

**AMERICA’S WRITTEN CONSTITUTION:  
REMEMBERING THE JUDICIAL DUTY TO SAY WHAT THE  
LAW IS**

JOSHUA J. SCHROEDER, J.D.\*

“Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine . . . reduces to nothing what we have deemed the greatest improvement on political institutions – a written constitution.”<sup>1</sup>

-- Chief Justice John Marshall, *Marbury v. Madison*

---

Copyright © 2015, Joshua J. Schroeder, J.D.

\* Joshua J. Schroeder, J.D., Lewis & Clark Law School in Portland, Oregon. Member of the Oregon and California bars. This project began as a memorandum known as the Equity Memorandum regarding the state of the Court’s equitable power after the 2013 term in light of the *Wheaton* injunction.

<sup>1</sup> *Marbury v. Madison*, 5 U.S. 137, 178 (1803). *C.f.* James Wilson, 2 J. Elliot, *Debates on the Federal Constitution* 432 (2d ed. 1863) (“Sir William Blackstone will tell you, that in Britain the [sovereign] power is lodged in the British Parliament; the Parliament may alter the form of the government; and that its power is absolute, without control. The idea of a constitution, limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain. There are, at least, no traces of practice conformable to such a principle. The British constitution is just what the British Parliament pleases. When the Parliament transferred legislative authority to Henry VIII., the act transferring could not, in the strict acceptance of the term, be called unconstitutional. To control the power and conduct of the legislature, by an overruling constitution, was an improvement in the science and practice of government reserved to the American states. Perhaps some politician, who is not considered with sufficient accuracy our political systems, would answer that, in our governments, the supreme power was vested in the constitutions. This opinion approaches a step nearer to the truth, but does not reach it. The truth is, that, in our governments, the supreme, absolute, and uncontrollable power *remains* in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions.”).

## I. INTRODUCTION: THE PROBLEM OF FEIGNED POSITIVISM

In 2013 the Supreme Court embraced a policy of feigned positivism.<sup>2</sup> Legal positivism suggests there will be no day of future rewards and punishments, and thus there is no Natural Law which holds sway over rulers whether it is established by a creator God or not.<sup>3</sup> Thus, adopting positivism

---

<sup>2</sup> *Burrage v. United States*, 134 S. Ct. 881, 885–92 (2014) (The Court recognized that the “but-for” causation requirement for criminal guilt was “one of the traditional background principles ‘against which Congress legislates,’” but the Court also asserted that “Congress could have written” the law to avoid such a background principle for applying criminal punishment. The Supreme Court deceptively went further and promised “to apply the statute as it is written—even if we think some other approach might ‘accor[d] with good policy.’” This feigned promise affected many decisions throughout the 2013 term, even regarding structural safeguards explicitly created by the Court to ensure Justice itself. The Court even cited to the writings of H.L.A. Hart, an arch-positivist from England, for the common law “but-for” rule instead of U.S. common law developed by American courts.) (citing H. L. A. HART & A. HONORÉ, *CAUSATION IN THE LAW* 104 (1959)). *But see* JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* ch. I § 7 (13th ed. 1886) (“Equity must have a place in every rational system of jurisprudence, if not in name, at least in substance. It is impossible that any code, however minute and particular, should embrace or provide for the infinite variety of human affairs, or should furnish rules applicable to all of them.”). *C.f.* *Davis v. Ayala*, 135 S. Ct. 2187, 2212 (2015) (Sotomayor, J., dissenting) (dissenting on behalf of the “the basic background principle” of the adversarial process which the majority “fail[ed] to account for”) (citing *Kaley*, 134 S. Ct. at 1113 (Roberts, C.J., dissenting)).

