primary responsibility for cultivating the spiritual foundation of society on the Church and Christians. *Id.* See also JOSEPH RATZINGER, *Freedom, Law, and the Good*, in VALUES IN A TIME OF UPHEAVAL 52 (2006) (emphasizing the public task of Christian churches in that they must be free “to address the freedom of all human beings so the moral forces of history may remain forces in the present”); JOSEPH RATZINGER, *Biblical Aspects of the Question of Faith and Politics*, in CHURCH, ECUMENISM & POLITICS: NEW ESSAYS IN ECCLESIOLOGY, *supra* note 12, at 147, 151 [hereinafter Ratzinger, *Biblical Aspects*] (The core responsible political activity is to nurture public acceptance of the validity of morality and God’s commandments.).

<sup>159</sup> See, e.g., Ratzinger, *Political Stance*, *supra* note 13, at 161-62 (noting that “[w]here the Church itself becomes the state, freedom becomes lost.” But freedom is also lost when the Church is precluded from being a public and publically relevant authority).

<sup>160</sup> See, e.g., JOSEPH RATZINGER, *Conscience in Its Age*, in CHURCH, ECUMENISM & POLITICS: NEW ESSAYS IN ECCLESIOLOGY, *supra* note 12, at 165, 174 [hereinafter Ratzinger, *Conscience*] (noting that, by altering the ancient practice of state authority over religion, Jesus set a limit to earthly authority and proclaimed the freedom of the person that transcends all political systems); Ratzinger, *Biblical Aspects*, *supra* note 158, at 148-49; JOSEPH RATZINGER, *Searching for Peace*, in VALUES IN A TIME OF UPHEAVAL 114 (2006).

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of reason.<sup>161</sup> But Church and State have a common moral responsibility based on the essence of man and the essence of justice.<sup>162</sup> Thus, although politics is the realm of reason, Ratzinger emphasizes that political reason must include moral reason.<sup>163</sup> Further, it cannot be limited to mere technological and calculating reason, a reason that has cut off its historical roots, namely, the basic memory of mankind.<sup>164</sup> Because of modernity's self-imposed narrowing of reason, the evidential character of a fundamental intuition common to all the great cultures has been eroded, namely, the conviction regarding:

[T]he doctrine of objective values expressed in the Being of the world; the belief that attitudes exist that correspond to the message of the universe and are true and therefore good, and that other attitudes

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<sup>161</sup> See, e.g., JOSEPH RATZINGER, *Searching for Peace*, in *VALUES IN A TIME OF UPHEAVAL* 22-24 (2006)..

<sup>162</sup> See, e.g., *id.* at 114. Ratzinger frequently explains that the essence of justice depends on a universal criterion, as opposed to merely pragmatic criteria determined by the group or by majority vote. See, e.g., Ratzinger, *A Turning Point*, *supra* note 11, at 133-37 (noting that, in Greek and Roman philosophy of the state, a state that constructs justice only on the basis of majority opinions sinks down to the level of the "robber band").

<sup>163</sup> See, e.g., JOSEPH RATZINGER, *NEED ARTICLE NAME*, in *VALUES IN A TIME OF UPHEAVAL* 24 (2006); Ratzinger, *A Christian Orientation*, *supra* note 12, 216-17.

<sup>164</sup> See, e.g., JOSEPH RATZINGER, *CHRISTIANITY AND THE CRISIS OF CULTURES* 36-43 (2006) (explaining the confused ideology of freedom that has resulted from modern philosophy's tendency to limit reason to what is considered objectively verifiable fact, and to see issues only in terms of feasibility, functionality, and effectiveness and characterizing such an approach to reasoning as being radically opposed to all other historical cultures of humanity).

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likewise exist that are genuinely and always false because they contradict Being. . . . [and thus] the conviction that man's Being contains an imperative; the conviction that he does not himself *invent* morality on the basis of calculations of expediency but rather *finds* it already present in the essence of things.<sup>165</sup>

In governing, the State should make full use of reason's capacity to discern the moral message—the intelligible meaning—within creation. And, in doing so, the State should recognize that the discernment process is greatly assisted by the insights of faith.<sup>166</sup>

For its part, the Church's primary role is to evangelize and bring about the inner conversion of

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<sup>165</sup> Ratzinger, *A Turning Point*, *supra* note 11, at 34-36 (emphasis in original).

<sup>166</sup> Ratzinger explains that modernity's self-limitation of reason has meant that what is most specific to man—moral reasoning—has been unjustifiably delimited to the subjective realm. He notes that, in reality, reason can perceive more than quantitative facts. Creation reveals a moral message that is discernible by use of reason, especially when assisted by faith and when it draws upon the experience of human existence over time. Full use of moral reasoning is reasoning in the highest sense. The imposed limitation of reason to quantifiable facts precludes the scientific method from attaining its aim of garnering knowledge most in accord with reality; and, conversely, full use of reason's capabilities will more readily attain knowledge in accord with reality. Thus, "the great ethical insights of mankind are just as rational and just as true as—indeed, more true than—the experimental knowledge of the realm of the natural sciences and technology. They are more true, because they touch more deeply the essential character of Being and have a more decisive significance for the humanity of man." *Id.* at 37-42.



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individuals. The political and economic running of society is not a direct part of the Church's mission, but Jesus "entrusted to [the Church] the word of truth which is capable of enlightening consciences."<sup>167</sup> The power of the Gospel, as lived by convicted Christians, can "penetrate[] the human community and its history," thereby purifying and sustaining a culture of life consistent with the Beatitudes.<sup>168</sup> This includes nurturing the idea of conscience as recognition of man as creation, thereby fostering respect for the Creator *in* man as opposed to the more common notion of conscience being a wholly independent internal forum for deciding what is good or evil.<sup>169</sup> But the Church in various institutional forms, and especially in and through the activities of individuals, can and also must make claims and demands on public law.<sup>170</sup>

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<sup>167</sup> ICFL, *supra* note 44, at #61.

<sup>168</sup> *Id.* at #62. *See also* ICATL, *supra* note 44, at ch. XI, #8 ("[I]t is only by making appeal to the 'moral potential' of the person and to the constant need for interior conversion, that social change will be brought about which will be truly in the service of man. For it will only be in the measure that they collaborate freely in these necessary changes through their own initiative and in solidarity, that people, awakened to a sense of their responsibility, will grow in humanity. The inversion of morality and structures is steeped in a materialist anthropology which is incompatible with the dignity of mankind").

<sup>169</sup> *See* Ratzinger, *Conscience*, *supra* note 160, at 169-70 (quoting Reinhold Schneider: "Conscience is knowledge of responsibility for the whole of creation and before him who has made it."). Ratzinger agrees that a person must follow a clear verdict of conscience, but stresses that this must be understood in conjunction with the reality that conscience cannot be identified with a person's subjective certainty about himself and his moral conduct (this would in fact enslave persons by making them dependent on prevailing opinions of the day), and also that conscience can err. *See* JOSEPH RATZINGER, *If You Want Peace. . . , in* VALUES IN A TIME OF UPHEAVAL 75-100 (2006).

<sup>170</sup> *See* Ratzinger, *Political Stance*, *supra* note 13, at 163 (noting that "the Church cannot simply retreat into the private sphere"). In addition, the Church has societal function. As explained by Ratzinger in *Introduction to Christianity*, the Church and being Christian relate to

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In making demands on the public law, however, Ratzinger emphasizes the need to focus on *essential core values* bearing on freedom. This is the second key principle to keep in mind in carrying out the exchange between politics and faith. It is an important way of preventing overreaching that would upset a proper Church-State balance. At times Ratzinger points to certain core essentials, namely, human dignity and human rights grounded in man as the image of God; marriage, and family, grounded in the truth of the human person; and reverence for God and to that which is holy to other persons.<sup>171</sup> More often, Ratzinger points to the Decalogue as a starting point, because it constitutes a “sublime expression” of moral reason and, as such, coincides in many ways with the great ethical traditions of other religions.<sup>172</sup> To Ratzinger, respect for the Creator *in* man entails living “as an answer – as a response to what we are in truth.”<sup>173</sup> And the Decalogue, with its origin from the Creator, is a “self-presentation and self-exhibition of God,” and thus a “luminous manifestation of his truth.”<sup>174</sup> Notably, he stresses the need to continually unfold the meaning of the Decalogue, recognizing that coming to appreciate the whole of the truth requires an active process in which “reason’s entire quest for the criteria of our

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the fact that each human must work out his freedom within the “framework of the already existing whole of human life that stamps and molds him;” their purpose is “to save history as history and to break through or transform the collective grid that forms the site of human existence.” Ratzinger, *Introduction*, *supra* note 77, 247-48.

<sup>171</sup> See, e.g., JOSEPH RATZINGER, *Europe’s Identity*, in *VALUES IN A TIME OF UPHEAVAL* 147-49 (2006).

<sup>172</sup> See JOSEPH RATZINGER, *To Change or Preserve*, in *VALUES IN A TIME OF UPHEAVAL* 29 (2006).

<sup>173</sup> See Ratzinger, *Truth and Freedom*, *supra* note 26, at 349-51.

<sup>174</sup> *Id.*

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responsibility truly comes into its own.”<sup>175</sup> To Ratzinger, this is simply part and parcel of Christianity’s synthesis of faith and reason: reason needs faith, but faith also, precisely as faith, must work in conjunction with reason.<sup>176</sup>

Ratzinger also is convinced that judicious use of core Christian insights and values to inform the ordering of relationships in society helps maintain full consistency with notions of tolerance. His reasoning on this issue has two aspects to it. First, Ratzinger has explained that use of Christian insights as the inviolable point of reference for law and justice in society should not be considered an unjust imposition of values. The insights reflect the intelligibility *in* things or the meaning or truth in Creation. And, as explained by Ratzinger, there is in man—at the ontological level—an expectation of sorts, a primal knowledge or remembrance of the good and true that needs help from without to become aware of its own self.<sup>177</sup> This is the ontological level of the human conscience. He explains:

This anamnesis of our origin,  
resulting from the fact that our  
being is constitutively in  
keeping with God, is not a

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<sup>175</sup> *Id.* (noting that freedom is enhanced by heightened awareness of responsibility—living in response to what the human being is in truth—which entails being guided by the Decalogue, unfolded in rational understanding).

<sup>176</sup> Ratzinger has explained the relationship between faith and reason as follows: “[F]aith demands and reveals reason, understands itself as the environment of reason, so that faith is not correct if the insights to which it leads are not at least rudimentarily reasonable, while on the other hand reason cuts the ground from beneath its feet if it does away with faith.” Ratzinger, *Political Stance*, *supra* note 13, at 158.

<sup>177</sup> JOSEPH RATZINGER, *If You Want Peace: Conscience and Truth, in VALUES IN A TIME OF UPHEAVAL* 90-95 (2006) (explaining the classical concept of *synderesis* as *anamnesis of the Creator* existing at the ontological level of conscience).

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knowledge articulated in concepts, a treasure store of retrievable contents. It is an inner sense, a capacity for recognition, in such a way that the one addressed recognizes in himself an echo of what is said to him. If he does not hide from his own self, he comes to the insight: *this* is the goal toward which my whole being tends, *this* is where I want to go. This *anamnesis of the Creator*, which is *identical with the foundations of our existence*, is the reason that mission is both possible and justified.<sup>178</sup>

This primal knowledge, of course, can become distorted or greatly weakened by culture. Nonetheless, when the Church or others present and explain Christian values, it can spark recognition. This is not an imposition, but, rather, there is a fusion that activates the capacity to receive the truth.<sup>179</sup>

Second, because Christian insights and values are grounded in Love, their use as the inviolable reference should not lead to inappropriate intolerance for other perspectives. Rather, as explained by Ratzinger, the surest guarantee of tolerance is the identity of Truth and Love. On the one hand this means that, in an appropriate praxis of freedom, the evangelical mission of the Church and Christians will be carried out with Love, which necessarily implies respect for religious liberty freedom in civil

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<sup>178</sup> *Id.* at 92.

<sup>179</sup> *Id.* at 92-94.

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society.<sup>180</sup> On a deeper level, however, the identity of Truth and Love suggests that typical notions of tolerance reflect confusion about the meaning of genuine human freedom. The typical idea of tolerance is that it is the attitude of respect for the views of others that safeguards freedom.<sup>181</sup> From the Christian perspective of human freedom, it is the use of core Christian values or insights as a point of reference for law and justice that is itself the safeguard for freedom. Tolerance is simply the appropriate attitude to have since matters of conscience should not be coerced. This is a subtle but real distinction. The persuasiveness of Ratzinger's view—as to both aspects of notions of tolerance—is tied to careful and prudent use of essential core values.

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<sup>180</sup> See JOSEPH RATZINGER, TRUTH AND TOLERANCE: CHRISTIAN BELIEF AND WORLD RELIGIONS 231 (Henry Taylor trans., Ignatius Press 1st Am. ed. 2004). See also Letter from Benedict XVI, Supreme Pontiff, to the Bishops, Priests, and Deacons; Men and Women Religious; and all the Lay Faithful on Christian Love, (June 29, 2009) (on file with author), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20090629\\_caritas-in-veritate\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html), at #2 (noting that “[t]ruth needs to be sought, found and expressed with the ‘economy’ of charity, but charity in its turn needs to be understood, confirmed and practiced in the light of the truth”). See also Declaration on Religious Freedom (*DIGNITATIS HUMANAE*): On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious), promulgated by Pope Paul VI, December 7, 1965 (available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html)) (last accessed 4/28/2014).

<sup>181</sup> For example, in a law review article calling for the abandonment of the neutrality principle, Dean Steven Smith explains that the “restoration of tolerance” as a “respectable attitude” is justified. He explains that tolerance – respect for the views of those who disagree with the substantive values selected by society – will protect their liberty. See Steven D. Smith, *The Restoration of Tolerance*, 78 Calif. L. Rev. 305 (1990).

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Ratzinger has thus addressed the major concerns that relate to use of core Christian insights as the inviolable standard in a pluralistic democratic society. The Christian vision, when fully and properly understood, remains consistent with key democratic ideals.

## V. Conclusion

A key purpose of this article has been to explain, in a comprehensive way, a well-reasoned alternative perspective of human freedom that brings to light the fact that the doctrine of neutrality presents a real obstacle to freedom in democratic society. A sound argument exists to support the claim that liberty and justice in society depend on state recognition of, and prudent use of, core Christian values in lawmaking and policy-making.<sup>182</sup> A strong case has been made that judgments concerning the ends in life worthy of pursuit are *not* solely subjective. Rather, freedom is an integral aspect of the human person, and, thus, *how* freedom is used matters. The heart of the message is that Christian values have their origin from the transcendent and, more specifically, from the Creator of humanity and the world. As such, these values are necessarily consistent with the meaning or intelligibility *in* creation and will thereby promote genuine human freedom. Personal choices about how to live *do* matter, and it should be permissible for the State—through prudent adherence to core values—to foster a culture in which persons can more readily live in a genuinely human way.

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<sup>182</sup> It is appropriate to reiterate that this would not necessarily mean a return to state practices struck down by the Court due to Establishment Clause concerns. Past reliance on Christian values in fashioning laws may not always have been “prudent” and may have involved values beyond the realm appropriately considered “core values.” *Cf.* Ratzinger, *A Christian Orientation*, *supra* note 12, at 212 (noting that Christians have at times in the past expected too much from the “earthly city”).

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From this alternative perspective, the essence of human freedom is being receptive to God the Creator, and acting consistent with the pattern impressed on the human spirit by virtue of being a creature of God.<sup>183</sup> This view of freedom is of course intimately bound-up with belief in God. But the counter-perspective—the view associated with the radical philosophy of freedom and, ultimately, the principle of liberal neutrality—similarly has a theological basis, namely, the rejection of belief in God the Creator.<sup>184</sup> A rejection that is played out by the banishment of ideas related to religion and morality to the subjective realm.<sup>185</sup> Indeed, in *Christianity and the Crisis of Cultures*, Ratzinger emphasized that the ultimate divide in contemporary society rests on the question of the existence of God:

The real antagonism typical of today's world is not that between diverse religious cultures; rather, it is the antagonism between the

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<sup>183</sup> Indeed, Ratzinger has stated that “[i]f there is no longer any obligation to which [man] can and must respond in freedom, then there is no longer any realm of freedom at all.” Ratzinger, *A Turning Point*, *supra* note 11, at 41.

<sup>184</sup> Ratzinger has explained that behind the radical philosophy of freedom “there stands a programme which must ultimately be labeled theological: God is no longer recognized as a reality standing over against man, but instead man may himself or herself become what he or she imagines a divinity would be if it existed. . . .” Ratzinger, *Freedom and Liberation*, *supra* note 24, at 260.

