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## Constitutionalism and Coercion

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## THE CLOUGH DISTINGUISHED LECTURE IN JURISPRUDENCE

# CONSTITUTIONALISM AND COERCION

FREDERICK SCHAUER\*

**Abstract:** A common understanding of constitutionalism sees a constitution as a device for keeping self-serving, corrupt, misguided, incompetent, power-hungry, or otherwise bad officials from doing bad things. But an alternative vision of constitutionalism recognizes the role of a constitution in imposing second-order constraints on the well-intended and often wise policies and decisions of even good officials, and doing so in the service of a range of longer-term values often likely to be slighted given the incentives of day-to-day politics and policy making. Using a series of prominent Supreme Court cases as a springboard, this Article, the written version of the Clough Distinguished Lecture in Jurisprudence at Boston College Law School, develops this alternative vision of constitutionalism and the role of a constitution. The Article then suggests that such a role for a constitution is especially in need of strong devices for coercive enforcement of constitutional constraints, stronger than those commonly in place in the United States today.

### INTRODUCTION

Government is not very popular these days. In the United States, and to a significant extent elsewhere, trust in government appears to be extraordinarily low. And the degree of distrust of government is matched by, and arguably caused by, distrust of the governors—the officials who collectively constitute the government. On a daily basis, we hear and read about officials who take bribes, provide jobs for their relatives, grant sinecures to their friends, favor their donors, and put reelection and political ambition above the needs and interests of their

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constituents. Indeed, although experience is often thought to be a valuable job credential, it is not so in politics, where extensive political or public service experience seems far more often to be an electoral liability than a political asset.

In this environment, James Madison's memorable words in *The Federalist No. 51*—"If men were angels, no government would be necessary"—resonate perhaps even more than when Madison wrote them.<sup>1</sup> Especially in recent years, this Madisonian idea has informed a great deal of American constitutional thinking.<sup>2</sup> Constitutions exist to keep bad governors from doing bad things, it seems commonly to be assumed, and thus constitutions serve principally to protect the public and the public interest from the actions of officials that are far too rarely inspired by a genuine commitment to the public interest. Three decades ago, for example, Cass Sunstein argued that a proper understanding of the U.S. Constitution—in significant part Madison's Constitution—would recognize the central importance of guarding against the "naked preferences" of the populace and its representatives.<sup>3</sup> As a consequence, he argued, it is necessary to entrench principles of constitutional interpretation that would expose and diminish the importance of preferences devoted to the private interests of factions and officials, rather than to the genuine public interest.<sup>4</sup>

Sunstein's views embody a common view of constitutionalism as a way of keeping incompetent, misguided, corrupt, ignorant, or otherwise bad officials from doing bad things.<sup>5</sup> And certainly there is much

<sup>1</sup> THE FEDERALIST No. 51, at 290 (James Madison) (Clinton Rossiter ed., 1999).

<sup>2</sup> Perhaps "Hobbesian" would be a better description of the idea's provenance. See generally THOMAS HOBBS, LEVIATHAN (Richard Tuck ed., Cambridge Univ. Press 1991) (1651) (arguing that government exists to counteract people's selfish instincts).

<sup>3</sup> See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689–93, 1730–32 (1984). I make no claim that this position represents—or does not represent—Sunstein's current views.

<sup>4</sup> See *id.* at 1730–32. Madison also stressed the government's role in controlling factions. See generally THE FEDERALIST No. 10 (James Madison).

<sup>5</sup> On the American people's distrust of government and the belief that, if unchecked by constitutional principles, government actors will act self-interestedly rather than for the public good, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 88–101 (1980); Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 19 (2006); Richard A. Epstein, *Judicial Engagement with the Affordable Care Act: Why Rational Basis Analysis Falls Short*, 19 GEO. MASON L. REV. 931, 931 (2012); Marci A. Hamilton, *The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence*, 29 GA. L. REV. 81, 91 n.34 (1994); Russell Hardin, *Distrust*, 81 B.U. L. REV. 495, 516–17 (2001); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 917 (2005).

in American constitutional thought and history to support such a view.<sup>6</sup> The Constitution has kept racist officials from effectuating racist policies;<sup>7</sup> it has prevented rogue law enforcement officials from railroading innocent suspects;<sup>8</sup> it has prevented officials from clinging to outmoded and (morally and empirically) mistaken gender stereotypes;<sup>9</sup> and it has prevented presidents from using the powers of the office to punish political enemies and attempt to cover up the evidence of their misdeeds.<sup>10</sup> And this is only the tip of the iceberg.

This vision of constitutionalism—the constitution of distrust—is focused on officials who do or might act badly. “Badly” is a loose term, but it encompasses the officials who act for reasons of self-interest rather than public interest; who are corrupt in a more direct sense; who use their offices to pursue obviously immoral practices; who seek to increase their power and disable those who might threaten it; who use their official power to embody racist and other blatantly discriminatory policies; and who in various other ways fit Madison’s characterization. Such officials may not always be “devils,” but nor are they “angels” in Madison’s sense. The constitution of distrust is thus a constitution aimed principally at preventing such people from pursuing the foregoing agendas. The constitution of distrust is a constitution designed to keep bad people from doing bad things.

There is, however, an alternative vision of constitutionalism and of the function of constitutions in most modern democracies, a vision that views constitutionalism as imposing second-order constraints on the first-order policy decisions made by reasonable, well-meaning officials. This alternative vision and the constitution of distrust are not necessarily mutually exclusive. But although this alternative vision captures much of our constitutional tradition, its implications—especially for the

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<sup>6</sup> See generally GARY WILLS, *A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT* (1999).

<sup>7</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that state anti-miscegenation statutes violated the Equal Protection and Due Processes Clauses of the Fourteenth Amendment); *Cooper v. Aaron*, 358 U.S. 1, 4, 16–17 (1958) (holding that the Equal Protection Clause of the Fourteenth Amendment prohibited suspension of a school integration plan).

<sup>8</sup> See BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 19–20, 36–40 (2011) (examining the Constitution’s role in protecting against the use of false confessions at trial).

<sup>9</sup> *United States v. Virginia*, 518 U.S. 515, 519 (1996) (holding that the exclusion of women from a public college violated the Equal Protection Clause of the Fourteenth Amendment).

<sup>10</sup> *United States v. Nixon*, 418 U.S. 683, 686, 713 (1974) (holding that executive privilege did not protect President Nixon from producing tapes and documents subpoenaed in a criminal prosecution).

coercive sanctions we choose to ensure constitutional compliance—are often ignored.

## I. NINE CASES

To support the claims just briefly summarized, and thus to explain the alternative vision of constitutionalism, I want to examine a series of cases. This series is neither a random nor a representative sample. Rather, it is a series of carefully selected illustrations of an alternative conception of constitutional law—or, perhaps more accurately, an alternative role that constitutional law often plays. I begin with cases involving freedom of speech under the First Amendment, and I then move to several cases involving other aspects of constitutional law. Although the phenomenon these cases illustrate is by no means restricted to the First Amendment, it is not surprising, for reasons that I will explain, that the phenomenon surfaces so frequently in the context of the First Amendment.

### A. *Brandenburg v. Ohio*

In 1966, Clarence Brandenburg was the leader of a southern Ohio chapter of the Ku Klux Klan.<sup>11</sup> In that capacity, and in the presence of a television camera team he invited, Brandenburg gave a speech to a rally of Klan leaders on a farm in Hamilton County, Ohio.<sup>12</sup> Brandenburg and his audience were attired in hoods and other Klan regalia, and they carried weapons—including a rifle, pistol, and shotgun.<sup>13</sup> The group burned a cross, and while the cross was burning, Brandenburg spoke to the audience.<sup>14</sup> In his speech, he threatened acts of “revengeance” against African-Americans<sup>15</sup> and Jews, and urged that all African-Americans be sent to Africa and all Jews to Israel, by force if necessary.<sup>16</sup>

The Klan rally, the weapons, the burning cross, and the threats—especially in the tense and racially charged atmosphere of mid-1960s southern Ohio—alarmed local authorities, who charged Brandenburg with the crime of criminal syndicalism under the Ohio Criminal Syndi-

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<sup>11</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 444–45 (1969) (per curiam).

<sup>12</sup> *Id.* at 445–46.