<sup>3</sup> Jeremy Bentham, *Short Review of the Declaration* (1776), in DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY 173–74* (2007) (“Of the preamble I have taken little or no notice. The truth is, little or none does it deserve. The opinions of the modern Americans on Government, like those of their good ancestors on witchcraft, would be too ridiculous to deserve any notice, if like them too, contemptible and extravagant as they be, they had not led to the most serious evils. . . . They are about ‘to assume,’ as they tell us, ‘among the powers of the earth, that equal and separate station to which’—they have lately discovered—‘the laws of Nature, and of Nature’s God entitle them.’ . . . ‘All men,’ they tell us, ‘are created equal.’ This surely is a new discovery; . . . The rights of ‘life, liberty, and the pursuit of happiness’ . . . ‘they ‘hold to be unalienable.’ This they ‘hold to be among truths self-evident.’” These words of the Declaration of Independence were considered by Bentham as a mere “cloud of words” made only to “throw a veil over” evil plans. Thus Bentham’s positivist rejection of natural law was developed as a wholly anti-American body of thought. Hypocritically the Supreme Court has begun to cite Bentham as if the United States willingly participated in some sort of Anglo-Saxon tradition of erasing the vestiges of the legitimacy of the American government.). *See Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006) (citing JEREMY BENTHAM, *INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 6, 296 (J. Burns & H. Hart eds. 1970)). *But see* *THE DECLARATION OF INDEPENDENCE* para. 2

leaves the Court with an existential problem because the Court's equitable power flows directly from Natural Law and Nature's God<sup>4</sup> and is much older than the new country known as the United States.<sup>5</sup> But even in the scope of

---

(U.S. 1776); *Calder v. Bull*, 3 U.S. 386, 388 (1798) (Chase, J.) (“The purposes for which men enter into society will determine the nature and terms of the social compact. . . .”); 2 *Peter* 3 (speaking of the day of days, and of future rewards and punishments).

<sup>4</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). The Declaration specifically drew upon “the Laws of Nature and of Nature’s God” in order to “assume among the powers of the earth” the sovereign power of the American people to dissolve its ties with England. Writers in the Law of Nations long argued that God speaks to all human beings with the “voice of nature,” thus the laws of “Nature’s God” in the sense that term is used in the DECLARATION is meant to be broad, covering all human beings and speaking to all human beings with the God’s mouthpiece—Nature. It is from God’s voice that the Law of Nations was derived. The DECLARATION was entered into the Law of Nations to speak to the nations of the Earth in order to convince them of the legitimacy of the United States. The DECLARATION continues to fulfill this role. See Hugo Grotius, *The Freedom of the Seas* 1 (trans. Ralph van Deman Magoffin, 1916) (1609) (“The law by which our case must be decided is not difficult to find, seeing that it is the same among all nations; and it is easy to understand, seeing that it is innate in every individual and implanted in his mind. Moreover the law to which we appeal is one such as no king ought to deny to his subjects, and one no Christian ought to refuse to a non-Christian. For it is a law derived from the law of nature, the common mother of us all, whose bounty falls on all, and whose sway extends over those who rule nations, and which is held most sacred by those who are most scrupulously just.”); Letter from Phillis Wheatley to Reverend Samson Occom (1774) (“The Israelites never accepted Egyptian rule, for in every human Breast, God has implanted a Principle, which we call Love of Freedom; it is impatient of Oppression, and pants for Deliverance.”); Benjamin Franklin, Great Seal Design (1776) (Franklin’s design included a scene from Exodus with Moses and the Israelites escaping Pharaoh’s army with the inscription “Rebellion to Tyrants is Obedience to God.”); Marcus Tullius Cicero, *De Officiis*, 1.4.13, available at [http://www.constitution.org/rom/de\\_officiis.htm](http://www.constitution.org/rom/de_officiis.htm) (“To this passion for discovering truth there is added a hungering, as it were, *for independence*, so that a mind well-moulded by Nature is unwilling to be, subject to anybody save one who gives rules of conduct or is a teacher of truth or who, for the general good, rules according to justice and law. From this attitude come greatness of soul and a sense of superiority to worldly conditions.”) (emphasis added).