<sup>185</sup> See, e.g., Ratzinger, *A Turning Point*, *supra* note 11, at 33-41 (noting that the consequence of materialism and the narrowing of reason is that “[m]orality, just like religion, now belongs to the realm of the subjective. If it is subjective, then it is something posited by man. It does not precede vis-à-vis us: we precede it and fashion it. This movement of [separating the world of feelings and the world of facts] . . . essentially knows no limits. . . . Calculation rules, and power rules. Morality has surrendered.”).

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radical emancipation of man from God, from the roots of life, on the one hand, and the great religious cultures, on the other. If we come to experience a clash of cultures . . . [it] will be between this radical emancipation of man and the great historical cultures. Accordingly, [the strategy of using constitutions to keep God out of the public realm] is not the expression of tolerance that wishes to protect the non-theistic religions and the dignity of atheists and agnostics; rather, it is the expression of a consciousness that would like to see God eradicated once and for all from the public life of humanity and shut up in the subjective sphere of cultural residues from the past. In this way relativism, which is the starting point of the whole process, becomes a dogmatism that believes itself in possession of the definitive knowledge of human reason, with the right to consider everything else merely as a stage in human history that is basically obsolete and deserves to be relativized. In reality, this means that we



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have need of roots if we are to survive and that we must not lose sight of God if we do not want human dignity to disappear.<sup>186</sup>

This is strong language from a respected political thinker, and the relativism of which he speaks is simply another way of discussing neutrality. In the *Crisis of Cultures* and other writings, Ratzinger has addressed the reasonableness of belief in creation<sup>187</sup> and the reasonableness of faith.<sup>188</sup>

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<sup>186</sup> JOSEPH RATZINGER, CHRISTIANITY AND THE CRISIS OF CULTURES 44 (2006) (The phrase “the strategy of using constitutions to keep God out of the public realm” was substituted for the phrase “the refusal to refer to God in the Constitution,” in which Ratzinger was referring to the European constitution).

<sup>187</sup> For example, Ratzinger has explained that belief in Creation is reasonable, and, further, that “even from the perspective of the data of the natural sciences it is the ‘better hypothesis,’ offering a fuller and better explanation than any of the other theories.” See Ratzinger, *God the Creator*, *supra* note 82, at 17. In the second homily, Ratzinger explains that the scientific-based theories hinge on the entire ensemble of nature arising out of errors and dissonances and that some scientists acknowledge the absurdness of the theories but, nonetheless, cannot break out of the scientific mindset because “the scientific method demands that a question not be permitted to which the answer would have to be God.” Ratzinger, *The Meaning*, *supra* note 82, at 22-25.

<sup>188</sup> In *Crisis of Cultures*, Ratzinger explains that science cannot prove that God does not exist, and, if a person searches for God, certainty can be reached as to God’s existence. The assurance arises in part the way faith in other aspects of a technology-based society arises: we place trust in others who are qualified, credible and have knowledge when the validity of that trust is verified in daily experiences. A relationship with God always involves relationship with other humans. Over time, the living encounter with others that is inherently part of faith (the encounter with God and other humans) leads to certainty. Faith is transformed to knowledge. “The experience builds and comes to possess an evidentiary character that assures us.” JOSEPH RATZINGER, CHRISTIANITY AND THE CRISIS OF CULTURES 79-82, 103-110 (2006). Ratzinger notes that seeking knowledge of God is not irrational.

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In light of the failures of the modern political freedom movements and the thorough and well-reasoned case supporting the prudent use of core Christian values in democratic society, it is reasonable to conclude that a more moderate use of neutrality principles will better safeguard liberty and justice.

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Rather, what is being sought is actually the very foundation of rationality. *Id.* at 89-90.

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STUDENT SHOWCASE ARTICLE

**Incorporating the Lonely Star: How Puerto Rico  
Became Incorporated and Earned a Place in the  
Sisterhood of States**

*By: Willie Santana*<sup>1</sup>

In the prosecution of the war against . . . Spain by the people of the United States in the cause of liberty, justice, and humanity, its military forces have come to occupy the island of Puerto Rico. They come bearing the banner of freedom. . . . They bring you the fostering arm of a free people, whose greatest power is in its justice and humanity to all those living within its fold.<sup>2</sup>

Major General Nelson A. Miles, Commander of U.S. Forces in Puerto Rico, in a proclamation issued in 1898 upon the American invasion of the island.

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<sup>1</sup> Mr. Santana is a third-year law student at the University of Tennessee College of Law and a native of Puerto Rico. He thanks his wife Kara for her support, and Professor Ben Barton for his encouragement and guidance in researching and writing this paper.

<sup>2</sup> FRENCH ENSOR CHADWICK, *THE RELATIONS OF THE UNITED STATES AND SPAIN: THE SPANISH-AMERICAN WAR*, Vol. II, 297 (1911).

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## I. Introduction

On November 7, 2012, Americans all around the nation celebrated or bemoaned the result of the quadrennial presidential election. Meanwhile, a historic vote in Puerto Rico to reject the existing status of the island went largely unnoticed in the rest of the United States.<sup>3</sup> Popular indifference towards Puerto Rico and the other American territories was not always the rule. In fact, the election of 1900 was largely decided on the issue of what to do with the new American possessions,<sup>4</sup> and a series of Supreme Court decisions, later collectively named the INSULAR CASES, were front and center in the national dialogue during the early twentieth century.<sup>5</sup>

While largely unknown today, the Insular Cases are immensely significant because they created a dichotomy of

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<sup>3</sup> When asked whether voters supported the present territorial status of the island, fifty-four percent of voters voted “No.” A large majority of registered voters, seventy-seven percent, participated in the vote. PUERTO RICO ELECTIONS COMMISSION, PRESENT FORM OF TERRITORIAL STATUS – ISLAND WIDE RESULTS, *available at* [http://div1.ceepur.org/REYDI\\_NocheDelEvento/index.html#en/default/CONDICION\\_POLITICA\\_TERRITORIAL\\_ACTUAL\\_ISLA.xml](http://div1.ceepur.org/REYDI_NocheDelEvento/index.html#en/default/CONDICION_POLITICA_TERRITORIAL_ACTUAL_ISLA.xml).

<sup>4</sup> The territories in question at the time of the 1900 election were the four islands ceded to the United States pursuant to the treaty ending the Spanish-American War—Cuba, Guam, the Philippines, and Puerto Rico. A Treaty of Peace between the United States and Spain, 30 Stat. 1754. Modern American territories include Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands. U.S. DEPARTMENT OF STATE, DEPENDENCIES AND AREAS OF SPECIAL SOVEREIGNTY, *available at* <http://www.state.gov/s/inr/rls/10543.htm>.

<sup>5</sup> Although the exact list of Insular Cases is debated, for the purposes of this paper, the Insular Cases include: *Balzac v. Porto Rico*, 258 U.S. 298 (1922), *De Lima v. Bidwell*, 182 U.S. 1 (1901), *Goetze v. United States*, 182 U.S. 221 (1901), *Dooley v. United States*, 182 U.S. 222 (1901), *Armstrong v. United States*, 182 U.S. 243 (1901), *Downes v. Bidwell*, 182 U.S. 244 (1901), and *Huus v. N.Y. and Porto Rico Steamship Co.*, 182 U.S. 392 (1901).

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status—a novel concept at the time—for American territories under the Constitution’s Territorial Clause.<sup>6</sup> Under the Insular Cases, territories are classified as either incorporated or unincorporated. Incorporated territories are nascent states, while unincorporated territories are subject to the plenary power of Congress in perpetuity unless Congress changes the territory’s status.<sup>7</sup> This principle, enshrined in law by the same Fuller Court that framed the infamous separate-but-equal doctrine, is known as the territorial incorporation doctrine.

While the public debate over whether the United States, a nation born of anti-colonial fever, could itself become an imperial power has largely subsided, its consequences live on today. Although the issues raised by the territorial incorporation doctrine are of consequence to all modern American territories, most discussion of these issues is centered on Puerto Rico—by far the largest American territory, both in size and population.<sup>8</sup>

The chief premise behind the doctrine of territorial incorporation is that, because territories are “subject to the sovereignty of and []owned by the United States,” they are not foreign in the “international sense. . . . [but are] foreign

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<sup>6</sup> The Territorial Clause of the Constitution reads: “The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. CONST. art. IV, § 3, cl. 2.

<sup>7</sup> The Court held that because “incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view,” Congress did not incorporate Puerto Rico by granting Puerto Ricans citizenship. *Balzac v. Porto Rico*, 258 U.S. 298, 306 (1922).

<sup>8</sup> At nearly 4 million residents, the population of Puerto Rico far surpasses that of the other territories. In comparison, the next highest populated territory has a total population of 181,000. U.S. CENSUS BUREAU, ESTIMATED RESIDENT POPULATION WITH PROJECTIONS available at <http://www.census.gov/compendia/statab/2012/tables/12s1313.pdf>.

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to the United States in a domestic sense.”<sup>9</sup> In reaching this decision, the Court was influenced heavily by a series of Harvard Law Review articles, many of which were open in their paternalism, and sometimes contempt, for the inhabitants of the new possessions.<sup>10</sup>

The true significance behind the doctrine of territorial incorporation as a constitutional principle is that the doctrine placed the new territories outside a traditional territorial transition process that was older than the Constitution itself. The territory-to-state process was first conceived by the Congress of the Confederation of the United States through the Northwest Ordinance of 1787.<sup>11</sup> The ordinance itself influenced the drafting of the Territorial Clause of the Constitution during the Philadelphia Convention. This ordinance was later amended to be compatible with the new Constitution by the First Congress of the United States and signed into law by George Washington in 1789. Although the Northwest Ordinance was explicitly drafted to govern only the modern Midwest (then known as the Northwest Territory), with few

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<sup>9</sup> *Downes v. Bidwell*, 182 U.S. 244, 341 (1901) (White, J., concurring).

<sup>10</sup> For the five contemporary articles discussing the legal disposition of the American possessions see Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition of Government by the United States of Island Territories*, 12 HARV. L. REV. 393 (1899); C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions: A Third View*, 13 HARV. L. REV. 155 (1899); James B. Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1890). Mr. Baldwin, for example, did not attempt to clothe his contempt for the residents of the new American possessions, openly describing citizens of Puerto Rico as “ignorant and lawless brigands that infest[ed]” the island. Baldwin, *supra* note 10, at 451.

<sup>11</sup> GRUPO DE INVESTIGADORES PUERTORRIQUEÑOS, BREAKTHROUGH FROM COLONIALISM, VOL. I., at Loc. 639 (Kindle ed. 2012) [hereinafter STATEHOOD STUDY].

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exceptions each subsequent territory followed the same process to transition to statehood after the formation of the union.<sup>12</sup>

The Northwest Ordinance transition-to-statehood process can be broken down into three steps.<sup>13</sup> First, Congress appoints a governor, secretary, and judiciary to administer the territory. The territorial governor and judiciary establish laws to govern the territory, and these laws are subject to congressional oversight.<sup>14</sup> In phase two, the territory establishes a more representative form of government where the territorial citizens elect a house of representatives, while the governor and a new upper chamber remain appointed by Congress.<sup>15</sup> This upper chamber, the Legislative Council, is appointed from names submitted by the territorial legislature. During this stage, the legislature also elects a non-voting delegate to Congress. The third stage requires a fully republican form of government and mandates admission to the union as a matter of right.<sup>16</sup> The people of Puerto Rico expected to follow this process after the island came under the sovereignty of the United States, but to date Puerto Rico continues to exist not as a nation or a state, but as a territory or possession—a quasi-colony of the United States.<sup>17</sup>

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<sup>12</sup> Thirty one-states joined the Union following the process set out by the Northwest Ordinance, the most recent being the former Territory of Hawaii. In fact, only the original thirteen colonies and the states of Kentucky (ceded from Virginia), Vermont (independent), Maine (ceded from Massachusetts), West Virginia (ceded from Virginia), Texas (independent) and California (U.S. Military rule post-Mexican American War) joined the Union through a process other than that established by the Northwest Ordinance. STATEHOOD STUDY, *supra* note 11, at loc. 929.

<sup>13</sup> STATEHOOD STUDY, *supra* note 11, at loc. 639-655.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> EDGARDO MELÉNDEZ, PUERTO RICO'S STATEHOOD MOVEMENT, 2-12 (Bernard K. Johnpoll ed., 1988).



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America won Puerto Rico after a thirteen-day military campaign. A force of 3,415 American soldiers encountered little opposition and were instead greeted by Puerto Ricans with cheers of: “¡Viva Puerto Rico [A]mericano!”<sup>18</sup> Even prior to the invasion, a strong annexationist movement existed because the United States was, as it is today, the main export market for Puerto Rico’s goods, and also because of an attraction to America’s classical liberal governing philosophy.<sup>19</sup> Puerto Rico’s pre-invasion annexationist movement actually aided the invasion force in selecting its initial targets and provided assistance to the U.S. military as it moved through the island.<sup>20</sup> Because of the annexationist movement’s involvement in the invasion of Puerto Rico, expectations were high that the invasion would in time lead to the island joining the several states as a full member of the union. The annexationist movement transitioned to a statehood party, the Republican Party of Puerto Rico, shortly after the invasion.<sup>21</sup>

Among the modern political parties on the island, the pro-statehood New Progressive Party can trace its philosophical roots back to the Republican Party of Puerto Rico, founded on July 4<sup>th</sup>, 1899.<sup>22</sup> Early actions taken by the United States on the island—the passing of an Organic

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<sup>18</sup> *Id.* at 21.

<sup>19</sup> *Id.* at 17-18.

<sup>20</sup> *Id.* at 20-21.

<sup>21</sup> The Republican Party of Puerto Rico was founded on July 4, 1899 and sought the “definitive and sincere annexation” of Puerto Rico to the United States with the goal of the island’s eventual admission as a state. *Id.* at 36.

<sup>22</sup> *Partido Nuevo Progresista* in Spanish (PNP). The modern PNP organization has its technical roots in the Partido Estadista Republicano (PER) of the 1960’s, but the intellectual father of Puerto Rico’s statehood movement is José Celso Barbosa who founded the Republican Party of Puerto Rico in 1899.

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Act in 1900,<sup>23</sup> the establishment of Federal Courts in the island, a series of economic reforms, and later the wholesale grant of American citizenship to those living (and born thereafter) in Puerto Rico—fanned the hopes of annexation on the island. The Supreme Court has periodically dashed those hopes ever since.<sup>24</sup>

The legal issues presented by Puerto Rico and the other territories acquired by the United States at the turn of the twentieth century were novel and thus ripe for Supreme Court review.<sup>25</sup> For the first time, the United States assumed sovereignty over land not only non-contiguous to its existing states and territories, but also over culturally distinct peoples with little connection to Anglo-American tradition.<sup>26</sup> In some ways, these issues remain unresolved today, as the territories still exist in an ambiguous, perpetual, quasi-colonial status.

At first, however, the issue of Puerto Rico's status appeared more certain. When Congress passed an organic act for Puerto Rico in 1900, it seemed to have placed Puerto Rico on the track to statehood. The Act created a territorial government to succeed the military commission that governed the island since its invasion and created the office of Resident Commissioner, a non-voting delegate to the House of Representatives.<sup>27</sup> This organic act largely

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<sup>23</sup> 31 Stat. 77 (1900).

<sup>24</sup> Meléndez, *supra* note 17 at 33-34.

<sup>25</sup> The imperialism debate refers generally to a national conversation that took place at the turn of the century, but specifically to the election of 1900. DUKE UNIVERSITY PRESS, FOREIGN IN A DOMESTIC SENSE PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION 4 (Christina Duffy Burnett & Blake Marshall eds. 2001) [Hereinafter Burnett].

<sup>26</sup> Although the former Mexican colonies of California, New Mexico, and the Republic of Texas were largely populated by distinct cultural and ethnic peoples, a large population of American immigrants already resided in these locales.

<sup>27</sup> 31 Stat. 77 (1900).