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

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

<sup>15</sup> *See id.* at 447. This was not the label that Brandenburg actually used. *See id.*

<sup>16</sup> *Id.* at 446–47.

calism Act.<sup>17</sup> That statute, enacted during the 1919 Red Scare, was originally designed for use against Communists, Socialists, and others who advocated “crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform,” or who voluntarily assembled for such advocacy.<sup>18</sup> *Brandenburg* was convicted at trial, and his conviction was upheld by the Supreme Court of Ohio.<sup>19</sup> In a unanimous decision, whose per curiam opinion remains the foundation of American free speech jurisprudence regarding advocacy of or incitement to violence to this day,<sup>20</sup> the U.S. Supreme Court reversed the conviction, holding that the First Amendment bars criminal convictions for advocacy of even unlawful or violent conduct unless “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>21</sup>

### B. Collin v. Smith

In 1977, Frank Collin and his fellow members of the National Socialist Party of America—the American Nazi Party for short—made plans to hold a march celebrating Nazism and glorifying the Nazi regime.<sup>22</sup> They selected as a location the town of Skokie, Illinois,<sup>23</sup> the selection based plainly on the fact that Skokie, at the time, was home to a large Jewish population, approximately 5000 of whom were survivors of the Holocaust.<sup>24</sup> In an effort to protect its residents—especially those

<sup>17</sup> See *Brandenburg*, 395 U.S. at 444–45; see also OHIO REV. CODE ANN. § 2923.13 (West 1966), *invalidated* by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>18</sup> *Brandenburg*, 395 U.S. at 448; see 1919 Ohio Laws 189, *invalidated* by *Brandenburg v. Ohio*, 395 U.S. 444 (1969); Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917–1927*, 85 OR. L. REV. 649, 696–700 (2007) (discussing the Red Scare of 1919–1920 and its causal effect on the enactment of criminal syndicalism statutes).

<sup>19</sup> *Brandenburg*, 395 U.S. at 444–45.

<sup>20</sup> *Id.* at 447–49; see, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (citing *Brandenburg* as an example of a content-based restriction on speech); *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011) (same); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670 (2011) (distinguishing the incitement in *Brandenburg* from pharmaceutical marketing’s influence on physicians’ treatment decisions). *Brandenburg*’s scope may not extend to tort actions against speakers and publishers when their speech is a foreseeable cause of harm committed by others. See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 255–56 (4th Cir. 1997); David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957, 970–74 (2002); Rodney A. Smolla, *Should the Brandenburg v. Ohio Test Apply in Media Violence Tort Cases?*, 27 N. KY. L. REV. 1, 43 (2000).

<sup>21</sup> *Brandenburg*, 395 U.S. at 447.

<sup>22</sup> *Vill. of Skokie v. Nat’l Socialist Party of Am.*, 373 N.E.2d 21, 22 (Ill. 1978).

<sup>23</sup> *Id.*

<sup>24</sup> See *id.*

who were close to Holocaust survivors or were themselves Holocaust survivors—from the anguish the Nazi march was almost certain to cause, the town officials sought to block the march.<sup>25</sup>

In both the Seventh Circuit and the Supreme Court of Illinois, however, the town's efforts were rebuffed on free speech grounds.<sup>26</sup> The courts relied on *Brandenburg* and several post-*Brandenburg* Supreme Court cases<sup>27</sup> emphasizing that viewpoint-based restrictions on parades, marches, and demonstrations were constitutionally impermissible,<sup>28</sup> and that offense or anguish to unwilling or inadvertent viewers was insufficient justification for restricting speech in the public forum.<sup>29</sup> Although the Supreme Court's denial of certiorari in the federal case was technically not a decision on the merits,<sup>30</sup> the events attracted so much national publicity that the Court's refusal to give the case a full hearing on the merits was widely understood—and presumably understood by the Court—as an implicit statement that the town's attempt to restrict the march was so plainly unconstitutional that no plenary consideration by the Supreme Court was necessary.

### C. United States v. Stevens

In 2010, the Supreme Court in *United States v. Stevens* invalidated a federal statute prohibiting the creation, sale, or possession of films and

<sup>25</sup> See *id.* at 21; Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 629 (1985); David Goldberger, *Skokie: The First Amendment Under Attack by Its Friends*, 29 MERCER L. REV. 761, 762 (1978).

<sup>26</sup> *Collin v. Smith*, 578 F.2d 1197, 1207–09 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978); *Skokie*, 373 N.E.2d at 22. The state proceeding was preceded by U.S. Supreme Court decisions at 432 U.S. 43, 44 (1977) and 434 U.S. 1327, 1327–28 (1977), which resolved certain preliminary issues before remanding back to the Illinois Supreme Court—including an application for a stay of a preliminary injunction.

<sup>27</sup> See *Collin*, 578 F.2d at 1202–03; *Skokie*, 373 N.E.2d at 23–26.

<sup>28</sup> See *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972); see also Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 26–28 (1975) (arguing that *Mosley* adopted the principle of equal liberty of expression); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 203–07 (1983) (discussing *Mosley's* analysis of viewpoint-based restrictions on speech); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 624–28 (1991) (same).

<sup>29</sup> See *Cohen v. California*, 403 U.S. 15, 21 (1971). See generally William Cohen, *A Look Back at Cohen v. California*, 34 UCLA L. REV. 1595 (1987) (summarizing *Cohen* and subsequent cases).

<sup>30</sup> See *House v. Mayo*, 324 U.S. 42, 48 (1945) (“[A] denial of certiorari by this Court imports no expression of opinion upon the merits of a case.”), overruled on other grounds by *Hohn v. United States*, 524 U.S. 236 (1998).

other like material depicting cruelty to animals.<sup>31</sup> Stevens had made and sold video recordings of dog-fighting as part of his own illegal dog-fighting business.<sup>32</sup> The statute at issue, however, was aimed at even more overt filmed acts of cruelty to animals—including crushing puppies and kittens under the heels of actors, presumably for the pleasure of the small subculture for whom such images provide psychic and sexual stimulation.<sup>33</sup>

In an 8–1 decision, with only Justice Samuel Alito dissenting, the Court held the statute unconstitutional.<sup>34</sup> Although the Court recognized the plausibility of extending the *New York v. Ferber* rationale for regulating non-obscene child pornography<sup>35</sup> to depictions of animal cruelty involving actual cruelty to actual animals,<sup>36</sup> the Court nevertheless refused to do so.<sup>37</sup> As a result, the statute at issue in *Stevens* became merely another example of an attempt to regulate non-obscene images because of their content,<sup>38</sup> and the Court's conclusion of unconstitutionality followed from that finding.<sup>39</sup>

#### D. Snyder v. Phelps

In 2011, one year after *Stevens*, the Court in *Snyder v. Phelps* was again faced with an attempted restriction of what most observers would consider to be genuinely appalling communicative conduct.<sup>40</sup> The Reverend Fred Phelps and the members of his Westboro Baptist Church believed that military deaths were God's punishment for American toleration of homosexuality.<sup>41</sup> Because of this belief, Phelps and his followers engaged in the systematic practice of picketing military funerals,

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<sup>31</sup> 559 U.S. 460, 464, 482 (2010); see 18 U.S.C. § 48 (2006 & Supp. IV 2010), *invalidated* by United States v. Stevens, 559 U.S. 460 (2010).

<sup>32</sup> *Stevens*, 559 U.S. at 466.

<sup>33</sup> See 18 U.S.C. § 48; *Stevens*, 559 U.S. at 465–66; 145 CONG. REC. 10,685 (1999) (“Sick criminals are taking advantage of . . . the lack of federal law on animal cruelty videos. This is a serious problem. Thousands of these videos are being sold. Thousands of dollars are being made. . . . This must be stopped!”).

<sup>34</sup> *Stevens*, 559 U.S. at 482.

<sup>35</sup> See *New York v. Ferber*, 458 U.S. 747, 753–66 (1982). See generally Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285 (exploring the doctrinal implications of *Ferber*).

<sup>36</sup> *Stevens*, 559 U.S. at 470.

<sup>37</sup> *Id.* at 470–72.

<sup>38</sup> See *id.*

<sup>39</sup> See *id.* at 468, 481–82.

<sup>40</sup> See *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011).

<sup>41</sup> See *id.*; Gina Davis, *At Carroll Funeral, a National Protest*, BALT. SUN, Mar. 11, 2006, [http://articles.baltimoresun.com/2006-03-11/news/bal-te.md.marine11mar11\\_1\\_military-funerals-westboro-baptist-church-shirley-phelps-roper](http://articles.baltimoresun.com/2006-03-11/news/bal-te.md.marine11mar11_1_military-funerals-westboro-baptist-church-shirley-phelps-roper).

including that of Lance Corporal Matthew Snyder, a heterosexual marine not previously known to the picketers.<sup>42</sup> At Snyder's funeral, the picketers held signs, many of them clearly visible to those attending the funeral, containing slogans such as: "Thank God for Dead Soldiers," "God Hates Fags," and "Thank God for 9/11."<sup>43</sup> The signs and the picketers had plainly caused distress to Corporal Snyder's family, who brought a tort action under Maryland law for intentional infliction of emotional distress.<sup>44</sup>

In another 8–1 decision, with Justice Stephen Breyer concurring and again only Justice Alito dissenting, the Supreme Court invalidated the \$5 million damage award,<sup>45</sup> primarily because the picketing was related to a matter of public concern.<sup>46</sup> Because of this, the Court held, the First Amendment prevented Maryland from applying the common law of intentional infliction of emotional distress to the conduct of Phelps and the Westboro Baptist Church.<sup>47</sup> Writing for the majority, Chief Justice John Roberts held that the harm caused by speech on matters of public concern was a necessary byproduct of the First Amendment's commitment to open public discourse.<sup>48</sup> Such speech could therefore not form the basis for criminal prosecution or civil damages.<sup>49</sup>

#### E. *Brown v. Entertainment Merchants Association*

Also in 2011, in *Brown v. Entertainment Merchants Ass'n*, the Supreme Court invalidated a California statute restricting minors' access to certain violent interactive video games.<sup>50</sup> These games, which typically gave users the virtual experience of engaging in rape, murder, and other violent and illegal activities,<sup>51</sup> were thought by the California legislature to increase the likelihood that the individuals who played them would engage in the actual activities depicted in the games.<sup>52</sup>

<sup>42</sup> See *Snyder*, 131 S. Ct. at 1213; Davis, *supra* note 41.