<sup>5</sup> *Galations* 5:22–23 (Equity is the power of the Court to recognize what was said in the Bible: “But the fruit of the Spirit is love, joy, peace, forbearance, kindness, goodness, gentleness and self-control. *Against such things there is no law.*”); STORY, *supra* note 2, at ch. I § 1 (“In the most general sense we are accustomed to call that Equity which in human transactions is founded in natural justice, in honesty and right, and which properly arises ex æquo et bono. In this sense it answers precisely to the definition of justice, or natural law, as given by Justinian in the Pandects.”). See also Marcus Tullius Cicero, *De Officiis* 1.10.32, available at [http://www.constitution.org/rom/de\\_officiis.htm](http://www.constitution.org/rom/de_officiis.htm) (giving an example of a time

U.S. history, positivism lost significant ground in its struggle with equitable power and the innovations of equitable law permeate the U.S. legal system.<sup>6</sup> Equity is so pervasive that any U.S. court adopting a wholly positivist approach would seem to be at war with itself.<sup>7</sup> Thus, like a butterfly that tore its own wings off to become a caterpillar again, the U.S. Supreme Court took the most painfully impossible action it could during the 2013 term: It used equitable power to declare that legislatures are “omnipoten[t] . . . absolute and without controul. . . .”<sup>8</sup> The Court’s theme of feigned positivism culminated in *Hobby Lobby*,<sup>9</sup> where the Court clung to Congress’s Article I power to create laws, turning its back on the authority of its own First Amendment precedent.<sup>10</sup> Soon after, the Court’s supposed adoption of positivism was proven disingenuous or “feigned” by the *Wheaton* injunction.<sup>11</sup>

Traditionally, equitable power allowed the Supreme Court to draw upon powers above its own.<sup>12</sup> Interacting with higher power meant the Court

---

long before Justinian and before Jesus Christ when equity was used by ancient judges to grant relief in cases of contracts made in bad faith using a “praetor’s edict”).

<sup>6</sup> See generally Douglas Laycock, *The Triumph of Equity*, 56 LAW AND CONTEMP. PROBS 53 (1993).

<sup>7</sup> *Id.*

<sup>8</sup> *Calder*, 3 U.S. at 387–88 (Chase, J.). See also *Marbury v. Madison*, 5 U.S. 137, 178 (1803); *Luther v. Borden* 48 U.S. 1, 64 (1841) (Woodbury, J., dissenting) (noting one fundamental distinction between the U.S. and English governments is that English Parliament is “omnipotent” and “unlimited in its powers” and the U.S. state and federal governments by contrast are limited at their most fundamental and foundational level by popular sovereignty.). *C.f.* Grotius, *supra* note 4, at 1 (The Court seemed to succumb to a positivist “delusion [that] is as old as it is detestable with which many men, especially those who by their wealth and power exercise the greatest influence, persuade themselves, or . . . rather . . . try to persuade themselves, that justice and injustice are distinguished the one from the other not by their own nature, but in some fashion merely by the opinion and the custom of mankind.”).

<sup>9</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>10</sup> *Id.* at 2756 (“[T]he results would be absurd if RFRA . . . merely restored this Court’s pre-*Smith* decisions in ossified form and restricted RFRA claims to plaintiffs who fell within a category of plaintiffs whose claims the Court had recognized before *Smith*.”).

<sup>11</sup> See generally *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (The *Wheaton* court held that the college was not required to follow the Government’s notice procedures regarding the school’s objection for religious purposes to the mandate that it provide insurance coverage for contraceptives.).

<sup>12</sup> *Calder*, 3 U.S. at 388 (Chase, J.) (Appealing to the state of nature to legitimize Judicial authority: “The purposes for which men enter into society will determine the *nature* and *terms*

*carefully* engaged with what the Declaration of Independence called the “Laws of Nature and of Nature’s God”—from which all fundamental human rights flow.<sup>13</sup> To be sure, the Declaration of Independence clearly invoked the Natural Law to recognize self-evident truths and “unalienable Rights” that are endowed by Nature’s God to all human beings.<sup>14</sup> In fact, securing these rights is why “Governments are instituted among Men.”<sup>15</sup> Below the Natural Law—and yet, still above the Sovereign power—sits the fabric of international law known as the Law of Nations.<sup>16</sup> The Court once used equitable power to derive guidance from the Law of Nations.<sup>17</sup> And finally the Court used equity as the ancients did, to recognize “that justice which lies beyond the written law” and to correct the law “where it is defective owing to its universality.”<sup>18</sup> Accordingly, the Supreme Court expressly

---

of the *social compact*; and as they are the foundation of the *legislative power*, they will decide what are the *proper* objects of it: The *nature*, and *ends* of legislative power will limit the *exercise* of it.”). See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (expounding the state of nature of liberty to declare legitimacy). See also *Luther v. Borden* 48 U.S. 1, 52 (1841) (Woodbury, J., dissenting) (“Our power begins after theirs ends. Constitutions and laws precede the judiciary, and we act only under and after them, and as to disputed rights beneath them, rather than disputed points in making them.”).