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mirrored the organic acts of the other territories that followed the Northwest Ordinance path to statehood, and mostly parallels the first phase of that process.<sup>28</sup>

Meanwhile, one of the main issues of the presidential election of 1900 was whether the Constitution extended in full force to the newly acquired territories. McKinley, an imperialist who argued that the Constitution did not necessarily extend to the new territories, won the election. Shortly thereafter the Supreme Court adopted this position in the Insular Cases.<sup>29</sup>

The Supreme Court announced the territorial incorporation doctrine in *Downes v. Bidwell*.<sup>30</sup> The case centered on a shipment of oranges from Puerto Rico to New York. Under the Organic Act of Puerto Rico, goods from Puerto Rico were subject to the same fees and duties as good from foreign countries, but the fees were discounted by eighty-five percent.<sup>31</sup> Mr. Downes paid the import duties under protest and sued for a refund. The lawsuit argued that since Puerto Rico was not a foreign country, the Uniformity Clause prohibited these fees.<sup>32</sup> Mr. Downes relied on a then-recent court decision that held Puerto Rico and the other territories ceded to the United States pursuant to the Treaty of Paris had ceased to be foreign countries.<sup>33</sup> The Court framed the issue in the case as whether the “revenue clauses of the Constitution extend of their own force to our newly acquired territories.”<sup>34</sup>

Declaring without discussion that “[t]he Constitution itself does not answer the question,” the Court then crafted an extraconstitutional answer to the question

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<sup>28</sup> 31 Stat. 77 (1900); Statehood Study, *supra* note 11 at loc. 929.

<sup>29</sup> Burnett, *supra* note 25 at 4.

<sup>30</sup> *Downes v. Bidwell*, 182 U.S. 244 (1901).

<sup>31</sup> *Id.* at 247-48.

<sup>32</sup> *Id.*

<sup>33</sup> The case Mr. Downes relied upon is another one of the Insular Cases: *De Lima v. Bidwell*, 182 U.S. 1 (1901).

<sup>34</sup> *Downes*, 182 U.S. at 249.

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presented to it.<sup>35</sup> The Court discussed the history of the Northwest Ordinance and the Territorial Clause of the Constitution, but focused most of its analysis distinguishing the Treaty of Paris from the Louisiana Purchase Treaty and the Joint Resolution Annexing the Republic of Hawaii. Interestingly, after analyzing the Louisiana Purchase and noting that the treaty explicitly provided that the people of this territory were to be guaranteed the “enjoyment of all the rights, advantages, and immunities of citizens of the United States” as soon as possible, the Court declared that Congress “would [n]ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our [culture], shall become at once citizens of the United States.”<sup>36</sup> Ultimately, because the Court was “of [the] opinion that the power to acquire territory by treaty implies . . . [the power] to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in . . . the ‘American empire,’” and because the Treaty of Paris provided “that the civil rights and political status of the native inhabitants [of the ceded territory] . . . shall be determined by Congress,” the Court held that the uniformity clause did not apply to Puerto Rico and its sister insular territories.<sup>37</sup>

The Court’s brief discussion of the territorial inhabitants’ status in the “American Empire” implied initially that citizenship would alter the state of affairs. Indeed, the Court pointed out that if citizenship were granted to the inhabitants of the new territories and their “children thereafter born, whether savages or civilized” it would result in “extremely serious” consequences.<sup>38</sup> The decision was silent on what these serious consequences

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 252, 280.

<sup>37</sup> *Id.* at 279-80.

<sup>38</sup> *Id.* at 279.

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could be, but the use of the word “savages” certainly provides a vivid hint.

Although *Downes* seemed to settle the issue of whether Puerto Rico was incorporated, and the consequences of this unincorporated status, the issue recurred. In 1915, Congress amended the Judicial Code to extend federal appellate jurisdiction over the Supreme Courts of Puerto Rico and the Territory of Hawaii.<sup>39</sup> In 1917, Congress passed the Jones–Shafroth Act, which granted American Citizenship to all former Spanish subjects and their children living in Puerto Rico.<sup>40</sup> The Act also established the Puerto Rican Senate and split up Puerto Rico’s government into legislative, executive, and judicial branches, thus mirroring state governments.<sup>41</sup> Finally, the Act created the Federal District Court for the District of Puerto Rico and placed that new court under the appellate jurisdiction of the First Circuit Court of Appeals. The Act also made Puerto Rico subject to all federal statutes.

Many annexationists in Puerto Rico took these actions to mean that Congress was moving Puerto Rico from the traditional “phase one” of the Northwest Ordinance scheme to phase two of that process. Implicit in this theory was the assumption that by making Puerto Ricans citizens and establishing a territorial government, Congress had in fact incorporated Puerto Rico into the union.

The Supreme Court would disappoint annexationists once again. Despite the breadth of the Jones Act, the Court again held that Puerto Rico was an unincorporated territory of the United States in *Balzac v. Porto Rico*.<sup>42</sup> Balzac came to the Court upon a writ of error

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<sup>39</sup> 38 Stat. 803 §246 (1915).

<sup>40</sup> The Jones Act (39 Stat. 951) provided a mechanism for Puerto Ricans to reject the grant of citizenship, only 288 did so.

<sup>41</sup> 39 Stat. 951 (1917).

<sup>42</sup> *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

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from the Supreme Court of Puerto Rico.<sup>43</sup> Mr. Balzac was a newspaper editor facing a charge of misdemeanor criminal libel. He demanded a jury trial under the Sixth Amendment. The district court declined.<sup>44</sup> Asserting constitutional error, Mr. Balzac appealed to the Puerto Rican Supreme Court, which affirmed the lower court's decision. The defendant then appealed to the Supreme Court of the United States.<sup>45</sup>

The Court held that extending American citizenship to the residents of Puerto Rico did not incorporate Puerto Rico into the United States, so the Court affirmed Mr. Balzac's conviction.<sup>46</sup> The Court declared that the Jones Act did not confer upon Puerto Ricans any additional right, other than the right to move to the mainland with the same rights and responsibilities as any other citizen.<sup>47</sup> More specifically, the Court ruled without dissent that it is not the *status* of a person that determines the applicability of constitutional provisions, but *locality*.<sup>48</sup>

The Court has not discussed the territorial incorporation doctrine in detail since. Instead, it has relied on the doctrine to extend or deny constitutional rights to the residents of Puerto Rico and to analyze the constitutionality of various provisions of a myriad of federal statutes.

On two occasions, however, the Court cast doubt on the continued validity of the doctrine. First, the Court noted in *Reid v. Covert*, a case involving military servicemen overseas, that the scope of the Insular Cases was to facilitate the temporary government of the territories, and thus the doctrine did not have wider

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<sup>43</sup> *Id.* at 300.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Only fundamental rights are extended to the unincorporated territories, and since at the time, a right to a jury trial was not deemed a fundamental right, this issue was dispositive. *Id.* at 306.

<sup>47</sup> *Id.* at 308.

<sup>48</sup> *Id.* at 309.

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applicability.<sup>49</sup> Therefore, unless a century-old exercise of sovereignty and rule can be regarded as temporary, the doctrine no longer applies.

Likewise, in *Torres v. Puerto Rico*, the Court decided that the protections of the Fourth Amendment extended to Puerto Rico.<sup>50</sup> Justice Brennan's concurrence, joined by three other Justices, argued that the Insular Cases were clearly not "authority" on the question of "the application of the Fourth Amendment – or any other provision of the Bill of Rights – to the Commonwealth of Puerto Rico."<sup>51</sup>

The Court has also noted that it "may well be that over time the ties between the United States and any of its unincorporated territories strengthen in ways that are of constitutional significance."<sup>52</sup> The ties between Puerto Rico and the United States have indeed strengthened significantly since the Court decided the Insular Cases. Today, more Puerto Ricans reside in the mainland United States than in Puerto Rico;<sup>53</sup> there is a Supreme Court Justice of Puerto Rican descent;<sup>54</sup> and hundreds of

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<sup>49</sup> 354 U.S. 1, 14 (1957).

<sup>50</sup> 442 U.S. 465, 471 (1979).

<sup>51</sup> *Id.* at 475-76 (Brennan, J., concurring).

<sup>52</sup> *Boumediene v. Bush*, 553 U.S. 723, 758 (2008) (discussing the Insular Cases to determine what constitutional rights extended to enemy combatants held prisoner in Guantanamo Bay).

<sup>53</sup> 4,623,716 Puerto Ricans resided in the United States as of the 2010 Census, while the population of Puerto Rico was 3,725,789. Census Bureau, *The Hispanic Population: 2010*, at 3 available at <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf> (last visited Feb. 15, 2013); Census Bureau, *2010 Census Interactive Population Search*, available at <http://www.census.gov/2010census/popmap/ipmtext.php?fl=72> (last visited Feb. 15, 2013).

<sup>54</sup> Sheryl Stolberg, *Woman in the News: Sotomayor, a Trailblazer and a Dreamer*, N.Y. TIMES, May 26, 2009, available at [http://www.nytimes.com/2009/05/27/us/politics/27websotomayor.html?\\_r=0](http://www.nytimes.com/2009/05/27/us/politics/27websotomayor.html?_r=0).

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thousands of Puerto Ricans have served with distinction in the United States Armed Forces since the Spanish-American war.<sup>55</sup> With Puerto Ricans in prominent and visible roles at all levels of American society, Puerto Ricans are no more foreign to the United States than are New Yorkers, Texans, or Hawaiians.

## II. Statehood Historically

The Constitution mentions new states only twice. The text of the New States Clause, Article 3 section 4, protects the geographic and political integrity of existing states.<sup>56</sup> The clause requires consent from a state's legislature for any cession of territory by a state for the formation of a new one, or the combination of several states for the same purpose.<sup>57</sup> By negative implication, the clause is the only constitutional prescription for forming a new state. The clause thus vests Congress with any other power to admit new states. The New States Clause was born out of a perceived deficiency of the Articles of Confederation—the controversy surrounding the authority of the Congress of the Confederation to pass the Northwest Ordinances governing territories.<sup>58</sup>

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<sup>55</sup> *Statement by Anabelle Rodriguez, Secretary of Justice for the Commonwealth of Puerto Rico, on the Bombing on Vieques*, [http://www.pbs.org/newshour/bb/military/jan-june01/vieques\\_4-27.html](http://www.pbs.org/newshour/bb/military/jan-june01/vieques_4-27.html) (last visited Feb. 1, 2013).

<sup>56</sup> The New States Clause reads: “New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.” U.S. CONST. art. IV, §3, cl. 1.

<sup>57</sup> U.S. CONST. art. IV, §3, cl. 1.

<sup>58</sup> Statehood Study, *supra* note 11 at loc. 787. See also THE FEDERALIST NO. 38 (James Madison).



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The Northwest Ordinance of 1787, dealing with the disposition of the western territories, is regarded as among the most important acts of the Congress of the Confederation, second only to the convening of the Philadelphia Convention.<sup>59</sup> The creation of architecture for the administration and disposition of these territories was no small feat. This achievement was critical to the formation of the union, as the unclear status of the western territories almost derailed the ratification of the Articles of Confederation.<sup>60</sup> The smaller landless states feared being overpowered in the union by the larger states with western lands and refused to ratify the Articles unless the larger states relinquished their claim over their unsettled western territories.<sup>61</sup> It was not until the State of Virginia, under the leadership of Thomas Jefferson, agreed to cede its western territory to the Confederacy, and the other landed states followed suit, that the Articles of Confederation were finally ratified.<sup>62</sup>

Having solved the problem of ratification, the Congress of the Confederation was immediately faced with the urgent matter of what to do with the ceded territory. The Articles of Confederation were silent on the creation and admission of new states, so the Congress tried to craft a process.<sup>63</sup> Several proposals emerged. The earliest proposal treated the territories as colonies of the states that ceded each territory.<sup>64</sup> However, fear of perpetual

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<sup>59</sup> The Library of Congress, *Primary Documents in American History Northwest Ordinance*, <http://www.loc.gov/rr/program/bib/ourdocs/northwest.html> (last visited Mar. 1, 2013).

<sup>60</sup> Statehood Study, *supra* note 11 at loc. 497 (noting that deadlock over the disposition of the western lands that many states laid claims to delayed ratification of the Articles of Confederation).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 510.

<sup>64</sup> *Id.* at loc. 514.

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ownership of these territories by the Confederacy became a strong concern, and the idea emerged for a compact between the states and the Confederacy that ensured self-governance for the territorial colonies and guaranteed their eventual admission into the Union.<sup>65</sup> This compact came to being as The Resolution of 1780, and it provided that the territory was to be “formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereign[ty] . . . as the other states.”<sup>66</sup> The purpose of this compact was to preserve the rights of the states and prevent imperialism.<sup>67</sup> Thus, through this compact, the Congress of the Confederacy would assume control over the territories for the explicit purpose of constituting new states.

Shortly after the Congress passed the Resolution of 1780, Thomas Paine proposed the creation of a new state, the state of Vandalia, in a region that today covers modern West Virginia, Kentucky, and parts of Pennsylvania.<sup>68</sup> Although the state was never formed, the Paine plan proposed transitional steps to statehood that were eventually paralleled by the Northwest Ordinance.

A few years after Paine’s proposal, several Continental Army veterans led by General Rufus Putnam proposed forming a new state in modern-day Ohio by granting ownership of the land to veterans of the American Revolution and providing the veterans with farming

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<sup>65</sup> *Id.*

<sup>66</sup> Congress of the Confederacy of the United States, *1780 Resolution on Public Lands*,

<http://www.minnesotalegalhistoryproject.org/assets/1780%20Resolution%20on%20Public%20Lands.pdf> (last visited Feb. 20, 2013).

<sup>67</sup> Statehood Study, *supra* note 11 at loc. 514.

<sup>68</sup> George H. Alden, *The Evolution of the American System of forming and Admitting New States into the Union*, 18 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 79, 83 (1901) (detailing the Paine Plan).

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equipment.<sup>69</sup> In return, this military state would provide for the defense of the union. Richard Bland, a delegate from Virginia, proposed a similar plan that would reserve ten percent of the lands in the new states to benefit the Confederacy in its efforts to provide for the defense of the union and other public works.<sup>70</sup> Both plans failed in Congress.

Although the Paine, Putnam, and Bland plans were unsuccessful in the creation of new states, elements of each plan can be found in the foundation of America's state-making architecture, the Northwest Ordinance. In 1784, Virginia presented the Confederacy with the Deed of Cession for its western territories and spurred action on the territories' disposition in Congress.<sup>71</sup> The same year, a committee led by Thomas Jefferson referred a plan to the Congress for the creation of sixteen curiously named new states.<sup>72</sup> Congress passed this plan into law with only minor amendments. The plan provided for an initial territorial government at the behest of settlers or through an order of Congress. Once the population of a territory reached twenty thousand, its citizens could call a constitutional convention and form a state government. This first version of the Northwest Ordinance prescribed certain parameters for the would-be state government structures, most notably a guaranteed republican form of government. This guarantee was later incorporated into the Constitution of the United States.<sup>73</sup>

The 1784 ordinance was never implemented, and a new ordinance was passed in 1785. The second Northwest

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<sup>69</sup> *Id.* at 84.

<sup>70</sup> *Id.* at 85.

<sup>71</sup> Statehood Study, *supra* note 11, at loc.580.

<sup>72</sup> Jefferson would have named the new states: Sylvania, Michigania, Cherronesus, Assenisippia, Metropotaima, Illinoia, Saratoga, Washington, Polypotamia, and Pelisipia.

<sup>73</sup> Statehood Study, *supra* note 11, at loc. 596.

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Ordinance is only notable because it established the basic survey system of townships that ensured a more orderly settlement of the western lands. A shift in leadership, from Jefferson to Monroe, and the emergence of powerful prospecting companies<sup>74</sup> seeking to exploit the western territories moved Congress to expressly repeal the ordinance of 1784 and enact the Northwest Ordinance of 1787. Thus, the Northwest Ordinance of 1787 became the nation's state formation system into the twentieth century.

As stated above, the ordinance established a three-stage process culminating on admission to the union as a matter of right. Like the ordinance of 1874, it provided that the new states should enter the union subject to specific covenants. It is also striking that the articles of compact between the Confederacy and the future states contained provisions strikingly similar to those that would become enshrined in the Bill of Rights and the Fourteenth Amendment.<sup>75</sup>

The Articles of the Confederacy failed to address many of the challenges that faced the nascent American nation. Recognizing these weaknesses, Congress called for a constitutional convention. The Framers convened in Philadelphia in May of 1787; the result was the Constitution of the United States. After agreeing on more pressing issues such as the necessity for a stronger national government, how this government would be subdivided, and how the states were to be represented in this new national body politic, the convention turned its attention to the mechanisms for the management of the existing western territories and the admission of new states.

This discussion about admission of new states focused on two main points: the silence of the Articles of Confederation on the subject and the existing Northwest

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<sup>74</sup>Specifically, the Ohio and Scioto prospecting companies.

<sup>75</sup>*Id.* at loc. 670.