<sup>43</sup> See *Snyder*, 131 S. Ct. at 1213; Davis, *supra* note 41.

<sup>44</sup> See *Snyder*, 131 S. Ct. at 1214.

<sup>45</sup> *Id.* at 1212, 1214, 1219–20; see *Snyder v. Phelps*, 533 F. Supp. 2d 567, 597 (D. Md. 2008) (issuing the award).

<sup>46</sup> *Snyder*, 131 S. Ct. at 1215–17.

<sup>47</sup> See *id.* at 1219.

<sup>48</sup> See *id.* at 1220.

<sup>49</sup> See *id.* at 1219–20. For a fuller analysis of the case, see Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 87–90.

<sup>50</sup> 131 S. Ct. at 2732–33, 2741–42; see CAL. CIV. CODE §§ 1746–1746.5 (West 2009), *invalidated by* *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

<sup>51</sup> See *Brown*, 131 S. Ct. at 2732.

<sup>52</sup> *Id.* at 2738–39; see 2005 Cal. Stat. 4920.

The purveyors of the video games challenged the statute, and the Court, with only Justices Breyer and Clarence Thomas dissenting, held the California law unconstitutional.<sup>53</sup> Justice Antonin Scalia's majority opinion characterized the statute as imposing a content-based restriction on non-obscene material,<sup>54</sup> and the Court refused to create a new exception to this by then well-settled First Amendment proposition.<sup>55</sup>

#### F. *Palmore v. Sidoti*

Turning from the First Amendment to the Fourteenth, and from freedom of speech to equal protection, consider the 1984 U.S. Supreme Court decision in *Palmore v. Sidoti*.<sup>56</sup> The underlying dispute was a custody battle between a divorced white couple.<sup>57</sup> By the time of the trial court's decision, the wife had begun living with an African-American man, whom she later married.<sup>58</sup> The Florida trial judge and the court-appointed counselor seemed to believe that a child raised in a mixed-race household in that community would confront more pressures, stresses, social stigmatization, and other difficulties than one not so situated, and on that basis, the judge awarded custody to the husband.<sup>59</sup>

In the Supreme Court, the losing spouse claimed that taking race into account in making a custody decision was a plain violation of the Equal Protection Clause, and the Court agreed.<sup>60</sup> Writing for a unanimous Court, Chief Justice Warren E. Burger noted that even if the judge had acted entirely in good faith and with no racial animus, and even if the judge was empirically right about the consequences to the child, the virtually absolute mandates of the Equal Protection Clause made race an impermissible basis for a custody decision.<sup>61</sup>

#### G. *Orr v. Orr*

Domestic relations were also at issue in *Orr v. Orr*, which the Supreme Court decided in 1979.<sup>62</sup> An Alabama statute provided that hus-

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<sup>53</sup> *Brown*, 131 S. Ct. at 2733, 2741–42, 2751, 2761.

<sup>54</sup> *Id.* at 2733–34.

<sup>55</sup> *Id.* On the First Amendment protections of depictions of violence, see generally *Winters v. New York*, 333 U.S. 507 (1948).

<sup>56</sup> See 466 U.S. 429, 432–33 (1984).

<sup>57</sup> *Id.* at 430.

<sup>58</sup> *Id.*

<sup>59</sup> See *id.* at 431.

<sup>60</sup> See *id.* at 431–32.

<sup>61</sup> See *id.* at 430, 432, 434.

<sup>62</sup> See 440 U.S. 268, 270 (1979).

bands, but not wives, could be required to pay alimony regardless of the particular financial circumstances of husband and wife at the time of divorce.<sup>63</sup> The statute was apparently motivated by a desire to assist women and was seemingly based on the statistically sound conclusion that gender was a reliable, if not perfect, proxy for actual need.<sup>64</sup>

In a decision that drew no dissenters on the merits,<sup>65</sup> the Supreme Court struck down the statute.<sup>66</sup> Justice William J. Brennan, Jr., writing for the majority, concluded that even a sound statistical basis could not justify the gender disparity.<sup>67</sup> Further, the Court concluded that a concern for the likely needs of women could not justify the failure to conduct individualized and gender-neutral assessments of actual needs in particular cases.<sup>68</sup>

### H. Hammon v. Indiana

The recent spate of Supreme Court cases dealing with the Confrontation Clause of the Sixth Amendment may be less familiar to constitutionalists not conversant with questions of evidence or criminal procedure, but that does not make them any less important.<sup>69</sup> And most relevant here is the U.S. Supreme Court's 2006 decision in *Hammon v. Indiana*.<sup>70</sup> In *Hammon*, a woman and her daughter had been the

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<sup>63</sup> See ALA. CODE §§ 30-2-51 to -53 (1975), *invalidated by* *Orr v. Orr*, 440 U.S. 268 (1979); *Orr*, 440 U.S. at 270.

<sup>64</sup> See *Orr*, 440 U.S. at 270.

<sup>65</sup> Chief Justice Burger and Justices Lewis F. Powell, Jr. and William Rehnquist dissented on procedural grounds, but did not reach the underlying merits of the issue. See *id.* at 285–300.

<sup>66</sup> See *id.* at 283.

<sup>67</sup> See *id.* at 281.

<sup>68</sup> *Id.* at 281–82.

<sup>69</sup> For examples of recent Confrontation Clause cases, see *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709–10 (2011) (holding that a forensic laboratory report identifying the defendant's blood-alcohol concentration was inadmissible, where the prosecution did not call as a witness the analyst who signed the report); *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011) (holding that statements made with the primary purpose of “enabl[ing] police assistance to meet an ongoing emergency” were admissible); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307 (2009) (holding that a forensic laboratory report identifying a substance as cocaine was inadmissible); *Giles v. California*, 554 U.S. 353, 355, 377 (2008) (holding that the California Supreme Court's theory of forfeiture by wrongdoing was not an exception to the Confrontation Clause); *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (holding that testimonial evidence is admissible only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant).

<sup>70</sup> See 547 U.S. 813, 829–32 (2006). *Hammon* was decided along with *Davis v. Washington*, 547 U.S. 813 (2006), but the facts of *Hammon* are more relevant for my purposes here than are those of *Davis*.

victims of domestic violence by the same man.<sup>71</sup> During one incident, the woman called the police, who arrived and interviewed the woman on the front porch of the family home shortly after the precipitating incident.<sup>72</sup> The police officer took the woman's statement and proceeded to initiate a domestic violence prosecution.<sup>73</sup> When the case came to trial, the woman did not appear.<sup>74</sup> As is often and increasingly the case, both the police and the prosecutor sought to proceed against the perpetrator anyway, using the woman's front porch statement as the principal prosecution evidence.<sup>75</sup>

Although the evidence was admissible against a hearsay objection under the excited utterance exception,<sup>76</sup> the Supreme Court nevertheless held, in an 8–1 decision, that the use of the statement violated the defendant's Sixth Amendment right to confront the witnesses against him.<sup>77</sup> Where the evidence was in some way testimonial, as it was here, the Court held that the existence of the excited utterance or any other longstanding hearsay exception was not sufficient to deprive the defendant of what would otherwise be his right to confront the prosecution's chief witness.<sup>78</sup>

### I. *Bacchus Imports, Ltd. v. Dias*

Finally, consider the seemingly less morally consequential 1984 Supreme Court decision in *Bacchus Imports, Ltd. v. Dias*.<sup>79</sup> Among Hawaii's many unique products is wine made from pineapples.<sup>80</sup> But as most aficionados of wine made from grapes may suspect, pineapple wine has a difficult time competing in the marketplace with wine made

<sup>71</sup> See 547 U.S. at 819–20.

<sup>72</sup> *Id.* at 819.

<sup>73</sup> *Id.* at 819–20.