<sup>13</sup> THE DECLARATION OF INDEPENDENCE para. 1–2 (U.S. 1776).

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

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

<sup>16</sup> JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 1–2 (1834) [hereinafter STORY, CONFLICT OF LAWS] (“The Earth has long since been divided into distinct Nations, inhabiting different regions, speaking different languages, engaged in different pursuits, and attached to different forms of government . . . . It is certain, that the nations of antiquity did not recognize the existence of any general or universal rights and obligations, such as among the moderns constitute, what is now emphatically called, the Law of Nations . . . . The truth is, that the Law of Nations, strictly so called, was in a great measure unknown to antiquity, and is the slow growth of modern times, under the combined influence of Christianity and Commerce . . . . [The Law of Nations] finally became by silent adoption a generally connected system, founded in the natural convenience, and asserted by the general comity of the commercial nations of Europe.”). See, e.g., *Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 116 (2d Cir. 2008) (“the law of nations could support an ATS [Alien Tort Statute] claim”); *Younger v. Harris*, 401 U.S. 37, 56 (1971) (noting that federalism internalizes “the notion of ‘comity’” from the Law of Nations as Joseph Story described).

<sup>17</sup> See, e.g., *Johnson v. M’Intosh*, 21 U.S. 543, 572 (1823).

<sup>18</sup> Roger A. Shiner, *Aristotle’s Theory of Equity*, 27 LOY. L.A. L. REV. 1245, 1247 (1994) (internal quotation marks omitted); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1979 (Breyer, J., dissenting) (internal quotation marks omitted) (“[T]he nature of the

turned its back on judicial positivism in *Marbury v. Madison* to carry out its constitutional mandate as a check in the balance of powers refusing to “close their eyes on the Constitution, [in order to] see only the law.”<sup>19</sup> As the Court expounded, “[t]his theory is essentially attached to a written constitution, and is . . . one of the fundamental principles of our society.”<sup>20</sup> This is because constitutional law also sits above the Court, and expounding it against the laws of Congress requires an expenditure of equitable power.<sup>21</sup>

All of this carries a risk for an independent Court because issues of judicial legitimacy arise when the Court interacts with higher powers that can attract political criticism for obstructing the plans of the other branches.<sup>22</sup> Nonetheless, the U.S. Supreme Court is meant to brave these risks to speak to Natural Law concerns using equitable power—especially in order to proclaim the principles of U.S. statecraft.<sup>23</sup> In the U.S., the Declaration of Independence requires legitimate governments to secure natural rights.<sup>24</sup> Thus, the Court’s role is to safeguard natural liberties abused by the other branches and to denounce the abuse of fundamental human rights by foreign nations.<sup>25</sup> This is so because “it is the duty of the Court to be last, not first, to give [its country’s principles of statecraft] up.”<sup>26</sup>

The principles of U.S. statecraft, which the Court is bound to keep, are found in the Declaration of Independence. They include equal liberty and the consent of the governed, both of which were drawn from the broad streams of fundamental human rights that flow from the Natural Law.<sup>27</sup>

---

equitable,’ Aristotle long ago observed, is ‘a correction of law where it is defective owing to its universality.’”). *See also* STORY, *supra* note 2, at ch. I § 3 (“Grotius and Puffendorf have both adopted the definition of Aristotle; and it has found its way, with approbation, into the treatises of most of the modern authors who have discussed the subject.”).

<sup>19</sup> *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

<sup>20</sup> *Id.* at 177. *But see* *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2573 (2014).

<sup>21</sup> *See generally* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (discussing the issue over whether the Constitution has expressly delegated powers to Congress or to the President but assuming that both must answer to the Constitution).

<sup>22</sup> *See, e.g., id.* at 654.

<sup>23</sup> *See, e.g., id.* at 655 (Jackson, J., concurring) (“[I]t is the duty of the Court to be last, not first, to give [its country’s principles of statecraft] up.”).