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Ordinances.<sup>76</sup> In many ways, the two foci of discussion were interrelated; while the wisdom of the territorial scheme created by the ordinances was fairly accepted, authority for the system's creation was doubtful. The convention delegates were faced with the choice of legitimizing the territorial scheme by crafting authority for Congress to enact it, or to strip the national government of its control over the lands ceded to the federal government by the states.<sup>77</sup> The delegation from Virginia proposed granting the power to admit states to the Congress and submitted a draft resolution to that effect for consideration by convention delegates. The delegates adopted the Virginia resolution as a working draft for this provision.<sup>78</sup>

Beginning with the Virginia proposal, the Framers debated whether the new states would be admitted on equal footing as the original states and how to protect the existing states from being dismembered in order to reduce their influence. Eventually, the drafters decided that unequal membership in the union was antithetical to the post-colonial ideals the new nation was born out of, but agreed that the integrity of the existing states should be protected.<sup>79</sup> Thus, the Virginia proposal was amended so that consent of a state would be necessary before it could be divided to form a new one. The Framers borrowed language from the Northwest Ordinance of 1787 and the Resolution of 1780 to draft what became the New States Clause of the Constitution. Having established authority

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<sup>76</sup>THE FEDERALIST NO. 38 (James Madison) (noting that the territorial system was conceived “without the least color of constitutional authority”). Curiously, the most influential of the land ordinances, the Northwest Ordinance of 1787, was passed while the constitutional convention was in session.

<sup>77</sup>C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43, 57-58 (1949).

<sup>78</sup>Statehood Study, *supra* note 11, at loc. 812.

<sup>79</sup>*Id.* at loc. 845.

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for Congress to admit new states, the convention turned its attention to the disposition and governance of the territories and the ability of the central government to hold property. Through several amendments, language giving Congress authority to “dispose of and make all needful rules” for all territory and property of the United States was approved without amendment in the final draft of the Constitution.<sup>80</sup> The Constitution was ratified by June of 1788.

a. Routes to Statehood

Congress now has clear power over the disposition of the western territories; since ratification, thirty-one states have followed the process from territories organized by Congress under an organic act into full statehood.<sup>81</sup> Congress first exercised its new territorial authority when it organized the Southwest Territory, the modern state of Tennessee, following the three-phase model of the Northwest Ordinance of 1787.<sup>82</sup> Shortly after the organization of the Southwest Territory, Congress reenacted the Ordinance of 1787 as the First Organic Act for the Northwest Territory in 1789.<sup>83</sup> The rest of the states followed somewhat similar paths.

b. Unique States

a. *California*

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<sup>80</sup> The territorial clause of the constitution does not appear to have been hotly debated. It reads: The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state. U.S. CONST. art. IV, §3, cl. 2.

<sup>81</sup> See *supra* note 12 and accompanying text.

<sup>82</sup> Statehood Study, *supra* note 11 at loc. 1754.

<sup>83</sup> *Id.* at loc. 906.

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California, although it followed the Tennessee Plan<sup>84</sup> to achieve statehood, is unique in that California transitioned from a sparsely populated former colony of Mexico under American military rule to a state of the union without ever being organized as a territory.<sup>85</sup> California was not organized as territory because Congress could not decide what role slavery would play, if any, in the new territory.<sup>86</sup> This controversy continued as Congress debated California's petition for statehood. Representatives from southern states objected to California's request for admission as a free state since there was no counterbalancing slave state to admit in order to maintain the balance of power between the free and slave states of the union. Congress even discussed splitting California in two at the Mason-Dixon Line.<sup>87</sup> Additionally, some members of Congress felt that allowing California to skip the territorial transition process would undermine the state-making system.<sup>88</sup> Abolitionist and slave-holding factions eventually negotiated the Compromise of 1850, and California was admitted to the union as a free state.

*b. New Mexico*

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<sup>84</sup> The term *Tennessee Plan* refers to the largely self-driven process that Tennessee followed into statehood. The then-Southwest territory organized its own legislature, called for a constitutional convention, and boldly declared its territorial status ended before Congress ever saw its petition for statehood. The territory also elected its congressional delegation and sent them to Washington without congressional consent. The Tennessee plan was implemented successfully by the states of Michigan, Iowa, California, Oregon, Kansas, and Alaska. *Id.* at loc. 1775, 1997.

<sup>85</sup> *Id.* at loc. 6450.

<sup>86</sup> *Id.* at loc. 6710.

<sup>87</sup> *Id.* at loc. 6758.

<sup>88</sup> *Id.* at loc. 6726.

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Congress passed an organic act establishing territorial government for the territory of New Mexico as part of the compromise leading to California's admission to the union in the year 1850.<sup>89</sup> By the time of its organization, the Territory was already populous enough to petition for statehood, and the same year as its organization an unofficial convention drafted a state constitution. This constitution was written both in English and Spanish and declared that New Mexico was a non-slaveholding state.<sup>90</sup> Because of tensions leading up to the Civil War and irregularities in the original state elections, this first effort for statehood failed. The process of establishing a state government would suffer fits and starts for decades. Efforts in Congress also suffered similar fates, with several bills narrowly failing, stifled by technicalities or dying at the conference stage.<sup>91</sup> New Mexico would remain a territory for sixty-two years before achieving statehood. New Mexico finally joined the union in 1912 through the enabling-act route to statehood (as opposed to the Tennessee Plan route). Although many internal and external factors led to this delay, the substantial Hispanic population of the territory and the territorial government's adherence to Spanish as an official language in the territory were large factors. In fact, the enabling-act admitting New Mexico to the union explicitly prescribed the use of English in public schools.<sup>92</sup>

*c. Hawaii*

The most recent addition to the community of states, the insular state of Hawaii, is unique in a myriad of ways. Together with Alaska, it is one of only two non-

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<sup>89</sup> *Id.* at loc. 10921, 10954.

<sup>90</sup> *Id.* at loc. 10970.

<sup>91</sup> *Id.* at loc. 11250.

<sup>92</sup> *Id.* at loc. 11314.



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contiguous states. It is the only island-state and the only bilingual state.<sup>93</sup>

Hawaii's relationship with the United States has been a tenuous one. The road to statehood for Hawaii began with sugar. In 1875 the Kingdom of Hawaii and the United States signed what today would be recognized as a free trade agreement. The treaty allowed Hawaiian sugar and other goods to reach to American markets duty free and ceded territory to the U.S. Navy for what later became the Pearl Harbor Naval Base.<sup>94</sup> The treaty was very lucrative to Hawaii, but its sugar production came to be dominated by American companies and industrialists.

In 1890, a series of tariffs in the United States threatened the island's sugar market and American sugar industrialists realized that the annexation of the island would eliminate the tariff. These industrialists enlisted the United States Minister to Hawaii's assistance, and he persuaded the U.S. Marine Corps to assist the industrialists in overthrowing the Hawaiian monarchy.<sup>95</sup> The American businessmen then set up a provisional government in Hawaii to request annexation by the United States. Despite President Cleveland's calls for the monarchy's reinstatement, and his characterization of the actions by U.S. personnel as dishonorable, the monarchy was never reinstated.<sup>96</sup> Instead, the provisional government called a constitutional convention and formed the independent Republic of Hawaii. The Cleveland administration reluctantly engaged in diplomatic relations with the new government. The Hawaiian Republic negotiated a treaty of annexation, but it was never ratified in the U.S. Senate.

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<sup>93</sup> Hawaiian is designated as a co-official language in the island along with English. HAW. ST. CONST. art. XV, § 4.

<sup>94</sup> The treaty became known as the Reciprocity Treaty of 1875. 19 Stat. 625 (1875).

<sup>95</sup> H.R. Res 2001, 53rd Cong. (1894).

<sup>96</sup> S. J. Res. 19, 103d Cong. (1993).

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The onset of the Spanish-American war raised Hawaii's profile as a base in the Pacific Campaign against Spain in the Philippines. Following the process used to annex Texas, the United States soon annexed Hawaii as a territory pursuant to a joint resolution of Congress.<sup>97</sup>

Unlike Texas, Hawaii was organized as a territory pursuant to an organic act in 1900, and Hawaii's path to statehood took several decades.<sup>98</sup> Congress debated the subject of Hawaiian statehood in 1935 and again in 1937, but on both occasions the bills failed amid strong opposition.<sup>99</sup> In 1941, after the Japanese attack on Pearl Harbor, the territorial government ceded all independent authority when it declared martial law on the islands. Martial law ended in 1944.<sup>100</sup> World War II signaled a break in the Hawaiian statehood movement, but after the war it began again in earnest. In 1950, a Hawaiian state constitution was approved by more than seventy-five percent of voters. This vote was followed in 1954 by a 100,000-signature petition, reportedly weighing two hundred and fifty pounds.<sup>101</sup> As with prior states, partisan negotiations stalled Hawaii's admission. Democrats ironically thought that Hawaii was a reliably Republican state and insisted that reliably Democrat Alaska be admitted first.<sup>102</sup> In 1959, President Eisenhower signed the

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<sup>97</sup> This resolution became known as the Newlands Resolution, after Mr. Francis Newland who first proposed it. 30 Stat. 750 (1898).

<sup>98</sup> The Hawaiian Organic Act. 31 Stat. 141 (1900).

<sup>99</sup> The Honolulu Advertiser, *Timeline: Hawaii's March to Statehood*, <http://the.honoluluadvertiser.com/specials/statehood/statehoodTimeline> (last visited Feb. 28, 2013).

<sup>100</sup> HawaiiHistory.org, *This Day in History: Martial Law Ends*, <http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&PageID=44> (last visited Feb. 28, 2013).

<sup>101</sup> Timeline: March to Statehood, *supra* note 99.

<sup>102</sup> Yahoo, *Alaska celebrates statehood as two others consider options* (2013), <http://news.yahoo.com/alaska-celebrates-statehood-two-others-consider-options-110020290.html>.

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Hawaii Enablement Act and Hawaii became the last state to join the union.

### III. Political Path of Other Insular Territories of the United States

The United States currently exercises sovereignty over five inhabited island chains as unincorporated territories: American Samoa, the Northern Mariana Islands, the U.S. Virgin Islands, Guam, and Puerto Rico. Each has its own history of American acquisition and governance. They will be discussed, in order, as comparison points to the Puerto Rican experience.

#### a. American Samoa

The islands now known as American Samoa came under American sovereignty through a compromise between Germany, England, and the United States in 1899.<sup>103</sup> At different points in the 19th Century, all three nations laid claim to the entire archipelago. Since ratification of the Tripartite Convention, the islands have been governed as an unorganized territory of the United States.<sup>104</sup> The islands were first administered by the U.S. Navy and later by Department of the Interior.<sup>105</sup>

#### b. Northern Mariana Islands

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<sup>103</sup> This compromise is embodied in a treaty known as the *Tripartite Convention*. 31 Stat. 1878 (1900).

<sup>104</sup> Central Intelligence Agency, *The World Factbook: American Samoa*, <https://www.cia.gov/library/publications/the-world-factbook/geos/aq.html>.

<sup>105</sup> Exec. Order No. 10264, 16 F.R. 6417 (1951) (transferring control of the islands known as American Samoa from the Department of the Navy to the Department of the Interior effective July 1951).

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The Northern Mariana Islands are part of the same archipelago as the Island of Guam. At the end of the Spanish-American War, Spain ceded Guam to the United States and sold the rest of the archipelago to Germany.<sup>106</sup> Japan invaded the islands during World War I and retained control until the United Nations put the islands under American protection after World War II.<sup>107</sup> The Northern Mariana Islands made several attempts to reunify with Guam but were ultimately unsuccessful.<sup>108</sup> The Northern Mariana Islands' government then decided to pursue a closer relationship to the United States and formed a territorial government in 1978.<sup>109</sup> It has remained in that role since.

c. U.S. Virgin Islands

The United States purchased the then-Danish West Indies from Denmark in 1916 for the purpose of constructing a naval base in the archipelago. When both nations ratified the treaty, the islands became the U.S. Virgin Islands.<sup>110</sup> Interestingly, the naval bases were built

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<sup>106</sup> For the treaty selling the Northern Mariana Islands to Germany, see German-Spanish Treaty of 1899, Ger.-Spain, Feb. 12 1899, Gaceta de Madrid [Madrid Gazette], 1 de Julio de 1899 (Spain) available at <http://www.boe.es/datos/pdfs/BOE/1899/182/A00001-00001.pdf> (providing for the sale of the Carolinas and Mariana Islands –with the exception of Guam– to Germany for 25 million Spanish Pesetas or 17 million German Marks) (author's translation).

<sup>107</sup> University of Hawaii, Trust Territory of the Pacific Islands, <http://libweb.hawaii.edu/digicoll/ttp/tpi.html>.

<sup>108</sup> The reasons for the failure of reunification attempts are outside the scope of this paper, but the opposition stems, at least in part, from NMI native cooperation with the Japanese during World War II. See also, Haidee V. Eugenio, *NMI, Guam reunification will be up to the people*, SAIPAN TRIBUNE, Apr. 26, 2011 available at <http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=10892>.

<sup>109</sup> 90 Stat. 263 (1976).

<sup>110</sup> 39 Stat. 1706 (1916)

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in Puerto Rico instead. The U.S. Virgin Islands are governed as an unincorporated territory of the United States and administered by the Department of the Interior.

d. Guam

Guam came under U.S. jurisdiction by the Treaty of Paris of 1898. President McKinley immediately placed the island under the control of the U.S. Navy because of its strategic position in the Pacific Ocean.<sup>111</sup> The Navy controlled Guam until the Japanese Empire invaded the island during World War II.<sup>112</sup> The Japanese Empire controlled the island from 1941 until 1944, when allied forces invaded the island and restored the Naval Government.<sup>113</sup> Congress finally granted Guamanians American citizenship and a civilian government in 1950 through an organic act.<sup>114</sup> The issue of status in modern Guam has only been tested once in 1982, and Guamanian support for non-territorial options was weak.<sup>115</sup> Although the issue of status is important to Guamanians, focus on this political issue has diminished in recent years.<sup>116</sup>

e. Cuba and the Philippines

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<sup>111</sup> *Guam History and Culture*, <http://www.guam-online.com/history/history.htm>; Central Intelligence Agency, *The World Factbook: Guam*, <https://www.cia.gov/library/publications/the-world-factbook/geos/gq.html>.

<sup>112</sup> Guam History, *supra* note 111.

<sup>113</sup> *Id.*

<sup>114</sup> Organic Act of Guam, Ch. 512, 64 Stat. 384 (1950).

<sup>115</sup> Robert A. Underwood, *Guam's Political Status*, GUAMPEDIA (Aug. 13, 2012), <http://guampedia.com/guams-political-status/> (last visited Mar. 20, 2013) (noting that a territorial option received fifty-one percent of the vote in the 1982 plebiscite, statehood received twenty one percent, and independence five percent).

<sup>116</sup> *Id.*

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There are also two former U.S. Territories that moved on to nationhood: Cuba and the Philippines. The United States exercised control over Cuba and the Philippines at the beginning of the twentieth century. Like Puerto Rico and Guam, Spain ceded these islands to the United States under the Treaty of Paris. Cuba, however, was never intended to remain an American possession and declared its independence a mere three years after the Treaty of Paris in 1901.<sup>117</sup>

The Philippines, however, followed a rockier path to nationhood starting in 1896 with the Philippine revolution.<sup>118</sup> The revolution ebbed and flowed for two years until the revolutionaries allied with the United States during the Spanish-American War.<sup>119</sup> This Philippine-Spanish conflict officially ended in 1898 when the Kingdom of Spain ceded the island chain to the United States. The revolutionaries did not recognize American sovereignty over the islands and revolted in 1899.<sup>120</sup> The United States quickly subdued the revolution. The Philippines remained an unincorporated territory until the end of World War II. The United States granted the Philippines independence through the Philippine Independence Act.<sup>121</sup> The Act provided for a ten-year transition period and culminated with Philippine sovereignty in 1946.

#### IV. Puerto Rico's Path

Puerto Rico is the first unincorporated territory of the United States and the only one of Spain's former

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<sup>117</sup> Chadwick, *supra* note 2 at 434-35.

<sup>118</sup> *August 1896: Revolt in the Philippines*, PUB. BROAD.SYS., <http://www.pbs.org/crucible/t15.html> (last visited Mar. 20, 2013).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Philippine Independence Act, Ch. 85, 48 Stat. 456 (1934).