<sup>74</sup> See *id.* at 820. Her nonappearance may have been due to fear or the economic or psychological dependency that causes many victims of domestic violence to be reluctant to pursue their cases in court. See Beth I.Z. Boland, *Battered Women Who Act Under Duress*, 28 NEW ENG. L. REV. 603, 610–11 (1994) (explaining why battered women choose to remain in abusive relationships); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 279–85 (1985) (same).

<sup>75</sup> *Hammon*, 547 U.S. at 820; see Heather Fleniken Cochran, *Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence*, 7 TEX. J. WOMEN & L. 89, 96 (1997) (observing an increase in this phenomenon).

<sup>76</sup> *Hammon*, 547 U.S. at 821. On excited utterances generally, see FED. R. EVID. 803(2) and accompanying Advisory Committee commentary.

<sup>77</sup> *Hammon*, 547 U.S. at 834.

<sup>78</sup> *Id.* at 821–22; 829–32.

<sup>79</sup> See 468 U.S. 263 (1984).

<sup>80</sup> See *id.* at 265; see, e.g., *Pineapple*, MAUIWINE, <http://www.mauiwine.com/pineapple/> (last visited Oct. 23, 2013).

from grapes and originating in places such as France, Italy, or California.<sup>81</sup> So in order to assist a local and struggling industry dominated by indigenous Hawaiians, the legislature of Hawaii granted pineapple wine a tax break unavailable to other varieties of wine.<sup>82</sup>

Not surprisingly, the Supreme Court held that Hawaii's differential taxes explicitly designed to help a local industry represented clear protectionism and constituted a clear violation of the dormant commerce clause.<sup>83</sup> As students of the dormant commerce clause well know, the Supreme Court made absolutely no new law in so holding.<sup>84</sup> Even Hawaii's claim that the pineapple-wine industry was struggling was to no avail, and the well-entrenched prohibition on explicit or intentional economic protectionism determined the outcome.<sup>85</sup>

## II. EASY CASES

These nine cases, doctrinally diverse as they are, share three features in common. First, they were, as Supreme Court cases go, easy cases. Although truly easy cases may never get to the Court at all,<sup>86</sup> the very fact that none were 5-4 or 6-3 (at least on the merits) decisions is strong evidence of the fact that these cases were applications of moderately well-established formal doctrines, or at least of strong background principles. As subsequent and surrounding doctrinal developments have demonstrated, these cases were about as straightforward as Supreme Court constitutional decisions can be. The doctrines and principles they applied were widely accepted across the Court's political and ideological divisions, and even those Justices who might have preferred

<sup>81</sup> See *Bacchus* at 268-69.

<sup>82</sup> See *id.* at 265, 268-69.

<sup>83</sup> See *id.* at 273.

<sup>84</sup> See *id.* Justice John Paul Stevens, joined by Justices Rehnquist and Sandra Day O'Connor, dissented, but on the grounds that the Twenty-First Amendment allowed the states to engage in what would otherwise be constitutionally prohibited protectionism. See *id.* at 278-79 (Stevens, J., dissenting).

<sup>85</sup> See *Bacchus*, 468 U.S. at 272-73 (majority opinion).

<sup>86</sup> See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 404 (1985). The principal reason that truly easy cases are rarely decided by the Supreme Court is that the "selection effect" often keeps such cases from being disputed; or, if disputed, keeps them from going to litigation; or, if in litigation, keeps them from being tried to verdict; or, if the subject of a verdict, keeps them from being appealed. On the selection effect generally, the phenomenon by which difficult cases are disproportionately litigated, the seminal article is George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). For a useful and accessible overview, see generally Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315 (1999). For application to the Supreme Court and constitutional litigation, see generally Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988).

a different doctrinal path appeared to agree that the cases were decided on the basis of what were by then accepted doctrinal foundations.

Second, and more importantly for present purposes, none of the officials who initiated or supported the governmental actions in these cases fit the mold of the corrupt, self-dealing, power-grabbing, or otherwise non-publicly-interested public official so prominent in constitutional iconography. The police in *Hammon*, for example, were not rogue cops seeking something close to vigilante justice or acting out racist motivations. Rather, they and the prosecutors appeared to be responding in good faith to the serious national problem of domestic violence and to the well-documented under-prosecution of such cases because of the frequent unwillingness of victims to cooperate with the prosecution. Similarly, the judge in *Palmore* seems to have been no racist, and may well have only been reluctant to conscript young children as front-line soldiers in the battle against racism. And the Hawaii legislature whose actions resulted in *Bacchus* appears only to have been engaged in a desire to help a small local industry against typically large corporate out-of-state competition.

The same characterization fits the officials in the free speech cases as well. Although many free speech and free press cases do indeed involve officials stifling their critics,<sup>87</sup> or those whose views they simply find distasteful,<sup>88</sup> none of the free speech cases described above are among them. Rather, the efforts against the Klan in *Brandenburg*, the Nazis in the *Skokie* cases, the homophobic protesters in *Snyder*, the purveyors of violence in *Brown*, and the puppy torturers in *Stevens* all appear to have come from public officials who were acting in good faith to protect against what they honestly (and often accurately) perceived as genuine dangers.

Third, the policies that these well-meaning officials pursued were themselves at least plausibly sound policies, constitutional questions aside. As a matter of pure policy, and without engaging in a serious pol-

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<sup>87</sup> See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 240–41, 251 (1936) (invalidating a tax on newspapers); see also Appellees' Brief at 8–9, *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (No. 303), 1935 WL 32673 (arguing that the tax was designed to punish newspapers that had publicly opposed the governor).

<sup>88</sup> See *Smith v. Goguen*, 415 U.S. 566, 567–68 (1974) (invalidating prosecution for the use of a flag for a harmless anti-war protest); *United States v. O'Brien*, 391 U.S. 367, 369, 372 (1968) (upholding a conviction for the burning of a draft card); *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 685, 689–90 (1959) (invalidating a statute prohibiting favorable portrayals of sexual immorality).

icy analysis,<sup>89</sup> it is by no means unreasonable to think that it is sound policy to prosecute wife beaters and puppy torturers, prevent the harassment of grieving relatives of dead soldiers, compensate for the financial deficits imposed on women by past stereotypes and discrimination, and guard against Nazis and the Klan.

### III. TWO CONCEPTS OF CONSTITUTIONALISM

If officials were angels, would constitutions be necessary? Perhaps yes. Although we might not want to think of the officials just described as angels, they were not devils. These examples appear to portray well-meaning public officials trying to do the right thing for their primary constituencies, constituencies whose interests are far from illegitimate. It would be difficult, for example, to deny at least the plausibility of the desires of the Holocaust survivors to be protected against additional anguish, the military families to bury their relatives in peace, the Hawaiian pineapple farmers to use indigenous products in a commercially viable way, or the anti-domestic violence advocates to protect the victims of a far too commonly under-prosecuted crime. But in responding to these morally and politically legitimate desires, the public officials in these examples also rather clearly violated the Constitution. Indeed, and at least for purposes of this Article, we can even stipulate that the actions of these well-meaning officials were properly found unconstitutional. In other contexts, we might ask whether the established doctrines that produced the easy cases just described were constitutionally, morally, politically, policy-wise, or otherwise sound. But this is not that context, and now the issue is determining what follows from the fact that even sound doctrines, straightforwardly applied, will invalidate the plausibly policy-sound actions of well-meaning officials. More specifically, what does this phenomenon say about constitutionalism itself?

In terms of constitutionalism, we ought to be neither surprised nor upset. Constitutionalism is best understood as imposing second-order constraints on first-order policy preferences, even when those first-order preferences are sound. Just as at least part of law can be understood in much the same way,<sup>90</sup> constitutionalism is, at least in part, the

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<sup>89</sup> See generally EDITH STOKEY & RICHARD ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS (1978).

<sup>90</sup> This characterization is closest to the account of law prominently offered by Joseph Raz, an account emphasizing law's common exclusion of otherwise morally legitimate reasons. See generally, e.g., JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (2d ed. 2009); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986); JOSEPH RAZ, PRACTICAL REASON AND NORMS (1975).

same relationship applied to officials. Put another way, constitutionalism is a series of second-order rules that exclude a range of first-order policy reasons from official consideration—even those that might be otherwise sound.