<sup>24</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

<sup>25</sup> *See Youngstown Sheet & Tube Co.*, 343 U.S. at 654–55 (1952) (Jackson, J., concurring).

<sup>26</sup> *Id.* at 655.

<sup>27</sup> THE DECLARATION OF INDEPENDENCE para. 1, 2 (U.S. 1776). (“[T]o assume among . . . the separate and equal station to which the Laws of Nature and of Nature’s God

Thus, at appropriate times fundamental human rights must be expounded within the realm of Natural Law by courts.<sup>28</sup> One such appropriate time is when the Court considers Separation of Powers issues because the founders fashioned the Separation of Powers to protect and recognize the primacy of the Natural Law in matters of statecraft.<sup>29</sup> The Separation of Powers purposely sets the Supreme Court's powers in law and equity against the other branches of government.<sup>30</sup>

As recently as 2004, the Supreme Court recognized that the traditional avenues of review that include Natural Law considerations in the Law of Nations were not entirely foreclosed.<sup>31</sup> In fact, the Court specifically recognized that “the door is still ajar subject to vigilant doorkeeping” and that “[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”<sup>32</sup> Accordingly, U.S. courts must not “avert their gaze entirely from any international norm intended to protect individuals.”<sup>33</sup> This heightened role of judicial power was drawn from the Supreme Court's understanding that “it would be unreasonable to assume that the First Congress [who enacted the Judiciary Act of 1789 that included the Alien Tort Statute] would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.”<sup>34</sup> The Court posited that “nothing Congress has done is a reason for us to shut the door on the law of nations entirely.”<sup>35</sup> Justice Scalia scolded

---

entitle them . . . that all Men are created equal . . . [and] Governments are instituted among Men deriving their just Powers from Consent of the Governed . . .”).

<sup>28</sup> See *id.* para. 1, 2 (discussing how the elected governments will secure the rights to which “the Laws of Nature and of Nature's God entitle them.”). See, e.g., *Obergefell v. Hodges*, No. 14–556, slip op. at 10 (2015) (“The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.”).

<sup>29</sup> MASS. CONST., pt. I, art. XXX, § 31 (including the separation of powers within its declaration of rights for this reason).

<sup>30</sup> John Adams, *Thoughts on Government* (1776) [hereinafter Adams, *Thoughts*], available at <http://www.constitution.org/jadams/thoughts.htm> (“The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that.”).

<sup>31</sup> See *Sosa v. Alvarez-Machain et al.*, 542 U.S. 692, 729 (2004).

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

<sup>33</sup> *Id.* at 730.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 731.

the majority for creating “Never Say Never Jurisprudence,” arguing that the majority “wags a finger at the lower courts” while it ignores “its own conclusion[s].”<sup>36</sup> The problem with Justice Scalia’s faith in realism and positivism is simply that it is the very judicial activism that it claims not to be.<sup>37</sup> Positivism is a proposal to radically erase two centuries of American judicial practice, and it played a central role in the 2013 term that unsettled even the “fundamental and paramount law of the nation,” that is, “essentially attached to a written constitution, . . . that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.”<sup>38</sup>

---

<sup>36</sup> *Id.* at 750 (Scalia, J., dissenting).

<sup>37</sup> Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, PRINCETON UNIVERSITY: THE TANNER LECTURES ON HUMAN VALUES, 86, 89 (1995) (Scalia stoutly presumes the Realism and Positivism of common law – that judges make laws – rejecting the age old principles that the Court used to administer Justice under the laws out of sheer disbelief. Then Scalia wages war with his own bench for engaging in Realism and Positivism of forming the common law saying “the common-law judge is a sure recipe for incompetence and usurpation.” In so doing Scalia unconstitutionally challenges his own power and misses the age old discussion of political questions and the limits of the Supreme Court’s jurisdiction that *actually* anticipated his missteps.). *Cf.* *Luther v. Borden* 48 U.S. 1, 52–53 (1841) (Woodbury, J., dissenting) (“The disputed rights beneath constitutions already made are to be governed by precedents, by sound legal principles, by positive legislation, clear contracts, moral duties, and fixed rules; they are *per se* questions of law, and are well suited to the education and habits of the bench. . . . And if the people, in the distribution of powers under the constitution, should ever think of making judges supreme arbiters in political controversies, when not selected by nor, frequently, amenable to them, nor at liberty to follow such various considerations in their judgments as belong to mere political questions, they will dethrone themselves and lose one of their own invaluable birthrights; building up in this way—slowly, but surely—a new sovereign power in the republic, in most respects irresponsible and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarchy in the worst of times.”).