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colonies in the western hemisphere to remain a possession of another nation. The relevant political history of the island begins with the arrival of Christopher Columbus in 1493 and the first Spanish settlement in 1508. Despite attempts by France in 1528, England in 1595, and the Dutch in 1625 to wrestle control of the island from the Spanish, the Kingdom of Spain maintained almost continuous control over the island for more than four centuries. Early in the nineteenth century, Spain granted citizenship to its subjects in Puerto Rico and the island was represented in the Spanish Parliament through its provincial government pursuant to the Cadiz Constitution.<sup>122</sup> Spain stripped this representation and provincial autonomy from the island when the Cadiz Constitution was revoked several years later. High taxes imposed by the Spanish Crown and a strict policy of exile for dissenters sparked a popular uprising for independence known as *El Grito de Lares*.<sup>123</sup> The Spanish authorities subdued this rebellion, but it led Spain to grant Puerto Rico more control over its affairs.<sup>124</sup> In 1898, a semi-autonomous government convened in the island after popular elections.<sup>125</sup>

This semi-autonomous government would not last long. The United States included Puerto Rico as a target for its Caribbean intervention during the Spanish-American War at the behest of Puerto Rican exiles in New York.<sup>126</sup> American forces invaded the island in the summer of

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<sup>122</sup> CADIZ CONST. Art. I. *available at* [http://www.congreso.es/docu/constituciones/1812/ce1812\\_cd.pdf](http://www.congreso.es/docu/constituciones/1812/ce1812_cd.pdf) (last visited Feb. 28, 2013) (declaring that the Spanish Nation is comprised of Spaniards in both hemispheres) (author's translation).

<sup>123</sup> Translated to "The Lares Cry," named after the small town in southern Puerto Rico where it took place.

<sup>124</sup> Meléndez, *supra* note 17, at 16.

<sup>125</sup> This authority was granted to Puerto Rico and the other Spanish provinces in the *Carta Autonómica* in 1897. *Puerto Rico History*, <http://www.topuertorico.org/history4.shtml>.

<sup>126</sup> Meléndez, *supra* note 17, at 16.

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1898.<sup>127</sup> By December, the war was over and the United States and the Kingdom of Spain signed a treaty of peace in Paris. The terms of the treaty gave control over the islands of Cuba, Puerto Rico, Guam, and the Philippines to the United States.<sup>128</sup> The treaty was quickly ratified in the United States Senate the following year.

Between the ratification of the treaty and the passage of the first organic act for the island, Puerto Rico was under a military government. The military government was short lived, but it efficiently implemented a number of reforms aimed at integrating the island into the American way of life.<sup>129</sup> Congress established a territorial government in 1900 through the Foraker Act.<sup>130</sup> This law established the island's court system, introduced a series of property reforms to foster the island's sugar economy, and created the office of the Resident Commissioner, Puerto Rico's non-voting delegate to Congress.

The island of Puerto Rico gained more autonomy in the second decade of the twentieth century with the passing of the Jones-Shafroth Act of 1917. The most significant effect of the act was the extension of citizenship to all Puerto Ricans living in the island and their children.<sup>131</sup> The act also divided the territorial government into the traditionally American legislative-executive-judicial silos and mandated the popular election of the territorial legislature. Under the Jones Act, the governor remained an appointed official. Notably, no Puerto Rican would serve in the office until 1946. The Jones Act was amended in 1948 and Puerto Ricans for the first time had a fully representative local government.<sup>132</sup> Elections were held

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<sup>127</sup> Meléndez, *supra* note 17, at 17.

<sup>128</sup> Burnett, *supra* note 25, at 3.

<sup>129</sup> Meléndez, *supra* note 17, at 33-34.

<sup>130</sup> Burnett, *supra* note 25 at 5; Meléndez, *supra* note 17, at 34.

<sup>131</sup> Jones-Shafroth Act of 1917, ch. 145, 39 Stat. 951 (1917).

<sup>132</sup> See Elective Governor Act, ch. 485, 61 Stat. 770 (1947).



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later that year and the first popularly elected Puerto Rican governor took office in 1949.

A strong separatist movement advocated for Puerto Rico's independence from the United States during the first third of the twentieth century but ultimately failed to gain popular support on the island. By the middle of the century, the movement had significantly weakened. Many factors led to the decline, including Puerto Rico's inclusion in New Deal legislation, the island's strong participation in both World Wars and the conflict in Korea, a fracturing of the movement, and a mass migration of Puerto Ricans to the continental United States.

One of the major reasons for the separatist movement's decline was that one of its most charismatic leaders, Luis Muñoz Marín, broke with the movement when he refused to support an independence bill that was being considered by Congress in 1936. Shortly thereafter Mr. Muñoz<sup>133</sup> helped found the Partido Popular Democrático (PPD), the island's modern current pro-commonwealth party. Mr. Muñoz became the island's first popularly elected governor and served in the role for four continuous four-year terms.

Governor Muñoz presided over a period of rapid change for Puerto Rico. On July 4, 1950, President Truman signed Public Law 600 and the governor's administration set out to draft a constitution for Congress' approval.<sup>134</sup> The governor called for a constitutional convention and christened the convention's new constitution the *Estado Libre Asociado* (ELA), directly translated as Free Associated State. To avoid confusion that Puerto Rico was a state, the ELA would be referred to as the Commonwealth in the United States. This Puerto Rican Constitution was approved with two minor

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<sup>133</sup> Per Puerto Rican custom, the second last name is omitted when addressing a person by their last name.

<sup>134</sup> Puerto Rican Federal Relations Act, ch. 446, 64 Stat. 319 (1950).

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amendments in Congress the following year and took effect upon the results of a popular referendum approving the ELA on July 25, 1952.<sup>135</sup> The ELA has remained largely unchanged, but despite attempts by Governor Muñoz to reduce what can be best termed as cultural erosion on the island, Puerto Rican society has changed significantly under the ELA.

## V. The Future for Puerto Rico

The adoption of the ELA had the effect of cementing the political debate in the island around the issue of status. Governor Muñoz's PPD continues to advocate a version of the ELA, the annexationists became statehooders under the banner of the PNP, and what was left of the separatist movement became the Partido Independentista Puertorriqueño (PIP). To some extent, however, each party seeks the same end: The resolution of the island's political status once and for all.

### a. Continued Territorial Status – Estado Libre Asociado

One option for Puerto Rico's future is inaction. As previously established, the Insular Cases make it possible for Puerto Rico to remain a territory of the United States in perpetuity. Fortunately, inaction is disfavored both in Puerto Rico and the United States.<sup>136</sup> Maintaining the ELA

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<sup>135</sup> Congress approved the Puerto Rican Constitution through the passage of Public Law 447. Act of July 3, 1952, ch. 563, 66 Sta. 327 (1952).

<sup>136</sup> See PUERTO RICO ELECTIONS COMMISSION, *supra* note 3 and accompanying text. For the policy of the United States with reference to Puerto Rico's status, see Exec. Order No. 13,183, 65 F.R. 82889 (2000) (establishing the President's Task Force on Puerto Rico's Status with a stated goal to "help answer the questions that the people of Puerto Rico have asked for years regarding the options for the islands'

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is also contrary to the principles of self-governance and self-determination that the United States is founded upon. Thus, final resolution of this issue is long overdue and necessary.

b. Independence

Clearly, one way to resolve the island status is for Puerto Rico to become a free and independent nation. Precedent exists for this option in the experience of former Treaty of Paris territories Cuba and the Philippines, both independent today.<sup>137</sup>

Independence would preserve Puerto Rico's culture to a greater extent than either of the other possible governing structures and would mean protecting the central role of the Spanish language in the island. Legitimate concerns exist, however, about the island's municipal debt and its ability to economically support itself if it were to gain independence. Additionally, Puerto Ricans have come to take pride in and value their American citizenship, which would be at risk if Puerto Rico became independent.<sup>138</sup>

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future status"); Report by President's Task Force on Puerto Rico's Status at 10-11 (2007) *available at* <http://www.justice.gov/opa/documents/2007-report-by-the-president-task-force-on-puerto-rico-status.pdf> (last visited Mar. 20, 2013) (recommending a mandate of periodic votes until Puerto Ricans choose a non-territorial option and defining the non-territorial options as independence or statehood).

<sup>137</sup> It is important to note Cuba was treated differently in the Treaty of Paris and was never meant to remain under American sovereignty, the Philippines were granted independence in through an act of Congress. Philippine Independence Act, 48 Stat. 456 (1934).

<sup>138</sup> There is no guarantee that Puerto Ricans in the mainland would retain their American citizenship if Puerto Rico became independent. There is precedent to the contrary. The Philippine Independence Act stripped all Filipinos of their American citizenship upon the island chain's independence whether they were living in the United States or abroad. 48 Stat. 456 §14 ("Upon the final and complete withdrawal of

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Furthermore, a large Puerto Rican Diaspora has strengthened the ties between Puerto Rico and the United States to such an extent that disconnecting the communities could have negative social and political repercussions both on the mainland and the island.<sup>139</sup> Finally, and perhaps as a result of the aforementioned factors, Puerto Rican support for independence is very low. The island has voted on the question of status four times since the enactment of the ELA and the most support that independence has been able to garner was 5.5% of the votes in 2012.<sup>140</sup>

c. Enhanced Commonwealth

The pro-commonwealth party of the island proposes that an *enhanced or sovereign commonwealth* would best achieve Puerto Rican sovereignty.<sup>141</sup> Under the enhanced commonwealth, Puerto Ricans would remain American citizens and Puerto Rico would assume sovereignty over its own internal and external affairs. The PPD's proposal for an enhanced commonwealth would be based on a treaty of free association that would continue federal funding for programs on the island while reducing the federal administrative footprint in Puerto Rico.<sup>142</sup> On the surface,

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[the United States from] the Philippine Islands the immigration laws of the United States. . . shall apply to *persons who were born* in the Philippine Islands to the same extent as in the case of other foreign countries).

<sup>139</sup> See Census Bureau, *supra* note 53.

<sup>140</sup> Puerto Rico Elections Commission, *Non-Territorial Options – Island Wide Results*, available at [http://div1.ceepur.org/REYDI\\_NocheDelEvento/index.html#en/default/OPCIONES\\_NO\\_TERRITORIALES\\_ISLA.xml](http://div1.ceepur.org/REYDI_NocheDelEvento/index.html#en/default/OPCIONES_NO_TERRITORIALES_ISLA.xml) (last visited Feb. 1, 2013).

<sup>141</sup> Burnett, *supra* note 25, at 20.

<sup>142</sup> *Id.* at 20-21.

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this solution appears to be a silver bullet to solve the issue of Puerto Rico's status. The enhanced commonwealth would preserve the American citizenship of all Puerto Ricans, protect Puerto Rican culture from further cultural erosion, and Puerto Rico would be self-sovereign for the first time since before colonialism.

The enhanced commonwealth, however, may be incompatible with the Constitution of the United States because its dual promises of sovereignty and continued birthright American citizenship are irreconcilable. Further, it is an open question whether Congress would approve such a change, and why they would. From Congress' point of view, Puerto Rico would remain a relatively expensive proposition with less federal oversight and without an obvious reason why it should support a basically independent state.

The PPD's enhanced commonwealth proposal is very similar to a proposed commonwealth for the island of Guam that was debated by Congress in 1994.<sup>143</sup> The Guam proposal would have required the mutual consent of the citizens of Guam and of Congress before any act of Congress became applicable in the island. Because the act was incompatible with the long-recognized supreme power of Congress to dispose of the territories, the Act never made it out of committee. Congress' power over the territories is supreme, or plenary, because the Constitution recognizes only States and Territories and granted authority over the latter to Congress.<sup>144</sup> The territories are akin to municipalities in the states and are thus "mere subdivisions" of the United States. Congress' power over the territories remains "so long as they remain in a territorial condition."<sup>145</sup> Thus, even if Congress agreed to

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<sup>143</sup> Guam Commonwealth Bill, H.R. 1521, 103d Cong., 1st Sess. (1993).

<sup>144</sup> *Nat'l Bank v. Cnty of Yankton*, 101 U.S. 129, 132-33 (1880).

<sup>145</sup> *Shively v. Bowlby*, 152 U.S. 1, 48 (1894).

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an enhanced commonwealth solution, it could change its mind at any time. Only if Puerto Rico were to become independent, then negotiate on even ground with the United States for a treaty that continued federal funding in the island, would Congress be bound. Again, the political feasibility of such a negotiation is an open question.

The problem for the PPD's enhanced commonwealth is that remaining "in a territorial condition" is important to the enhanced commonwealth's second pillar—the preservation of American citizenship for persons born in the island. The Constitution did not contain a provision for citizenship until the Fourteenth Amendment's ratification. The Fourteenth Amendment explicitly extends birthright citizenship only to those born in *and* "subject to the jurisdiction" of the United States.<sup>146</sup> Thus, for the enhanced commonwealth's promise of continued birthright citizenship to Puerto Ricans to stand constitutional scrutiny, Puerto Rico must remain "subject to the jurisdiction" of the United States. It is clear that the ELA as it stands today is disfavored both by the United States and the people of Puerto Rico, and the enhanced commonwealth proposal is at best uncertain and at worst unworkable under the United States Constitution.

d. Statehood

The only other political avenue for the final resolution of Puerto Rico's status is for the island to join the community of states in the union. The prospect of becoming a state has steadily gained support in Puerto Rico since the first status referendum in 1967. Statehood

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<sup>146</sup> U.S. CONST. amend. XIV.

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received 39% of the vote then, but it garnered 46.3% in 1993, 46.5% in 1998, and 61.3% in 2012.<sup>147</sup>

In the 115 years since Puerto Rico came under American sovereignty, Puerto Ricans have steadily integrated into American culture and the institutions of American government have grown substantially in the island. The local political organization is virtually identical to those in the fifty states and Puerto Rico's economy has fully integrated with that of the mainland United States. This high degree of social and political integration over the past century makes transition to statehood the most easily implemented of all the possible non-territorial options.

Despite the fact that Puerto Ricans have been part of American society for over a century, there is strong opposition on the island and the mainland to a Puerto Rican state. On the island, both the independence and commonwealth parties oppose statehood, articulating concern for the protection of Puerto Rican culture and identity. These parties point out that by becoming a state, Puerto Rico would lose its Olympic team, the ability for Puerto Ricans to compete in pageants like the Miss Universe competition, and that Puerto Ricans would be forced to adopt English as their first language.

Whether Puerto Rico would remain Spanish speaking is a key issue for statehood opponents on the island and the mainland, with island opponents fearing English and mainland opponents demanding it. The mainland opposition also articulates economic and political concerns. On the economic front, if admitted, the island would be the poorest state of the union. Its per capita income is not even half of Mississippi's, currently the nation's poorest state, and the island's unemployment rate is almost double the national measure. Becoming a state

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<sup>147</sup> For the results of the votes through 1993, see Burnett, *supra* note 25 at 21. For the results of the 2012 vote, see Non-Territorial Options, *supra* note 140.

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would eliminate caps on direct aid to households in the island, which will dramatically increase the number of welfare recipients in Puerto Rico.

The other front of opposition in the mainland is political. If Puerto Rico were to be admitted to the union, it would be awarded five or six representatives and two senators in Congress. Republicans fear that Puerto Rico would be a reliably Democratic state. Large state delegations from states like California also fear their influence would be diluted by giving up a number of representatives in the house. Another avenue of political opposition is that admission of Puerto Rico as a state may prompt the other insular territories to petition for statehood.

Although the opposing arguments to Puerto Rico's statehood are formidable, they are by no means ironclad. The island opposition on the grounds of protecting the cultural integrity of Puerto Ricans, while laudable, fails to take into account that each state of the union is culturally distinct from the others. This cultural diversity existed at the time of the American Revolution and it remains a fact today. It is true that the distinct culture of some states is more accentuated than others, but it would be inaccurate to say that Hawaiians, New Yorkers, Texans and Louisianans are not culturally distinct from one other.

The issue of language, likewise, is soluble. If admitted, Puerto Rico would not be the first bilingual state, a distinction held by New Mexico, nor would it be the only currently bilingual state—Hawaii's state languages are English and Hawaiian.<sup>148</sup>

As for the economic questions, the effects of Puerto Rico's admission to the union are difficult to predict. It is very possible, if not likely, that economic activity in the island would increase upon its admission.<sup>149</sup> Indeed,

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<sup>148</sup> See *supra* notes 91, 93.

<sup>149</sup> On a grander scale, for example, the reunification of Germany produced an economic boom for the unified German nation. Steven



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American companies often stay away from investing in Puerto Rico because of its uncertain relationship with the United States. Tourism would likely also increase as more Americans come to the realization that they can travel to Puerto Rico without a passport.<sup>150</sup>

The political opposition to the Puerto Rico's admission to the island is also founded on shaky premises. Puerto Ricans on the island do not currently view politics from a Democrat or Republican point of view. Island politics have revolved around the issue of status for more than sixty years. Any attempt to predict how Puerto Ricans will fall along party lines would be futile. In fact, until 2012, the two highest offices in the island—the Governor and Resident Commissioner—were held by a Republican and a Democrat. Both men were members of Puerto Rico's statehood party.