To understand this alternative vision of constitutionalism, it is helpful to revisit the standard Madisonian vision of constitutionalism with which I began. According to the Madisonian and Hobbesian image, the Constitution and constitutionalism keep bad people—the non-angels—from doing bad things.<sup>91</sup> With the caveat that the word “bad” should be taken with a grain of salt, the Madisonian vision of constitutionalism is supported by the use of constitutional decision making to combat the racist practices underlying most of pre-*Brown v. Board of Education* segregation<sup>92</sup> and almost all of the post-*Brown* resistance to *Brown*.<sup>93</sup> It is supported by the use of the Constitution to restrict the activities of out-of-control police officers and officials who seek to target unpopular religions, as in the Supreme Court’s 1993 decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>94</sup> or those who single out their critics for special burdens, as in the Court’s 1936 decision in *Grosjean v. American Press Co.*<sup>95</sup>

As the examples I have featured were designed to emphasize, and as briefly noted in the introduction to this Article, the alternative vision of constitutionalism does not stress the role of the Constitution in keeping bad people from doing bad things, but instead emphasizes the role of the Constitution in keeping good people from doing good things, in the service of higher or longer-term goals. This alternative vision is captured in part by the idea of “rights as side constraints”<sup>96</sup> and in part by

<sup>91</sup> See THE FEDERALIST NO. 51, at 290 (James Madison) (Clinton Rossiter ed., 1999); *supra* notes 1–2 and accompanying text.

<sup>92</sup> See, e.g., *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54, 54 (1958), *aff’g* 252 F.2d 122 (5th Cir. 1958) (segregated municipal parks); *Holmes v. City of Atlanta*, 350 U.S. 879, 879 (1955), *rev’g* 223 F.2d 93 (5th Cir. 1955) (segregated golf courses); *Mayor and City Council of Balt. City v. Dawson*, 350 U.S. 877, 877 (1955), *aff’g* 220 F.2d 386 (4th Cir. 1955) (segregated beaches).

<sup>93</sup> See, e.g., *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 431–35 (1968) (holding that the school board’s “freedom-of-choice” plan that allowed students to choose which public school to attend was unconstitutional); *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 220–25 (1964) (holding that the school board’s closure of public schools was unconstitutional); *Cooper v. Aaron*, 358 U.S. 1, 5–12 (1958) (holding that school officials’ planned delay in implementing integration would be unconstitutional).

<sup>94</sup> See 508 U.S. 520, 525–28 (1993).

<sup>95</sup> See 297 U.S. 233, 240–41, 251 (1936); *supra* note 87 and accompanying text.

<sup>96</sup> See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28–33 (1974) (viewing rights as “moral constraints” that individuals are prohibited from violating in the pursuit of even legitimate goals).

the similar idea of “rights as trumps.”<sup>97</sup> Nothing in this vision, however, is exclusively or even primarily about rights. The vision is captured just as readily in dormant commerce clause cases such as *Bacchus Imports, Ltd. v. Dias* and separation of powers decisions such as the Supreme Court’s 1983 decision in *INS v. Chadha*, which invalidate good faith attempts to devise workable solutions to the problems of modern governance.<sup>98</sup> The same vision is also apparent in many decisions about congressional powers, at least on the theory that there may well be wise policies that are still beyond the powers of Congress to implement.<sup>99</sup>

#### IV. INITIAL IMPLICATIONS

Many different consequences flow from this alternative vision of constitutionalism, one that sees constitutionalism as imposing second-order constraints on the reasonable first-order policy decisions of reasonable and well-meaning officials. And among the most important of these consequences is the fact that it is extraordinarily unlikely that either policy makers or their constituents will genuinely accept and internalize these constitutional constraints. Importantly, this is an empirical claim, and not a logical or conceptual one. In theory, both citizens and officials could internalize these second-order constitutional constraints on their own first-order policy preferences, but as an empirical matter, this seems highly unlikely. Indeed, when we see the frequency with which officials appear to ignore constitutional limitations in the

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<sup>97</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xi, 364 (1977) (viewing rights as individual claims that have priority over the general welfare).

<sup>98</sup> See *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 268–69, 273; *INS v. Chadha*, 462 U.S. 919, 923–28 (1983) (invalidating a provision of the Immigration and Nationality Act that authorized a unicameral legislative veto to override the Executive Branch’s decision to suspend an individual’s deportation).

<sup>99</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 42–43 (2005) (O’Connor, J., dissenting) (arguing for invalidation of the Controlled Substances Act, which criminalized possession or manufacture of marijuana, in order to “protect historic spheres of state sovereignty from excessive federal encroachment”); *United States v. Morrison*, 529 U.S. 598, 601, 605 (2000) (invalidating the Violence Against Women Act of 1984, which provided a civil cause of action for victims of gender-motivated violence, on the grounds that it exceeded Congress’s power under the Commerce Clause and the Fourteenth Amendment’s Enforcement Clause); *United States v. Lopez*, 514 U.S. 549, 551–52 (1995) (invalidating the Gun-Free School Zones Act of 1990, which prohibited possession of firearms on school grounds, on the grounds that it exceeded Congress’s Commerce Clause power). As it turns out, examples of the exact phenomenon described in the text are somewhat hard to come by. The theoretical point seems obvious, but at least for Supreme Court cases we often see the invalidation—on grounds of lack of legislative power—of legislation that the invalidating judges might well have opposed as a matter of substantive policy.

pursuit of plausibly sound and certainly popular policies,<sup>100</sup> we are justifiably skeptical of the possibility that uncoerced officials will internalize constraints on what they sincerely and often accurately believe to be policies that are both wise and popular.

The problem of officials and constituents who fail to internalize constitutional constraints is presented most clearly in the context of First Amendment and criminal procedure issues. As exemplified recently by the child pornography<sup>101</sup> and flag desecration<sup>102</sup> cases, by *United States v. Stevens*,<sup>103</sup> *Snyder v. Phelps*,<sup>104</sup> and *Brown v. Entertainment Merchants Ass'n*,<sup>105</sup> described above, and by the earlier Klan<sup>106</sup> and Nazi<sup>107</sup> cases—a disproportionate number of First Amendment litigants are pretty miserable people with miserable things to say. Indeed, if we look back at the formative years of First Amendment doctrine, we can add the Jehovah's Witnesses, who although hardly miserable in the way that the members of the foregoing list are, have certainly been highly unpopular—an unpopularity assisted by, in the words of Zechariah Chafee, their “great religious zeal and astonishing powers of annoyance.”<sup>108</sup>

So too with criminal procedure, where it is hardly controversial to observe that most of those who claim violations of their Fourth, Fifth, and Sixth Amendment rights have actually committed the crimes of which they are charged. And if they have not committed the crimes of which they are charged, it is again not particularly extravagant to ob-

<sup>100</sup> I have described many of these examples on multiple previous occasions. See Frederick Schauer, *The Political Risks (If Any) of Breaking the Law*, 4 J. LEGAL ANALYSIS 83, 89–91 (2012); Frederick Schauer, *Is Legality Political?*, 53 WM. & MARY L. REV. 481, 481–82 (2011); Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769, 770–74 (2010); Frederick Schauer, *Ambivalence About the Law*, 49 ARIZ. L. REV. 11, 12–13 (2007).

<sup>101</sup> See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 243 (2002) (display of virtual child pornography); *Massachusetts v. Oakes*, 491 U.S. 576, 578–80 (1989) (creation of child pornography); *New York v. Ferber*, 458 U.S. 747, 751–52 (1982) (distribution of child pornography).

<sup>102</sup> *United States v. Eichman*, 496 U.S. 310, 312–13 (1990) (right to burn American flag); *Texas v. Johnson*, 491 U.S. 397, 399–400 (1989) (same).

<sup>103</sup> See *United States v. Stevens*, 559 U.S. 460, 466 (2010) (films depicting cruelty to animals).

<sup>104</sup> See *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011) (picketing at a funeral).

<sup>105</sup> See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738–39 (2011) (sale of violent video games to minors).

<sup>106</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 446–47 (1969) (speech threatening African-Americans and Jews).

<sup>107</sup> See *Vill. of Skokie v. Nat'l Socialist Party of Am.*, 373 N.E.2d 21, 22 (Ill. 1978) (march celebrating Nazism).

<sup>108</sup> ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 399 (Atheneum 1969) (1941).

serve that defendants in criminal cases are disproportionately likely to have committed other crimes.

None of this is to say that the rights claimed by such speakers and criminal defendants are inappropriate. Far from it. Just as the rights in the First Amendment are designed to protect the popular and the unpopular, so too are the rights in the Fourth, Fifth, and Sixth Amendments designed to protect the guilty as well as the innocent—in part because by protecting the guilty we protect the innocent as well, and in part because even the guilty are entitled to fair procedures. But to observe that many First Amendment litigants are deservedly unpopular and that most defendants in criminal cases are guilty of the crimes charged is to say that those who claim these rights are especially unlikely to attract the political or moral sympathy of officials or their constituents. The political power of the child pornographers, the flag-burners, the overt racists, the puppy torturers, and the guilty defendants is, to put it mildly, minimal. And once we appreciate this lack of political power, we can appreciate as well that the issue is about the extent to which officials are likely to internalize and apply second-order constitutional constraints on first-order policy choices that they and their constituencies believe to be correct, and that might ultimately produce unpopular winners and popular losers. Indeed, although the First Amendment and criminal procedure issues present the phenomenon of the unpopular constitutional winner with particular vividness, the phenomenon exists in many other areas. As described above, many other constitutional issues arise in cases in which well-meaning and responsive officials make reasonable and sympathetic policy choices that are nevertheless ultimately invalidated in the service of abstract constitutional values, values especially unlikely to be obvious either to officials or their constituencies.