Opposition to Puerto Rico's statehood on the grounds that the other insular territories will also seek statehood upon Puerto Rico's admission is unwarranted. First, unlike Puerto Rico, the population of the other insular territories is relatively small.<sup>151</sup> Admitting states with such small populations is not likely to be desirable or feasible. Secondly, Puerto Rico is further along the political process to statehood than any of the other insular territories. For example, the Department of the Interior administers all other insular territories while Puerto Rico is largely self-

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Greenhouse, *Evolution in Europe; East-West Berlin, a Boomtown in the Making*, N.Y. TIMES, July 2, 1990, at A1 (noting that an economic boom in Germany in the early 1990s was the direct result of German reunification).

<sup>150</sup> Americans can already travel to the island without a passport, but it is not a widely known fact. Carlos Romero-Barcelo, *Puerto Rico, U.S.A.: The Case for Statehood*, 59 FOREIGN AFF. 60, 80-81 (1981).

<sup>151</sup> If admitted Puerto Rico would be the 29th most populous state of the union. See *supra* note 8 and accompanying text.

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governed as a de facto state.<sup>152</sup> Finally, of the other insular territories, only Guam has ever taken steps indicating a desire for eventual admission.<sup>153</sup> Thus, at least for the moment, the people of the insular territories appear satisfied with their current status.

## VI. Puerto Rico's Incorporation

The Supreme Court once opined that “[i]t may well be that over time the ties between the United States and any of its unincorporated territories strengthen in ways that are of constitutional significance.”<sup>154</sup> Puerto Rico has reached that tipping point. In the century since the United States invaded the island, Puerto Ricans have risen to some of the highest positions in the Federal Government. Puerto Ricans have served as Federal Judges, American Ambassadors, Generals, and Admirals. Since 2009, with the confirmation of Justice Sonia Sotomayor, a Puerto Rican sits on the highest court of the land.

Many Puerto Ricans, including Justice Sotomayor's mother, have served in the United States military since 1898. In fact, if Puerto Rico were a state, it would be among the highest in per capita volunteering for the armed forces.<sup>155</sup>

More evidence of the strengthening of ties to the United States is the 1966 Public Law 89-571, which made the Federal District Courts in Puerto Rico into Article III courts, an act that Congress has not taken with other unincorporated territories.<sup>156</sup> All federal agencies treat Puerto Rico in the same manner they would a state. Unless

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<sup>152</sup> *History of the Office of Insular Affairs*,  
<http://www.doi.gov/oia/about/history.cfm>.

<sup>153</sup> See *supra* note 115 and accompanying text.

<sup>154</sup> *Boumediene*, 553 U.S. at 758.

<sup>155</sup> Rodriguez, *supra* note 55.

<sup>156</sup> 80 Stat. 764 (1966).

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otherwise specified, all civil and criminal federal laws apply to Puerto Rico as they do to the states.<sup>157</sup> Perhaps the most reliable indicator of the integration of Puerto Rico into American society is the fact that as of the census of 2010, more Puerto Ricans resided in the United States than in Puerto Rico.<sup>158</sup>

## VII. Conclusion

It has been more than a century since American forces quietly landed on a beach in southern Puerto Rico and were received with cheers of “Viva Puerto Rico Americano.” Ninety-six years have passed since Puerto Ricans joined the brotherhood of citizenship with their continental counterparts. Four hundred thousand Puerto Ricans have served in the United States military and have risen to the highest levels of American society. Despite all of this, Puerto Ricans on the island remain sentenced to second-class citizenship. This situation is patently unfair to Puerto Ricans on the island, who have no vote in a Congress with plenary power over their affairs. The situation is also unfair to Americans on the mainland who largely subsidize Puerto Rico’s government.

This past November, Puerto Ricans rejected the current territorial status of the island. That much is clear. Opponents of statehood have raised questions about the interpretation of the statehood portion of the vote, but even they cannot deny that a majority of Puerto Ricans voted to do away with the territorial nature of their relationship with the United States. Ultimately, everyone involved is best served by a final resolution to this question, and that can only come through statehood or independence. Of those, statehood best respects the sacrifices made by Puerto

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<sup>157</sup> 48 U.S.C § 734; Memorandum on the Commonwealth of Puerto Rico, 57 F.R. 57093 (1992).

<sup>158</sup> See *supra* note 53 and accompanying text.

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Ricans in the past century and reflects the gradual but significant integration of the island into American society.

The Supreme Court of the United States once declared that Puerto Rico was “not foreign in the “international sense . . . [but] foreign to the United States in a domestic sense.”<sup>159</sup> This proclamation was arguably erroneous even in its time, and it definitely is today. Puerto Rico and its people are no longer foreign to the United States in a domestic or international sense; accordingly, it makes no sense to consider them as such.

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<sup>159</sup> *Downes v. Bidwell*, 182 U.S. 244, 341 (1901) (White, J., concurring).

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POLICY NOTE

**SOME MORE FOR SAMOA:  
THE CASE FOR CITIZENSHIP UNIFORMITY<sup>1</sup>**

*By: Benjamin S. Morrell<sup>2</sup>*

**I. Introduction**

In the late 1960s, Leneuoti Tuaua graduated from college in California and applied to several government jobs around the state, hoping to start a career in law enforcement.<sup>3</sup> He scored well on the entrance exams for the California Highway Patrol and the San Mateo County Sheriff's Office.<sup>4</sup> Tuaua had lived in the United States his entire life and had a U.S. passport, yet his applications were denied because he was not a citizen. At the top of Tuaua's passport, stamped in large type, read the words: "THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN."<sup>5</sup> Tuaua was born in American Samoa, a longtime U.S. territory in the South Pacific that consists of five volcanic islands and two coral atolls, and has a population of over fifty-five thousand.<sup>6</sup> Unlike Americans born in Puerto Rico, Guam, and every other U.S. territory, those born in American Samoa are

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<sup>1</sup> SOME MORE OF SAMOA (Columbia Pictures 1941).

<sup>2</sup> J.D. Candidate 2016, University of Tennessee College of Law.

<sup>3</sup> Fili Sagapolutele, *Am. Samoans Sue for U.S. Citizenship Based On Constitution*, PACIFIC ISLANDS REPORT, July 12, 2012, available at <http://pidp.org/pireport/2012/July/07-13-10.htm>.

<sup>4</sup> *Id.*

<sup>5</sup> *DC Circuit Appeal*, WE THE PEOPLE PROJECT, [http://www.equalrightsnow.org/tuaua\\_appealed\\_to\\_d\\_c\\_circuit](http://www.equalrightsnow.org/tuaua_appealed_to_d_c_circuit) (last visited Jan. 29, 2014).

<sup>6</sup> *Insular Area Summary for American Samoa*, U.S. DEPARTMENT OF THE INTERIOR (Apr. 2010), <http://www.doi.gov/oia/islands/american-samoa.cfm>.

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“generally considered nationals but not as citizens of the United States.”<sup>7</sup> This status carries with it several difficulties, limitations, and perplexities, as well as an intangible stigma of lacking citizenship rights afforded to other Americans.<sup>8</sup>

Tuaua, along with four other American Samoans and the Samoan Federation of America, a nonprofit organization that advocates for Samoans’ rights,<sup>9</sup> sued the U.S. government in 2012, arguing that the Citizenship Clause of the Fourteenth Amendment guarantees full citizenship to those born in American Samoa.<sup>10</sup> On June 26, 2013, a federal district court judge in Washington, D.C. granted the government’s motion to dismiss, disposing of the suit in its earliest stages.<sup>11</sup> Citing the doctrine of territorial incorporation from a hundred-year-old body of Supreme Court precedent known as the Insular Cases,<sup>12</sup> the court noted that, for the purposes of the Fourteenth Amendment, American Samoans are not entitled to U.S. citizenship by birth.<sup>13</sup> The plaintiffs have appealed the case to the U.S. Court of Appeals for the D.C. Circuit.<sup>14</sup> Tuaua, the lead plaintiff, asks, “[i]f we are American Samoans, then why not citizens? I believe American Samoans deserve the same rights and benefits as all other Americans.”<sup>15</sup>

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<sup>7</sup> 12 U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., USCIS POLICY MANUAL pt. A, ch. 2 (Mar. 11, 2014).

<sup>8</sup> *Tuaua FAQ*, WE THE PEOPLE PROJECT, [http://www.equalrightsnow.org/tuaua\\_faq](http://www.equalrightsnow.org/tuaua_faq) (last visited Jan. 29, 2014).

<sup>9</sup> *Id.*

<sup>10</sup> *Tuaua v. United States*, 951 F. Supp. 2d 88. (D.D.C. 2013).

<sup>11</sup> *Id.* at 90.

<sup>12</sup> *Id.* at 94; *see Id.* n. 9 (for a full list of the Insular Cases).

<sup>13</sup> *Id.* at 94.

<sup>14</sup> *DC Circuit Appeal*, *supra* note 5.

<sup>15</sup> *American Samoa Lawsuit Seeks US Citizenship*, BLOOMBERG BUSINESSWEEK NEWS (July 13, 2012),

<http://www.businessweek.com/ap/2012-07-13/american-samoa-lawsuit-seeks-us-citizenship>.

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This note will explore the territorial incorporation doctrine, a judicially created doctrine under which the Constitution applies fully only in incorporated United States territories, and the reasons why it has no legitimate place in Twenty-First Century American jurisprudence. From the outdated and xenophobic cases that support the doctrine, to the discriminatory practices it promotes, the territorial incorporation doctrine simply fails to advance any compelling state or federal interest.

## II. Development of the Law

### A. Historical Background

American Samoa became a territory of the United States in 1899 after Germany and the U.S. signed the Tripartite Convention, agreeing to divide ownership of the Samoan Islands.<sup>16</sup> Located in the Polynesian region of the southern Pacific Ocean, American Samoa's annexation occurred soon after the Spanish–American War; this period marked the apex of America's foray into the entrenched European institutions of imperialism and colonialism.<sup>17</sup> During World War II, U.S. troops in the Pacific Theatre used American Samoa as a major communications hub and naval base.<sup>18</sup> Many Samoans voluntarily enlisted in the U.S. Marines and served on active duty until the end of the war.<sup>19</sup> Samoans have served in the U.S. military ever since. Per capita, soldiers from American Samoa have died in Afghanistan and Iraq at a higher rate than any other U.S.

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<sup>16</sup> GEORGE HERBERT RYDEN, *THE FOREIGN POLICY OF THE UNITED STATES IN RELATION TO SAMOA* 574 (1933).

<sup>17</sup> Joe Waldo Ellison, *The Partition of Samoa: A Study in Imperialism and Diplomacy*, 8 PAC. HIST. REV. 259, 288 (1939).

<sup>18</sup> JACK C. HUDSON & KATE G. HUDSON, *AMERICAN SAMOA IN WORLD WAR II* 18 (1994), available at <http://ashpo.com/downloads/library/7500319.pdf>.

<sup>19</sup> *Id.* at 25–27.



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state or territory.<sup>20</sup> Three of the plaintiffs in *Tuaua v. United States* are veterans.<sup>21</sup>

New Zealand wrested control of Western Samoa from Germany during the First World War. Following World War II, it became a “trust territory” of the United Nations before declaring independence in 1962.<sup>22</sup> Today, the Independent State of Samoa comprises the majority of the island chain, with a population of nearly two hundred thousand.<sup>23</sup> By contrast, American Samoa has seen very little political change over the last century and today “continues its status as an unorganized, unincorporated United States territory.”<sup>24</sup>

## B. “National” vs. “Citizen”

The Citizenship Clause of the Fourteenth Amendment to the Constitution provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>25</sup> The concept of citizenship by birth has its roots in the ancient Greco–Roman concept of *jus soli*: “the law of the soil,” which granted citizenship

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<sup>20</sup> Kirsten Scharnberg, *Where the U.S. Military is the Family Business*, CHICAGO TRIBUNE, Mar. 11, 2007, available at [http://articles.chicagotribune.com/2007-03-11/news/0703110486\\_1\\_military-recruiters-american-samoans-boot-camp](http://articles.chicagotribune.com/2007-03-11/news/0703110486_1_military-recruiters-american-samoans-boot-camp).

<sup>21</sup> *Tuaua FAQ*, *supra* note 8.

<sup>22</sup> Stanley K. Laughlin, Jr., *United States Government Policy and Social Stratification in American Samoa*, 53 OCEANIA 29, 29–30 (1982).

<sup>23</sup> Central Intelligence Agency, *Samoa*, THE WORLD FACTBOOK (Jan. 30, 2014), <https://www.cia.gov/library/publications/the-world-factbook/geos/ws.html>.

<sup>24</sup> Laughlin, *supra* note 22, at 30.

<sup>25</sup> U.S. CONST. amend. XIV, § 1.

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by birth within the territory of a state or city.<sup>26</sup> English common law adopted the doctrine following the decline of medieval feudalism, and the U.S. kept it at common law until the passage of the Fourteenth Amendment codified *jus soli* in the Constitution.<sup>27</sup>

Congress has defined a “national of the United States” as “a citizen of the United States, or . . . a person who, though not a citizen of the United States, owes permanent allegiance to the United States.”<sup>28</sup> All citizens, then, are nationals, but not all nationals are citizens. A “person born in an outlying possession of the United States on or after the date of formal acquisition of such possession” is a national, but not a citizen.<sup>29</sup> Presently, “[t]he term ‘outlying possessions of the United States’ means American Samoa and Swains Island.”<sup>30</sup> The only Americans who become noncitizen nationals by birth are those born in American Samoa.

American Samoans are not citizens of any country, though they still have obligations and some rights under American law. Compared to other Americans, and even those living in other territories, Samoans often have fewer rights and more hardships with no apparent rhyme or reason. Although nationals can generally work and reside anywhere in the U.S.,<sup>31</sup> like U.S. citizens in other territories, they cannot vote in federal elections and do not pay many

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<sup>26</sup> *Citizenship*, ENCYCLOPAEDIA BRITANNICA ONLINE ACADEMIC EDITION, <http://www.britannica.com/EBchecked/topic/118828/citizenship?anchor=ref22254> (last visited Jan. 29, 2014).

<sup>27</sup> *Id.*

<sup>28</sup> 8 U.S.C. § 1101(a)(22) (2012).

<sup>29</sup> 8 U.S.C. § 1408(1) (1988).

<sup>30</sup> 8 U.S.C. § 1101(a)(29) (2012). In 1925, Congress declared U.S. sovereignty over Swain’s Island and made it a part of American Samoa. *See* 48 U.S.C. § 1662.

<sup>31</sup> *U.S. National*, IMMHELP (2014), <http://www.immihelp.com/immigration/us-national.html>.

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federal taxes.<sup>32</sup> Nationals may apply for U.S. citizenship, but under the same rules as other permanent residents,<sup>33</sup> which requires living in a U.S. state for three months,<sup>34</sup> paying nearly seven hundred dollars in fees, and passing a civics exam and an English literacy test.<sup>35</sup> Despite the high rate of military enlistment, American Samoans cannot become military officers unless they successfully apply for citizenship.<sup>36</sup> Different states treat nationals inconsistently. Among other restrictions, many states prohibit nationals from owning guns, serving on juries, and holding public office.<sup>37</sup>

### C. The Insular Cases and Territorial Incorporation

After the American annexation of several overseas territories at the turn of the century, individuals who found themselves suddenly under the authority of the United States attempted to invoke the rights and freedoms of the Constitution through the American courts. The U.S. Supreme Court handled these challenges in a series of decisions known as the Insular Cases.<sup>38</sup> Whereas previous administrations had sought to create new states out of freshly acquired land, President McKinley established a new trend of colonialism with the intention of keeping these new “colonies” at arm’s length, using them primarily

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<sup>32</sup> *Insular Area Summary for American Samoa*, *supra* note 6.

<sup>33</sup> *Id.*

<sup>34</sup> *American Samoa Lawsuit Seeks US Citizenship*, *supra* note 15.

<sup>35</sup> *DC Circuit Appeal*, *supra* note 5.

<sup>36</sup> Sean Morrison, *Foreign in a Domestic Sense*, 41 HASTINGS CONST. L.Q. 71, 85–86 (2013).

<sup>37</sup> *Id.*

<sup>38</sup> Adriel Cepeda Derieux, *A Most Insular Minority*, 110 COLUM. L. REV. 797 (2010).