## V. FURTHER IMPLICATIONS

One implication of the foregoing is that we might well have a healthy skepticism about recent enthusiasm for so-called “popular constitutionalism,” the view that constitutional meaning is created by, dependent on, or at least influenced by the views of the public.<sup>109</sup> Before

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<sup>109</sup> See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7–8 (2004); Larry D. Kramer, *Popular Constitutionalism*, *Circa 2004*, 92 CALIF. L. REV. 959, 959, 962 (2004); Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 16–74 (2001) (same); Robert C. Post, *The Supreme Court 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and*

accepting such an understanding of constitutionalism, however, it is appropriate to ask whether the public can reasonably be expected to understand, internalize, and apply rules, doctrines, and principles that negate their very own all-things-except-the-law-considered judgment about what to do and what policies to prefer. In theory it is possible. But if we understand the role of a constitution as imposing constraints on even wise policies proposed and implemented by even wise officials, then we can understand just how implausible it is to suppose that the public can do what it is that the pure theory of popular constitutionalism expects of it.<sup>110</sup>

Much the same can be said about “departmentalism,” the view that each branch of government should have its own constitutional interpretive responsibilities.<sup>111</sup> Operationally, departmentalism is thus committed to the view that although the Supreme Court can and should interpret the Constitution for its own purposes,<sup>112</sup> the Court has no position of interpretive supremacy vis-à-vis the other branches.<sup>113</sup> To the departmentalist, therefore, neither Congress nor the President need accept what the Court thinks the Constitution means when it conflicts with their own interpretative judgments.<sup>114</sup>

Yet as with popular constitutionalism, departmentalism exists in considerable empirical tension with the constraining version of constitutionalism I offer here. Indeed, if we assume that people become officials in the first place either because they have especially strong views about policy or because they are especially sensitive to the opinions of their constituents, then it may follow that officials are no more likely,

*Law*, 117 HARV. L. REV. 4, 5–8 (2003); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 17–30 (2003).

<sup>110</sup> See Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1633–35 (2005) (reviewing KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 109).

<sup>111</sup> See generally Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998) (analyzing arguments for and against departmentalism); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L. REV. 217 (1994) (adopting a form of departmentalism).

<sup>112</sup> See Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985–86 (1987); see also Robert Nagel, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 380, 380–81 (1988) (arguing that, in the face of public defiance of the Supreme Court’s authority, the Court interprets the meaning of the Constitution “on the basis of the Court’s effort to protect itself from what it perceives as illegitimately motivated disagreement”).

<sup>113</sup> See Meese, *supra* note 112, at 985–86. But see Rex E. Lee, *The Provinces of Constitutional Interpretation*, 61 TUL. L. REV. 1009, 1015–16 (1987) (arguing that Attorney General Edwin Meese, III’s 1986 Tulane University speech was not so sweeping as to “call for drastic devaluation of the Supreme Court”).

<sup>114</sup> See Meese, *supra* note 112, at 985–86.

and possibly less likely, than the citizenry to be willing or able to suppress their first-order policy views in favor of constitutional rules or values. It should thus come as little surprise that presidents often go with their preferred policies in the face of relatively clear legal or constitutional constraints, and that Congress and other legislative bodies quite often do the same.

That officials will typically prefer what they think is wise policy or good politics over what they think the law requires, when the two diverge, is thus only to be expected. At times the divergence will be a product of the belief that the law is simply mistaken, morally or otherwise, as with laws restricting the use of marijuana and other so-called “soft drugs,” and about laws prohibiting various sexual practices allegedly in conflict with the majority’s moral notions. At other times, people believe that the law’s mandates are mistaken because the law appears, by virtue of its generality, to have generated a poor result on some particular occasion.<sup>115</sup> Many people who violate traffic laws, for example, do not object to traffic laws as such, nor even to the particular traffic laws they violate. Rather, they often believe that the traffic laws, because of their necessary generality, have caused a bad or silly result on some particular occasion, as with a speed limit that seems far too low on a clear, dry, and traffic-free Sunday morning, or a “Don’t Walk” sign that tells pedestrians to wait at the curb when there is no approaching car as far as the eye can see.

Whether the occasion is a belief that an entire law is wrong or only that a good law would produce a poor result under particular circumstances, people often find themselves in situations in which their all-things-except-the-law-considered best judgment indicates one course of action and the law indicates another. And when the question is so formulated, the research is consistent with the conclusion that the law seems to make little difference under such conditions. In one study, for example, researchers asked subjects whether they would, as a teacher, violate a rule (which in this context can be considered equivalent to the law) mandating so-called blind grading of papers when following the

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<sup>115</sup> Law is necessarily general, and by virtue of its generality will inevitably produce erroneous results on occasion. Aristotle first captured this idea, arguing that equity was the necessary method of “rectification” of the mistakes occasioned by the intrinsic imprecision of general rules and laws. ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, at 139–41 (J.A.K. Thomson & Hugh Tredennick trans., Penguin Group rev. ed. 2004) (c. 384 B.C.E.). On the problem of rule-generated error, see generally FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* (2003).

rule would produce injustice.<sup>116</sup> And although the subjects professed to have general attitudes somewhat favoring rule adherence over rule-independent positive outcomes, these general attitudes did not stand up in the face of a concrete example.<sup>117</sup> When given a concrete example as opposed to asking for their abstract opinion, the subjects preferred the positive outcome to the rule-directed one.<sup>118</sup> Indeed, this was so not only for lay subjects, but also for law students and lawyers.<sup>119</sup> Law students and lawyers were somewhat more inclined than those without legal training to follow the rule, even when it produced what they perceived to be an unjust result.<sup>120</sup> Nevertheless, the subjects in all categories took their own sense of what was a just result to be more important than following what they perceived to be the governing law in the situation.<sup>121</sup> Thus, this particular study not only suggests that there may be less law following for the sake of law than others have supposed, but also that abstract attitudes about the importance of law following may be less reliable as predictors of law following behavior than is often assumed.<sup>122</sup>

Other studies have produced similar results. In one pair of studies, law students were found to be more willing to make decisions in accordance with their own policy preferences than in accordance with the law, even when the law was clear, they were given incentives to follow the law, and even though they tended to believe that their policy preferences should not and did not have any effect on their legal decisions.<sup>123</sup> Again, these studies indicate not only that being guided by law qua law is less prevalent than is often assumed, but also that the importance of legal guidance is systematically over-estimated, even by the decision makers themselves.

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<sup>116</sup> N.J. Schweitzer et al., *The Effect of Legal Training on Judgments of Rule of Law Violations* (Mar. 5, 2008) (unpublished poster presented at the annual meeting of the American Psychological Association, Jacksonville, FL.) (on file with author).

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

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*; see also N.J. Schweitzer et al., *Rule Violations and the Rule of Law: A Factorial Survey of Public Attitudes*, 56 DEPAUL L. REV. 615, 634–35 (2007) (finding that survey participants demonstrated stronger rule-following preferences in response to abstract questions than in resolving concrete dilemmas).

<sup>120</sup> Schweitzer et al., *supra* note 116.

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

<sup>122</sup> See *id.*

<sup>123</sup> Joshua R. Furgeson et al., *Behind the Mask of Method: Political Orientation and Constitutional Interpretive Preferences*, 32 LAW & HUM. BEHAV. 502, 504–09 (2008); Joshua R. Furgeson et al., *Do a Law's Policy Implications Affect Beliefs About Its Constitutionality? An Experimental Test*, 32 LAW & HUM. BEHAV. 219, 222–25 (2008).

These conclusions are unsurprising. We know that preferences influence judgments, the overall phenomenon being what psychologists call “motivated reasoning.”<sup>124</sup> The more specific application of this overall phenomenon is the tendency of legal decision makers, including ordinary people deciding whether the law constrains their actions, to understand the law in light of their outcome preferences.<sup>125</sup> Indeed, this was the basic claim of the American Legal Realists, who argued that judges often understood and interpreted the law in light of their non-legally-determined outcome preferences.<sup>126</sup> Others have more recently made similar claims.<sup>127</sup> And thus to the extent that both lay and legally-trained people tend to treat the law as less important than their law-independent judgments, the empirical foundations of the notion of the law operating as a coercion-independent external constraint on people’s preferred courses of action becomes even more attenuated.

Once we absorb the implications of these various perspectives and studies, we can see that the notion of a constitution as restricting the well-meaning “angels” as well as the non-angels—and as limiting wise policies as well as unwise ones—has implications extending beyond questioning popular constitutionalism and departmentalism. Indeed, these implications extend even beyond supporting a regime of strong judicial review or providing an argument for judicial interpretive su-

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<sup>124</sup> See generally Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990). A noteworthy legal application is Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 7–8 (2011).

<sup>125</sup> See EILEEN BRAMAN, LAW, POLITICS, & PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING 13–17 (2009); Joshua Furgeson & Linda Babcock, *Legal Interpretation and Intuitions of Public Policy*, in IDEOLOGY, PSYCHOLOGY, AND LAW 684, 684–87 (Jon Hanson ed., 2012); see also Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 723–47 (2009) (reviewing quantitative studies on judicial decision making).

<sup>126</sup> Legal Realism has many dimensions, but the focus on judicial opinions and justifications as law-based rationalizations for decisions reached on non-legal grounds is most associated with, inter alia, the works of Jerome Frank, Joseph Hutcheson, and Herman Oliphant. See generally JEROME FRANK, LAW AND THE MODERN MIND (Peter Smith 1970) (1930); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274 (1929); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928). On this aspect of, and understanding of, Legal Realism, see Frederick Schauer, *Editor’s Introduction to Karl N. Llewellyn, THE THEORY OF RULES 1*, 15–22 (Frederick Schauer ed., 2011); FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 124–47 (2009); Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 752–56 (2013).

<sup>127</sup> See, e.g., Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 518–19, 559 (1986); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 834–35 (2008).

premacy.<sup>128</sup> More specifically, understanding the Constitution's constraints on wise policies, and the difficulty of officials or the public of internalizing those constraints, supports the necessity of a genuinely coercive enforcement mechanism for implementing the Constitution.

## VI. COERCING CONSTITUTIONAL COMPLIANCE

When we think about external and coercive enforcement of constitutional rules, we are tempted to think that such mechanisms are already in place. After all, state officials who violate the constitution are subject to civil actions under the Civil Rights Act and related statutes,<sup>129</sup> and federal officials are similarly vulnerable to so-called *Bivens* actions if they violate the Constitution to the detriment of individual rights.<sup>130</sup> But various principles of immunity make a wide range of officials effectively out of the reach of such remedies,<sup>131</sup> even apart from the political considerations that make even technically available civil and criminal remedies quite rare. As just one obvious example, if state or federal law enforcement officers violate the Fourth Amendment by conducting searches without either a warrant or probable cause, they are potentially personally liable in civil rights or *Bivens* actions.<sup>132</sup> But if Congress or a state legislature explicitly authorizes those officials to violate the

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<sup>128</sup> On the latter, see generally Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

<sup>129</sup> See generally JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION (2d ed. 2007); SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (4th ed. 2012); PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983) (describing the significant effect on street-level bureaucrats of the risk of liability).

<sup>130</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395–97 (1971).

<sup>131</sup> On immunity at the highest levels of government, see *Harlow v. Fitzgerald*, 457 U.S. 800, 813, 815–19 (1982) (senior presidential aides and advisors); *Nixon v. Fitzgerald*, 457 U.S. 731, 749, 755 (1982) (president); *Butz v. Economou*, 438 U.S. 478, 508–17 (1978) (federal agency officials); *Hutchinson v. Proxmire*, 443 U.S. 111, 113–14, 133 (1979) (congressman); *Gravel v. United States*, 408 U.S. 606, 608–09, 621–22 (1972) (congressional aides). On the details of immunity for judges, prosecutors, and other officials, see Jeffries, et al., *supra* note 129, at 92–105; Nahmod, *supra* note 129, §§ 7:11–61. For a broader theoretical exploration, see Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1749–53, 1820–24 (1991).

<sup>132</sup> See *supra* notes 129–130 and accompanying text.

Fourth Amendment in this way, the legislators are subject to no formal sanctions whatsoever.<sup>133</sup>

In the example just mentioned, one might think that the remedies would be at the ballot box, and that legislators who violate the Constitution in such a way could and would be punished electorally. But the lesson to be drawn from the previous several Parts of this Article is that such consequences would be extremely unlikely given the first-order policy considerations stemming from such actions. When constitutional rules constrain well-meaning officials serving the immediate public interest in at least a plausible way, expecting the very public whose immediate interests are being served to punish the officials who have done so goes well beyond wishful thinking.

It is at this point that we must confront directly the question of coercion. If constitutional constraints are often pitted against popular and otherwise sound policies, then it is unreasonable to expect either officials or their constituents to prefer the constitutional rule to the sound policy unless they are forced to do so. Indeed, this much has been recognized in the context of civil rights actions and *Bivens* remedies. But in the absence of such remedies for higher officials, for legislators, and for various other officials shielded by immunity, it is quite possible that an important dimension of constitutionalism rests on little more than empirically unsupported hope.

Indeed, when we look at data on actual legal compliance in other contexts, we find substantial support for the hypothesis that unenforced law that does not track people's law-independent preferences and judgments—including moral judgments—is often quite ineffective. For example, before computers facilitated the process of tracking down people who did not appear in court in response to citations for traffic violations, the non-appearance rate was 60%, even though in such cases the legal "command" was directed to a particular person to engage in the particular act of showing up in court.<sup>134</sup> Much the same can be said about people who are individually summoned to appear for jury duty, where compliance rates absent stringent sanctions have been found to be as low as 20% and are often in the 30–40% range.<sup>135</sup> Similarly, the

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<sup>133</sup> See *Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998) ("The principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo-American law.").

<sup>134</sup> *Scofflaws' Nemesis*, PLAYGROUND DAILY NEWS (Florida), Dec. 5, 1967, at 12.

<sup>135</sup> See Joann Loviglio, *Judges Turn to Fines, Jail Time to Punish Jury Duty No-Shows*, TOPEKA CAP.-J., Aug. 11, 2001, at 11A.

scofflaw rate for parking meters in Los Angeles was 50% in 2011,<sup>136</sup> and official reports indicate that compliance rates for mandatory dog licenses are often below 20%, and perhaps as low as 1% or 2% for cat licenses.<sup>137</sup> In addition, noncompliance with high occupancy vehicle lane laws was as high as 89% in Australia,<sup>138</sup> and it was estimated at over 50% in the United States.<sup>139</sup> Similarly, fare evasion in cities and countries with so-called honor systems of fare collection on public transport has been reported at equivalently high rates.<sup>140</sup> And one study found that under circumstances of low enforcement, the degree of compliance with a law prohibiting tobacco sales to minors in Hong Kong was below 19%.<sup>141</sup>

Much of the most interesting data comes from studies about compliance with tax laws. There is a tendency in much of the tax compliance literature to refer to taxpayer-provided information and payments as “voluntary”<sup>142</sup> in order to distinguish such reporting and payments by the taxpayer from automatic payments, such as the common and re-

<sup>136</sup> Bill Vidonic, *Parking-Meter Scofflaws Owe City \$11 M*, PITT. TRIB.-REV., June 25, 2011, at B1, B7.

<sup>137</sup> See JOAN MILLER, THE CAT FINANCIERS’ ASS’N, WHY IS CFA OPPOSED TO CAT LICENSING? 2 (2004), <http://www.pacificanimal.org/news/Why%20is%20CFA%20opposed%20to%20cat%20licensing.pdf> (cat licenses); SCOTT STRINGER, LED ASTRAY: REFORMING NEW YORK CITY’S ANIMAL CARE AND CONTROL 2 (2013), <http://www.mbpo.org/uploads/FINALedAstray.pdf> (dog licenses); Daniel Kaas, Deputy Comm’r, Div. of Envtl. Health, Increasing Fee for Dog Licensing and Prohibiting Pet Owners from Restraining Animal Outdoors: Hearing on Intro. 328 and Intro. 425 before the N.Y. City Council Comm. on Health 3 (Dec. 17, 2010) (dog licenses); *Mandatory Pet Licensing*, ANIMAL OUTREACH OF SHELBY COUNTY. (May 15, 2010), <http://www.shelbycats.com/2010/05/mandatory-pet-licensing/> (cat licenses).

<sup>138</sup> STUART LYNDON ET AL., AUSTRALASIAN TRANSPORT RESEARCH FORUM, HIGH OCCUPANCY VEHICLE LANE ENFORCEMENT: A SUCCESSFUL TRIAL IN BRISBANE BY ADDING A SPLASH OF MAGENTA 5 (Sept. 2011), [http://www.atrf11.unisa.edu.au/Assets/Papers/ATRF11\\_0150\\_final.pdf](http://www.atrf11.unisa.edu.au/Assets/Papers/ATRF11_0150_final.pdf).

<sup>139</sup> See Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California’s Carpool Lanes*, 75 IND. L.J. 1231, 1242 n.52 (2000).