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for military purposes and posturing before the international community.<sup>39</sup>

Following the lead of the Executive Branch, the Supreme Court relegated the new territories to a legal periphery analogous to their geographic relation to the American mainland by conjuring up the doctrine of territorial incorporation and applying it throughout the Insular Cases:

This doctrine divided domestic territory -- that is, territory within the internationally recognized boundaries of the United States and subject to its sovereignty -- into two categories: those places “incorporated” into the United States and forming an integral part thereof (including the states, the District of Columbia, and the “incorporated territories”); and those places not incorporated into the United States, but merely “belonging” to it (which came to be known as the “unincorporated territories”).<sup>40</sup>

Beginning in 1901, the Insular Cases held that the full weight of the Constitution did not “follow[] the [American]

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<sup>39</sup> Christina Duffy Burnett, *Untied States*, 72 U. CHI. L. REV. 797, 799 (2005).

<sup>40</sup> *Id.* at 800.

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flag”<sup>41</sup> to these new, unincorporated territories, and that only the most basic Constitutional rights apply there.<sup>42</sup> Justifying the invention of this wholly new doctrine, the Court noted that one “false step at this time might be fatal to the development of . . . the American Empire.”<sup>43</sup> The Court provided little guidance on how to evaluate whether a constitutional right is “fundamental.”<sup>44</sup>

The Supreme Court specifically addressed the issue of citizenship regarding inhabitants of the territories in *Downes v. Bidwell*. The Supreme Court interpreted the Citizenship Clause of the Fourteenth Amendment as a “limitation to persons born or naturalized in the United States which is not extended to persons born in any place ‘subject to their jurisdiction.’”<sup>45</sup> Citizenship, the most fundamental and seminal of rights, was not fundamental enough for the Court to apply to the territories. Residents of the territories lived in a state of uncertainty as to which rights they had and which remained out of their grasp, nestled away in the incorporated and purportedly more civilized regions of the “American Empire.”

Eventually, as the country shifted away from its imperialistic gaze, Congress began to concretely define the legal and political relationships between the U.S. and its territories through legislation on an individual basis. Over the years, Congress granted full citizenship rights to residents of Guam,<sup>46</sup> Puerto Rico,<sup>47</sup> the U.S. Virgin Islands,<sup>48</sup> and the Northern Mariana Islands,<sup>49</sup> while

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<sup>41</sup> *Id.* at 805.

<sup>42</sup> *Downes v. Bidwell*, 182 U.S. 244 (1901).

<sup>43</sup> *Id.* at 286.

<sup>44</sup> Morrison, *supra* note 36, at 105.

<sup>45</sup> *Downes*, 182 U.S. at 251.

<sup>46</sup> Guam Organic Act of 1950, 48 U.S.C. § 1421 (1950).

<sup>47</sup> Jones–Shafroth Act, Pub. L. No. 64–36, 39 Stat. 951 (1917).

<sup>48</sup> 8 U.S.C. § 1406 (1952).

<sup>49</sup> 48 U.S.C. § 1801 (1976) (The Northern Mariana Islands gained full U.S. citizenship for its citizens contemporaneously with its political

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relinquishing control of the Philippines<sup>50</sup> and the Panama Canal Zone.<sup>51</sup> Among the inhabited territories of the U.S., only American Samoa remained unincorporated. Congress eventually passed the Immigration and Naturalization Act,<sup>52</sup> which codified the old distinction between incorporated territories and unincorporated territories. As the last unincorporated territory, American Samoa was the only place to experience a unique handicap of its residents' rights as Americans through the now legislated and codified territorial incorporation doctrine.<sup>53</sup>

### III. Analysis

The Insular Cases were decided by many of the same justices who endorsed racial segregation in *Plessy v. Ferguson* only a few years before.<sup>54</sup> They have invited comparison to *Plessy* ever since establishing a “doctrine of separate and unequal.”<sup>55</sup> The high percentage of native, nonwhite populations in the American territories, especially at the turn of the century, invite these ugly associations.<sup>56</sup> As the Court in *Downes* put it, the territories were “inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of

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union with the U.S. in 1976.). See Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America § 1801 (1975), available at <http://www.cnmilaw.org/section1801.html>.

<sup>50</sup> Treaty of General Relations and Protocol with the Republic of the Philippines, U.S.-Phil., July 4, 1946, 61 Stat. 1174.

<sup>51</sup> Panama Canal Treaty of 1977, U.S.-Pan., July 22, 1977, TIAS 10030.

<sup>52</sup> See generally 8 U.S.C. § 1101 (2012).

<sup>53</sup> 8 U.S.C. § 1101(a)(22) (2012).

<sup>54</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>55</sup> Juan R. Torruella, *The Insular Cases*, 29 U. PA. J. INT'L L. 283, 291 (2007).

<sup>56</sup> *Id.* at 289.

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thought.”<sup>57</sup> Tellingly, the opinion in *Downes* heavily quotes *Dred Scott v. Sandford*.<sup>58</sup> Through this unflattering historical lens, it becomes clearer how the Supreme Court could have found that citizenship is not a fundamental right under the Constitution. Fundamentality, they may have privately reasoned, depending on factors more transparent than the content of one’s character. McKinley’s original goal of colonial exploitation rang true. The U.S. was not interested in the people, only the land.

Rather than being actively based on institutional racism today, the anomaly of American Samoa’s status as the last unincorporated territory without citizenship by birthright appears to have no specific justification. A rule this obscure, perplexing, and technical should require a compelling reason for its existence. Neither the court in *Tuaua* nor Congress managed to pinpoint any distinct characteristics of American Samoa that would vindicate or even attempt to explain the arbitrary nature of its unique, unincorporated status today. With no governmental interest replacing the original imperialistic one, the incorporation doctrine has no purpose yet still exists. It is at best a vestigial reminder of America’s imperialistic past and at worst the last surviving mechanism of a systematic “regime of political apartheid.”<sup>59</sup>

The landscape of the Constitution has changed drastically over the last century, due more to its interpretation by the Supreme Court than its subsequent amendments. In the early Twentieth Century, the Fourteenth Amendment condoned racial segregation,<sup>60</sup> but would not tolerate maximum hours regulations for bakers

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<sup>57</sup> *Downes*, 182 U.S. at 287.

<sup>58</sup> *Id.* at 250, 271, 274–76 (citing *Dred Scott v. Sandford*, 60 U.S. 393 (1857)).

<sup>59</sup> *Downes*, 182 U.S. at 283.

<sup>60</sup> *Plessy*, 163 U.S. at 537.

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and factory workers.<sup>61</sup> Many state court verdicts could be retried, trumped, and reversed by federal common law at a defendant's whim.<sup>62</sup> The Bill of Rights largely did not apply to the states, even regarding crucial liberties like protection against double jeopardy<sup>63</sup> and confessions obtained through torture.<sup>64</sup> The Supreme Court has no qualms with overturning old precedent where a fundamental right is being infringed,<sup>65</sup> where years of experience have simply shown continuous and systematic unfairness,<sup>66</sup> or even where the Court finds a new right to read into the Constitution<sup>67</sup> or decides to delete a previously valid one.<sup>68</sup> Considering these modern trends in constitutional law, and the rotting, cobwebbed foundation of the territorial incorporation doctrine, the ruling in *Tuaua* makes sense only by remembering that it was decided at the trial level.<sup>69</sup> Trial judges typically leave the trendsetting to the appellate courts and often feel it beyond their authority to make new policy. Whether the Circuit Court of Appeals for the D.C. Circuit will take on this challenge remains to be seen, but given the shaky ground on which the territorial incorporation doctrine stands, it would not be surprising to see it fall.

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<sup>61</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>62</sup> *Swift v. Tyson*, 41 U.S. 1 (1842).

<sup>63</sup> *Palko v. Connecticut*, 302 U.S. 319 (1937).

<sup>64</sup> *Brown v. Mississippi*, 297 U.S. 278 (1936).

<sup>65</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>66</sup> See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Sweatt v. Painter*, 339 U.S. 629 (1950).

<sup>67</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>68</sup> See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

<sup>69</sup> *Tuaua*, 951 F. Supp. 2d at 88.



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#### IV. Conclusion

The Insular Cases' doctrine of territorial incorporation provides a spectacularly poor justification for preserving the modern distinction between U.S. citizens and nationals by birth. Considering the Court's woefully antiquated approach to constitutional interpretation, especially regarding the Fourteenth Amendment, and the fact that the underlying original goal of facilitating American colonial ambition is long gone, these cases offer little persuasive support once put in context. The difference now only applies to the residents of one tiny island chain in the Southern Hemisphere, following a protracted period of arbitrary congressional cherry picking of rights for other territories, evidences the perennial dearth of common sense surrounding this issue. Under the current dichotomy one might need to amend the Declaration of Independence to read "all men are created equal unless they are created in American Samoa."<sup>70</sup> Without a legitimate state interest this construction moves from the troubling to the absurd. Uniformity of American citizenship by itself would make practical sense on its face, eliminating the second-class stigma associated with hailing from one particular U.S. territory while simplifying a needlessly complex issue. Accomplishing this goal through the mechanism of the Fourteenth Amendment, by way of the courts, would offer more consistency, not only with the application of the law, but also with its interpretation.

The simple answer is, in this case, the correct one. Being in the United States should mean just that, with no need for an asterisk. As a vestige from a cavalier and discriminatory part of the nation's past, the doctrine of territorial incorporation squarely belongs in the dustbin of

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<sup>70</sup> Morrison, *supra* note 36, at 146.

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history, not in the pages of Twenty-First Century court opinions.<sup>71</sup>

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<sup>71</sup> Tuaua, 951 F. Supp. 2d at 88.

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POLICY NOTE

**SELLING ITS SOUL: AN ANALYSIS OF A FOR-  
PROFIT CORPORATION'S  
RELIGIOUS FREEDOM AND AUTONOMY IN  
AMERICA**

*By: Steffen Pelletier<sup>1</sup>*

**I. Introduction**

Is it possible to consider the principles and morals upon which a business entity is built as separate from the individual shareholders that form the business entity—do they make up a “soul”?

While the question above, on its face, rings more of philosophy than law and policy, there is currently a substantial question of law that is strikingly similar, if not the same, yielded by the contraception mandate of the Patient Protection and Affordable Care Act (“PPACA”). In brief, the PPACA, among other things, requires all health insurance policies, including those policies made available to subscribers through a privately held corporation, to provide contraceptive and preventative care for women.<sup>2</sup> Rooted in the fundamental religious beliefs they hold, many Americans find this so-called “contraceptive mandate” abhorrent.<sup>3</sup> Certainly, no one would question that it is those Americans’ right to speak and act in accordance with that belief. However, the more

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<sup>2</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 sec. 1001(a)(5), 42 U.S.C.A. § 300gg-13(a)(4) (2013).

<sup>3</sup> Jack Kerwick, *Backlash Against Obamacare Contraceptive Mandate*, THE NEW AM. (Jul. 3, 2013, 15:12),

<http://www.thenewamerican.com/usnews/constitution/item/15891-backlash-against-obamacare-contraceptive-mandate>.

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complex question arises when dealing with the privately held for-profit corporation. Specifically, assuming a private corporation's fundamental principles on which it was built are in direct conflict with the entire notion of contraceptive care, what is the extent of Congress's ability to require the corporation to make insurance available covering contraceptive care?

In this policy note, I will address the many considerations surrounding a corporation's legal and moral autonomy. The general threshold question is this: to what extent is a for-profit corporation afforded religion and speech protections separately and distinctly from its shareholders?<sup>4</sup> I intend this note to serve as a guide through the myriad complicated considerations implicated by this issue; in addition, I conclude that there is both objective value in and legal authority supporting the protection of a corporation's right to act in accordance with its religious affiliation. I will show that a corporation has a "soul" of its own—an individual and distinct set of principles that should be valued and protected.

## **II. The Development of the Law: The PPACA and "Preventative Health Services"**

The PPACA mandates that "preventative health services" be included in healthcare plans without any cost sharing.<sup>5</sup> Congress did not initially define "preventative health services" and instead authorized the Department of Health and Human Services ("DHHS") to promulgate rules to this effect.<sup>6</sup> DHHS issued a preliminary rule that defined the religious employer exception narrowly and included

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<sup>4</sup> John K. DiMugno, *The Affordable Care Act's Contraceptive Coverage Mandate*, 25 No. 1 CAL. INS. L. & REG. REP. 1 (2013).

<sup>5</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2713, 124 Stat. 119 (2010).

<sup>6</sup> 3 RELIGIOUS ORGANIZATIONS AND THE LAW § 13:51 (2013).

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contraception in the definition of “preventative health service.”<sup>7</sup> In order to qualify for the “religious employer exception,” an organization is required to (1) have the inculcation of religious values as its purpose; (2) primarily employ persons who share its religious views; (3) primarily serve persons who share its religious views; and (4) be a nonprofit organization.<sup>8</sup> Accordingly, this exemption did not exempt many religious employers, such as Catholic healthcare providers, from being required to offer contraception as part of the routine coverage policies they offered.<sup>9</sup> Because the Catholic Church forbids contraception, those non-exempt Catholic organizations would be forced to either violate their Catholic principles or violate the newly enacted law.<sup>10</sup> Although the DHHS attempted to resolve the issue by delaying the date on which religious-affiliated nonprofits were required to comply with the law by one year and ordered the insurance companies of those religious employers to pay for the contraception, rather than the employers directly, the primary dispute remained: specifically, the Catholic Church wanted absolutely no affiliation with the provision of contraceptives.<sup>11</sup>

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<sup>7</sup> Coverage of Preventive Health Services, 45 C.F.R. § 147.130(a)(iv) (2013).

<sup>8</sup> *Id.*

<sup>9</sup> 3 RELIGIOUS ORGANIZATIONS, *supra* note 6.

<sup>10</sup> *See id.*; Pope Paul VI, *Humanae Vitae*, Vatican (July 25, 1968), available at

[http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_25071968\\_humanae-vitae\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html).

<sup>11</sup> *See* 45 C.F.R. § 147.130; 3 Religious Organizations and the Law § 13:51 (citing *White House Misrepresents Its Own Contraceptive Mandate*, United States Conference of Catholic Bishops (Feb. 3, 2012), <http://www.usccb.org/news/2012/12-020.cfm>). Additionally, the exemption clause was again amended and expanded to define “religious employers” only as those that are considered nonprofit religious houses of worship and religious orders as defined by the IRS. The amended contraception mandate, while expanded to include more groups and

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Additionally, many other nonprofits and for-profits corporations have remained unwilling to breach their fundamental principles by providing insurance coverage for contraceptives. The crux of this conflict is primarily rooted in the interplay between the federal act giving individuals statutory claims where the government “substantially burdens” her freedom to exercise her religion and case law which identifies corporations as individuals.

### III. Substantive Law at Issue

#### A. Religious Freedom Restoration Act

The Religious Freedom Restoration Act (“RFRA”) of 1993 was a response to the holding of the Supreme Court in *Employment Div. v. Smith*.<sup>12</sup> In *Smith*, the Court held that the dispositive issue in evaluating the constitutionality of a law under the First Amendment is not whether a law suppressed an individual’s religious practices.<sup>13</sup> Rather, the Court held that, so long as the law was otherwise “neutral” and “generally applicable” to all individuals, the secondary effect of whether the law suppressed the religious practices of some is irrelevant.<sup>14</sup> In effect, the Court removed the sometimes ambiguous

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organization, still did not provide an exemption to other non-profits, and more extensively, for-profit corporations that asserted religious reasons for exemption. The amended contraception mandate was finalized on June 28, 2013. However, the mandate’s final version did little to mitigate the increased litigation from those still outside of the exemption. *See generally* DiMugno, *supra* note 4.

<sup>12</sup> Codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993); *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 885 (1990); *see* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 (1994).

<sup>13</sup> *Smith*, 494 U.S. at 885.

<sup>14</sup> *Id* at 878-81, 876.

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weighing between two equally valid considerations: a compelling government interest and the right an American enjoys to practice his or her religion freely.<sup>15</sup>

Congress acted swiftly through its enactment of the RFRA, which was not only intended to replace the *Smith* standard with the compelling interest test, shifting the burden of proof to the government, but also to provide statutory claims and defenses for an individual where a law “substantially burdens” his or her freedom to exercise his or her religion.<sup>16</sup> The RFRA provides that the government’s burden is met if it demonstrates that the law or policy is “(1) in a furtherance of a *compelling* governmental interest; and (2) is the *least restrictive means* of furthering that compelling governmental interest.”<sup>17</sup>

Notably, sub-section (c) provides that “[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”<sup>18</sup> To date, the federal circuit courts have held that subsection (c)’s use of “person” is ambiguous and therefore, the potential application of subsection (c) to different organizations and corporations is a matter of statutory interpretation.<sup>19</sup> There is a circuit split

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<sup>15</sup> *Id.* at 879.

<sup>16</sup> The RFRA provides that the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability[ ]” (citing 42 U.S.C. § 2000bb-1(a)); see *Klemka v. Nichols*, 943 F. Supp. 470, 474 (M.D. Pa. 1996) (citing *Rodriguez v. City of Chicago*, No.95C5371, 1996 WL 22964, at \*4 (N.D. Ill. Jan. 12, 1996)).

<sup>17</sup> 42 U.S.C. § 2000bb-1(b) (emphasis added).

<sup>18</sup> 42 U.S.C. § 2000bb-1(c).

<sup>19</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1129 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).



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as to which entities may bring a claim, and, of those, which entities may be successful in adjudicating their claims on the merits.<sup>20</sup>

**B. First Amendment and *Citizens United***

For-profit corporations raising claims based on the RFRA find support in the landmark Supreme Court holding in *Citizens United v. Federal Election Commission*,<sup>21</sup> which held that corporations enjoy First Amendment protections.<sup>22</sup> The petitioner, Citizens United, sought injunctive relief from anticipated civil and criminal penalties that would be imposed on it following the release of a political documentary within thirty days of the 2008 Democratic primary elections.<sup>23</sup> The Court specifically held that the First Amendment applies to corporations and it “does not permit Congress to make categorical distinctions based on corporate identity” concerning freedom of speech.<sup>24</sup> Further, it held that “[n]o sufficient governmental interest justifies limits on political speech of non-profit or for-profit corporations.”<sup>25</sup> *Citizens United*’s

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<sup>20</sup> *Id.*

<sup>21</sup> *See generally* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

<sup>22</sup> *Id.* at 886, 917.

<sup>23</sup> *Hobby Lobby Stores, Inc.*, 723 F.3d 1114; *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *Gilardi v. U.S. Dep’t of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013) (citing *Citizens United*, 558 U.S. 310).

<sup>24</sup> The First Amendment does not permit Congress to make categorical distinctions based on the corporate identity of the speaker and the content of the political speech. *Citizens United*, 558 U.S. at 364 (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778, n. 14 (1978)).

<sup>25</sup> *Citizens United*, 558 U.S. at 315. The sweeping implications of the holding that a corporation has its own identity that is separate from an individual citizen cannot be understated. When analyzing whether a section of the Bipartisan Reform Act restricting corporate speech was

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sweeping implication is simply this: “[t]he First Amendment protects speech and the speaker, and the ideas that flow from each,” regardless of whether the speaker is a person in the literal sense or a for-profit corporation.<sup>26</sup>

#### IV. Action to the Courts

##### A. Non-Profit Dismissals

Two types of lawsuits have been filed in response to the contraception: those brought by nonprofit religious employers like the Catholic dioceses, and those brought by for-profit companies owned by religious individuals who disagree with the use of contraception.<sup>27</sup> Many of the claims brought by nonprofit organizations have been dismissed on procedural grounds dealing primarily with ripeness.<sup>28</sup>

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unconstitutional, the Court noted that if the Act were imposed on an individual citizen the government’s “time, place, and manner” argument would not be accepted, but instead be seen as a government action to silence suspect voices. *Id.* at 339.

<sup>26</sup> *Id.* at 341.

<sup>27</sup> *HHS Mandate Central*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral/>, (last visited Jan. 28, 2014). Specifically, there have been a total of 91 cases filed by over 300 plaintiffs, including 46 cases brought by for-profit companies and 45 cases brought by non-profit organizations. Additionally, there have been 2 class action cases brought. Of those cases adjudicated on the merits, 33 injunctions have been granted and 6 denied in cases filed by for-profit companies, and 19 injunctions have been granted and 1 denied in cases filed by non-profit organizations. *See HHS Mandate Central*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral/> (last visited Jan. 28, 2014).

<sup>28</sup> DiMugno, *supra* note 4. (Noting the reason behind many of these dismissals was that the DHHS was still finalizing its rules.) *See Catholic Diocese of Nashville v. Sebelius*, 2012 WL 5879796 (M.D. Tenn. 2012).

## B. For-Profit Litigation and Circuit Court Splits

Cases brought by for-profit corporations generally do not share the same procedural impediments as their nonprofit counterparts<sup>29</sup> and have reached the United States Courts of Appeal on the merits.<sup>30</sup> Currently, there is a split between five Circuit Courts on whether for-profit corporations and their owners are able to bring First Amendment RFRA claims.<sup>31</sup> The Seventh and Tenth Circuits have held that for-profit corporations and their owners have legitimate RFRA claims.<sup>32</sup> The D.C. Circuit Court rejected the corporate claim, but recognized the individual claim.<sup>33</sup> Finally, the Third and Sixth Circuits rejected both corporate and individual claims.<sup>34</sup>

### 1. Seventh and Tenth Circuit Courts

In *Hobby Lobby Stores, Inc v. Sebelius*, Hobby Lobby, a for-profit corporation, and its individual owners filed for injunctive relief claiming that the contraception mandate for employers violated their religious freedoms by compelling them to fund insurance coverage for “drugs or devices they consider to induce abortions.”<sup>35</sup> In defense of

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<sup>29</sup> *Id.* at 1325.

<sup>30</sup> *Id.* at 1326.

<sup>31</sup> *Hobby Lobby Stores, Inc.*, 723 F.3d 1114; *Korte*, 735 F.3d 654, 665; *Gilardi*, 733 F.3d 1208; *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013); *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013) *cert. granted*, 134 S. Ct. 678 (U.S. 2013).

<sup>32</sup> *Hobby Lobby Stores, Inc.*, 723 F.3d 1114; *Korte*, 735 F.3d 654, 665.

<sup>33</sup> *Gilardi*, 733 F.3d at 1216.

<sup>34</sup> *Autocam Corp.*, 730 F.3d 618; *Conestoga Wood Specialties Corp.*, 724 F.3d 377.

<sup>35</sup> *Hobby Lobby Stores, Inc.*, 723 F.3d at 1141. What is problematic about this quote is that it is from the synopsis and this exact quote is not found within the case. The RE or stack checker should have found

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the PPACA, the Attorney General argued that for-profit corporations are not considered “persons” under the RFRA because, among other things, Congress did not specifically include for-profit corporations as an entity offered rights and protections under the RFRA.<sup>36</sup> Because Congress did not specifically define the term “person,” the United States contended that the Tenth Circuit should adopted the definition of ‘persons’ as defined under other laws that excluded corporations.<sup>37</sup>

The Tenth Circuit agreed that because Congress provided no definition for “person” within the RFRA, it left such definition to the discretion of the court.<sup>38</sup> However, the Tenth Circuit turned to the Dictionary Act, in which a corporation is included in the definition of a “person.”<sup>39</sup> Rejecting the government’s argument, the Tenth Circuit held that although other statutes do not include a corporation within the definition of a “person,” the court is not afforded the power to figuratively cut-and-paste definitions from statute to statute.<sup>40</sup> Accordingly, where

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where this was discussed in the case and made the appropriate citation, and then changed the language to paraphrase the same point.

<sup>36</sup> *Id.* at 1128.

<sup>37</sup> *Id.* at 1130 (citing The Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, (1964); The Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, (2009); the Fair Labor Standards Act (“FLSA”), 29 U.S.C.A. § 203 (2006)). (The United States argues that for-profit corporations are not recognized as persons? under these Acts and thus should not be given that status under the RFRA).

<sup>38</sup> *Id.* at 1129.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1130. (Rather than implying that similar narrowing constructions should be imported into statutes that do not contain such language, they imply Congress is quite capable of narrowing the scope of a statutory entitlement or affording a type of statutory exemption when it wants to. The corollary to this rule, of course, is that when the

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Congress did not define “person,” the court must default to the Dictionary Act.<sup>41</sup>

In *Korte v. Sebelius*, the Seventh Circuit addressed the same issue.<sup>42</sup> Like the Tenth Circuit, the Seventh Circuit held that corporations and individual owners might be successful on the merits of their cases.<sup>43</sup> However, the Seventh Circuit’s analysis differed slightly from that of the Tenth Circuit. Specifically, the Seventh Circuit held that “nothing in the Court’s general jurisprudence of corporate constitutional rights suggests a non-profit limitation on organizational free-exercise rights.”<sup>44</sup>

## 2. D.C. Circuit Court

In *Gilardi v. U.S. Department of Health & Human Services*, the D.C. Circuit recognized that individual corporate owners might have RFRC standing. However, the D.C. Circuit split from the Tenth and Seventh Circuits in its holding that a corporation itself does not have standing to bring a claim under a RFRA.<sup>45</sup> The court looked to the “nature and history” surrounding the passage of the RFRA.<sup>46</sup> The court held that the cases that

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exemptions are not present, it is not that they are “carried forward” but rather that they do not apply).

<sup>41</sup> *Id.* at 1129 (In addition, the Supreme Court has affirmed the RFRA rights of corporate claimants, notwithstanding the claimants’ decision to use the corporate form. *See* *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 973 (10th Cir. 2004) (en banc), *aff’d*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (affirming a RFRA claim brought by “a New Mexico corporation on its own behalf”).

<sup>42</sup> *Korte*, 735 F.3d at 664.

<sup>43</sup> *Id.* at 665.

<sup>44</sup> *Id.* at 681.

<sup>45</sup> *Gilardi*, 733 F.3d at 1215.

<sup>46</sup> *Id.* at 1214.

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influenced the RFRA's formation concerned individual rights, not corporate rights, and therefore they concluded that the RFRA does not apply to for-profit corporations.<sup>47</sup> Furthermore, the court held that "there is no basis for concluding that a secular organization can exercise religion."<sup>48</sup> Therefore, in effect, the D.C. Circuit held that it is simply not possible to infringe upon a secular corporation's freedom to exercise religion, as the corporation is not considered a "person" under the RFRA. The court notes that they are satisfied that the shareholders have been "injured in a way that is separate and distinct from an injury to a corporation."<sup>49</sup>

### 3. Sixth and Third Circuit Courts

In *Autocam Corporation v. Sebelius*, Autocam Corporation and Autocam Medical, high-volume manufacturing corporations owned by a single Catholic family, brought RFRA claims seeking injunctive relief from the contraception mandate. The Sixth Circuit held that Autocam was barred from bringing an RFRA claim because it was not considered a "person" under the RFRA and that the shareholders were barred because of the shareholder-standing rule.<sup>50</sup> The court held that the plaintiff's reliance on *Citizens United* was "unavailing" because the Free Exercise Clause and the Free Speech Clause have historically been interpreted in different ways.<sup>51</sup> The Court held that while *Citizen United* identified a number of cases where it recognized that corporations enjoyed rights under the First Amendment, because these cases only concerned freedom of speech, the Court could

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1215.

<sup>49</sup> *Id.*

<sup>50</sup> *Autocam Corp.*, 730 F.3d at 623, 626.

<sup>51</sup> *Id.* at 628.

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not concede that the Religious Exercise clause entailed the same constitutional treatment.<sup>52</sup>

Likewise, in *Conestoga Wood Specialties Corp. v. Secretary of U.S. Department of Health & Human Services*, the Third Circuit held that for-profit secular corporations could not assert claims under the RFRA because they were incapable of engaging in religious exercise.<sup>53</sup> It held that there is no authority applying the Free Exercise Clause of the First Amendment to secular for-profit organizations in the same way as the Free Speech Clause.<sup>54</sup> The court held that the proximity of the two clauses does not imply that all First Amendment rights are afforded to for-profit secular corporations.<sup>55</sup>

## V. The Future for For-Profit Corporations

While the RFRA protects religious organizations and individuals' religious freedoms from substantially burdensome government laws, the courts are addressing for the first time whether for-profit corporations are considered "persons" who have the ability and right to exercise religious freedoms.<sup>56</sup> *Citizen United* provides a compelling argument, implying that because corporations have a distinct voice and enjoy Freedom of Speech rights under the First Amendment, those business entities are also entitled to Religious Exercise rights as well.<sup>57</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Conestoga Wood Specialties Corp.*, 724 F.3d at 381.

<sup>54</sup> *Id.* at 385-86. The stack checker noted that this passage concerned the incorporation of the Free Exercise Clause and not really the direct application of the FEC to for-profit corporations. I wasn't sure exactly how to fix this.

<sup>55</sup> *Id.* at 387.

<sup>56</sup> Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59, 61 (2013).

<sup>57</sup> *Id.* at 98.

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The primary conflict between the circuit courts presents a more complex issue than the right to invoke the religious protection of the First Amendment. Rather, this issue arguably requires the reevaluation of a corporation's identity and ability to invoke any First Amendment protections.<sup>58</sup>

In March of 2014, the Supreme Court will have the opportunity to address this seemingly philosophical issue concerning the identity of the for-profit corporation.<sup>59</sup> However, the answer lies behind statutory analysis of the RFRA and previous Supreme Court decisions concerning corporate rights.<sup>60</sup> While analyzing the Circuit courts' holdings may provide insight into how the Supreme Court will rule concerning for-profit corporations' identities and First Amendment protections, the future of for-profit, privately owned corporations is unclear.

The idea of "corporate personhood" is not a modern idea, but a historical practice that has evolved with our country's democracy.<sup>61</sup> In today's modern economy, a business entity can, undoubtedly, have an identity that includes specific goals, motives, and morals.<sup>62</sup> Additionally, courts have recognized a business entity's ability to act in accordance with certain established

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<sup>58</sup> See generally DiMugno, *supra* note 4.

<sup>59</sup> Lyle Denniston, *Court to Rule on Birth-Control Mandate (UPDATED)*, (Nov. 26, 2013), <http://www.scotusblog.com/2013/11/court-to-rule-on-birth-control-mandate/>.

<sup>60</sup> *Hobby Lobby Stores, Inc.*, 723 F.3d at 1129; *Korte*, 735 F.3d at 681.

<sup>61</sup> John B. Stanton, *Keeping the Faith: How Courts Should Determine "Sincerely-Held Religious Belief" in Free Exercise of Religion Claims by for-Profit Companies*, 59 LOY. L. REV. 723, 748 (2013).

<sup>62</sup> *Id.* at 756 (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, (1983); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006)).



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principles.<sup>63</sup> What, then, creates the distinction between nonprofit and for-profit entities so as to deny for-profit corporations the ability to adhere to the same goals, motives, and morals?

As the Tenth Circuit held, there is both objective value in protecting a corporation's right to act in accordance with the religious affiliations upon which it was built, as well as legal authority to support such protection.<sup>64</sup> The Tenth Circuit held in *Hobby Lobby* that Hobby Lobby considered itself a "faith-based" corporation.<sup>65</sup> The court noted that nonprofits have historically been afforded the right to act in accordance with a "faith-based" identity in the market place.<sup>66</sup> In comparison, for-profit corporations have a voice that is protected by the First Amendment; furthermore, they are required to adhere to specific moral and social standards that are in place to benefit and protect the general public.<sup>67</sup> Thus, disallowing a corporation's clear faith-based identity would contradict those moral expectations that we as a society impose on corporations, and the US Supreme Court has allowed to flourish. Accordingly, and in the case of the PPACA, a for-profit corporation should be afforded the right to act in accordance with a faith-based identity, just as it has been offered in those other instances discussed above.<sup>68</sup>

## VI. Conclusion

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<sup>63</sup> THE BECKET FUND, *Statutes of Non Profit Cases*, (2013), <http://www.becketfund.org/hhsinformationcentral/#tab1>.

<sup>64</sup> *Hobby Lobby Stores, Inc.*, 723 F.3d at 1129.

<sup>65</sup> *Id.* at 1131.

<sup>66</sup> *Id.*

<sup>67</sup> Steven J. Willis, *Corporations, Taxes, and Religion: The Hobby Lobby and Conestoga Contraceptive Cases*, 65 S.C. L. REV. 1, 44 (2013).

<sup>68</sup> *Id.*

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The United States prides itself on its diversity of views, cultures, and religions. However, respecting and protecting the right to speak and act in accordance with those beliefs has been of the utmost importance throughout the nation's history.<sup>69</sup> The federal government is now attempting to alter the definition of for-profit corporations in our country by disallowing them to act upon any other motivation than monetary ends. Allowing a for-profit corporation to be forthcoming with its foundational principles not only reveals its greater purpose, but also puts the general public on notice of that purpose while allowing the correct implementation of the contraception mandate. Rather than restricting the ability of a for-profit corporation to act as moral entity, the Supreme Court should consider the sincerity of the corporation's foundational principles. By analyzing the sincerity of a for-profit corporation's motivation to adhere to specific principles, the government is both recognizing the identity and protecting the rights of the for-profit corporation.

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<sup>69</sup> William N. Eskridge, Jr, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2064 (2002).

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