<sup>140</sup> When Los Angeles County, for example, attempted to operate its subway system without active enforcement of the law requiring payment of the fare, a majority of people did not pay, causing the transit authority to give up the experiment and install turnstiles. See Ronald V. Clarke et al., *Deterrence and Fare Evasion: Results of a Natural Experiment*, 23 SECURITY J. 5, 7 (2010); *LA Subway Installs First Turnstiles*, BOS. GLOBE, May 4, 2013, at A2.

<sup>141</sup> Ming-yue Kan & Maggie Lau, *Tobacco Compliance Check in Hong Kong*, 10 NICOTINE & TOBACCO RES. 337, 338 (2008); see Ming-yue Kan & Maggie Lau, *Minor Access Control of Hong Kong Under the Framework Convention on Tobacco Control*, 95 HEALTH POL’Y 204, 205 (2010) (finding that as a result of increased enforcement, compliance had risen from 18.9% in 2006 to 27% in 2008).

<sup>142</sup> See, e.g., Danshera Cords, *Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs*, 2005 BYU L. REV. 1515, 1522–23; Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453, 1455 (2003).

quired practice of withholding taxes from salary payments.<sup>143</sup> But failing to report income is a crime, as is intentionally failing to pay the taxes that are due.<sup>144</sup> And even if the level of culpability does not rise to the criminal, underpayment of taxes typically brings substantial civil penalties.<sup>145</sup> As a result, so-called “voluntary” tax compliance is voluntary only in the same way that someone voluntarily chooses to drive under the speed limit rather than be stopped by the police and required to pay a fine, or in the way that a would-be thief voluntarily refrains from theft in order to avoid imprisonment. In some sense, it is true that someone who chooses compliance rather than punishment has made a voluntary choice, but to describe an act of legal compliance under threat of punishment for noncompliance as voluntary seems inconsistent with our ordinary understanding of voluntariness and is certainly inconsistent with our effort here to focus on coercive dimensions of law.

If we put aside the confusing connotations of the word “voluntary,” however, we discover that genuinely uncoerced compliance with the tax laws is hardly common.<sup>146</sup> In the United States, many forms of income are reported directly by the payor to federal tax authorities, and as a result, the opportunities for undetected evasion are small.<sup>147</sup> But for income neither withheld nor directly reported in this manner—income not subject to information reporting, as it is commonly put, and thus for income whose existence is known primarily by the taxpayer—estimates of rates of noncompliance range from fifty percent upward, despite taxpayer knowledge that failing to report is a crime involving serious penalties.<sup>148</sup> Although rates of tax compliance vary greatly across

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<sup>143</sup> The misleading nature of the word “voluntary” in this context is noted in Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 U. KAN. L. REV. 971, 975 n.27 (2003).

<sup>144</sup> See I.R.C. § 7201 (2006) (tax evasion); *id.* § 7203 (failure to report).

<sup>145</sup> See *id.* § 6662 (2006 & Supp. IV 2010).

<sup>146</sup> See Charles T. Clotfelter, *Tax Evasion and Tax Rates: An Analysis of Individual Returns*, 65 REV. ECON. & STAT. 363, 364 (1983) (noting empirical studies of tax evasion).

<sup>147</sup> See Lynda D. Willis, Dir., Tax Policy & Admin. Issues, Gen. Gov't Div., Testimony Before the National Commission on Restructuring the Internal Revenue Service (Jan. 9, 1997), in INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, GAO/T-GGD-97-35, TAXPAYER COMPLIANCE: ANALYZING THE NATURE OF THE INCOME TAX GAP 3 (1997) (“Wage earners whose wages are subject to tax withholding . . . are estimated to report ninety nine percent of their wages.”). See generally Michael G. Allingham & Agnar Sandmo, *Income Tax Evasion: A Theoretical Analysis*, 1 J. PUB. ECON. 323 (1972) (modeling an individual's decision to underreport income to the IRS).

<sup>148</sup> See Willis, *supra* note 147 (noting that informal suppliers, defined as “self-employed individuals who operate informally on a cash basis,” report nineteen percent of their self-employment income); INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, REDUCING THE FEDERAL TAX GAP: A REPORT ON IMPROVING VOLUNTARY COMPLIANCE 14 (2007) (estimating that for income subject to little or no information reporting, the net misreporting

countries, these figures are hardly atypical internationally.<sup>149</sup> Indeed, the data from the United States suggest that truly uncoerced and unthreatened obedience to the tax laws is far rarer than the image of the puzzled person would suggest.<sup>150</sup>

This collection of data appears to support the conclusion that when sanctions are removed from the equation, and when the laws do not track people's salient and law-independent sense of what they ought to do, compliance with the law just because it is the law is a far less widespread phenomenon than H.L.A. Hart, with his reference to the puzzled person,<sup>151</sup> and Tom Tyler, in presupposing that people *do* obey the law,<sup>152</sup> assume. Indeed, looking carefully at Tyler's reference to "law-related behavior" is particularly instructive. Behavior can be law-related if it correlates with law, even if it is not caused by law, and it can also be law-related if it is caused by the sanctions that accompany the law—or a perception of those sanctions—and not the sanction-independent internalization of a legal norm as a norm of behavior. But when we remove the instances in which we see correlation but probably not causation, and when we remove sanctions, we are left with an empirical claim about the prevalence of obedience to law qua law that appears not to be supported by the available evidence.

There is little reason to believe that the situation is any different with respect to the Constitution. If uncoerced obedience to law is less common for ordinary people than is sometimes assumed, we should not be surprised to discover that uncoerced obedience to law for officials is

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percentage was 54% in 2007); James Andreoni et al., *Tax Compliance*, 36 J. ECON. LITERATURE 818, 821 (1998) ("Taxpayers with income from [farms or sole proprietorships] tend to underestimate their taxes by substantially more than other taxpayers.").

<sup>149</sup> See James Alm, *Tax Compliance and Administration*, in HANDBOOK ON TAXATION 741, 741–43 (W. Bartley Hildreth & James A. Richardson eds., 1999); John L. Mikesell & Liucija Birskyte, *The Tax Compliance Puzzle: Evidence from Theory and Practice*, 30 INT'L J. PUB. ADMIN. 1045, 1060–61 (2007).

<sup>150</sup> H.L.A. Hart wrote of the "puzzled man," an individual who wishes to do right by the law if only he can determine what the law requires of him. See generally H.L.A. HART, *THE CONCEPT OF LAW* (1961).

<sup>151</sup> See generally HART, *supra* note 150.

<sup>152</sup> See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3–5 (Princeton Univ. Press 2006) (1990). Tyler is often understood as providing survey-based empirical support for the view that people often obey the law for reasons other than coercion, but Tyler's conclusion about the effect of law qua law is undercut by his view that "morality [is] the primary factor shaping law-related behavior." Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 224 (1997). It is clear that Tyler does not distinguish acting for reasons of morality from acting for reasons of law, and thus his research is of limited value in addressing the question of what people (or officials) would do when their moral (or policy) views differ from what the law requires.

similarly less common than ubiquitous “rule of law” rhetoric supposes. Uncoerced obedience to the Constitution may thus be similarly rare, at least when the Constitution is in its regulative, and not constitutive mode, and at least when what the Constitution requires diverges from an official’s all-things-except-the-Constitution-considered judgment.

#### CONCLUSION

In his memorable essay on civil disobedience, Henry David Thoreau observed that “[i]t is not desirable to cultivate a respect for the law, so much as for the right.”<sup>153</sup> Thoreau was being prescriptive and aspirational, but over time he may have turned out to be descriptively accurate. At least in the United States, and perhaps especially in the United States, people and the officials they choose appear to prefer “the right” to the law when the two diverge. And in a world that counts the Nuremburg trials as part of its history, it should be obvious that preferring the right to the law is occasionally necessary. But to the extent that the Constitution is law, and to the extent that constitutional governance requires that officials, at least presumptively even if not absolutely, prefer the law of the Constitution to their own possibly mistaken conception of the good, the prescience of Thoreau’s comment looms large. If officials are inclined to prefer the right to the law, and if their constituents support them in that choice, then reclaiming the occasional virtues of preferring the law of the Constitution to the often-mistaken policy preferences of officials may require that we take the mechanisms of constitutional coercion more seriously than has most recently been fashionable. It may also require, however, that we consider whether the mechanisms of constitutional coercion that we routinely apply to lower level officials should be extended to those higher officials whose actions may be far more consequential.

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<sup>153</sup> HENRY DAVID THOREAU, *Civil Disobedience*, in WALDEN AND CIVIL DISOBEDIENCE 261, 262–63 (Sterling Publ’g Co. 2012) (1849). See generally Lawrence A. Rosenwald, *The Theory, Practice, and Influence of Thoreau’s Civil Disobedience*, in A HISTORICAL GUIDE TO HENRY DAVID THOREAU 153 (William E. Cain ed. 2000).