<sup>38</sup> *Marbury v. Madison*, 5 U.S. 137, 177, 180 (1803). *See also* U.S. CONST. art. I, § 8, cl. 10 (giving Congress the power to expound violations to the law of nations on the high seas and expressly recognizing the “law of nations”); *Calder v. Bull*, 3 U.S. 386, 388 (1798) (Chase, J.) (“The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it.”).



## II. THE FEIGNED EMBRACE OF POSITIVISM IN THE 2013 TERM

On November 24, 2014, a Missouri grand jury did not indict Officer Darren Wilson, who gunned down 18-year-old Michael Brown in Ferguson, Missouri on August 14, 2014.<sup>39</sup> A rash of protests broke out across the country, ranging from peaceful to violent.<sup>40</sup> Many U.S. citizens raised their voices and fists in solidarity behind either Officer Wilson or Michael Brown respectively.<sup>41</sup> News coverage exposed numerous killings of teenagers across the country by police since Brown's demise.<sup>42</sup> Political attention turned to Justice Scalia's dicta in a 1992 case that casted doubt on the practicability of federalism and on the Supreme Court's ability to administer equal justice.<sup>43</sup>

On December 4, 2014, a Staten Island grand jury failed to indict a policeman for killing a peaceful black man named Eric Garner without reason.<sup>44</sup> Protest erupted further, echoing Eric Garner's last words: "I can't breathe, I can't breathe, I can't breathe."<sup>45</sup> All of the uproar came about after

---

<sup>39</sup> Meghan Keneally, *Ferguson Grand Jury Does Not Indict Officer Darren Wilson in Death of Michael Brown*, ABC NEWS, Nov. 24, 2014, <http://abcnews.go.com/US/ferguson-grand-jury-indict-officer-darren-wilson-death/story?id=27146400>.

<sup>40</sup> *Gunshots, Looting After Jury in Ferguson Case Does Not Indict Officer in Michael Brown Shooting*, FOX NEWS, Nov. 25, 2014, <http://www.foxnews.com/us/2014/11/25/ferguson-grand-jury-decision/>.

<sup>41</sup> See, e.g., John Bacon & Gary Strauss, *Ferguson Decision Triggers Nationwide Protests*, USA TODAY, Nov. 25, 2014, <http://www.usatoday.com/story/news/nation/2014/11/25/ferguson-michael-brown-darren-wilson-nationwide-protests/70080116/>; Jeff Thompson, *Oregon Cops Post 'I am Darren Wilson' Images on Facebook*, USA TODAY, Nov. 24, 2014, <http://www.usatoday.com/story/news/nation/2014/11/24/portland-facebook-darren-wilson/70051918/>; David McCormack, *Protestors Torched Michael Brown Family's Church During Monday Night's Ferguson Protests as Pastor Blames White Supremacists*, DAILY MAIL, Nov. 25 2014, <http://www.dailymail.co.uk/news/article-2849736/Church-attended-Michael-Brown-s-family-destroyed-Monday-night-s-protests.html>.

<sup>42</sup> Nina Storchlic, *The 14 Teens Killed by Cops Since Michael Brown*, THE DAILY BEAST, Nov. 25, 2014, <http://www.thedailybeast.com/articles/2014/11/25/the-14-teens-killed-by-cops-since-michael-brown.html>.

<sup>43</sup> Judd Legum, *Justice Scalia Explains What Was Wrong With The Ferguson Grand Jury*, THINK PROGRESS, Nov. 26, 2014, <http://thinkprogress.org/justice/2014/11/26/3597322/justice-scalia-explains-what-was-wrong-with-the-ferguson-grand-jury/> (citing *United States v. Williams*, 504 U.S. 36, 51–55 (1992)).

<sup>44</sup> J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES, Dec. 4, 2014, at A1.

<sup>45</sup> Vivian Yee, *'I Can't Breathe' Is Echoed in Voices of Fury and Despair*, N.Y. TIMES, Dec. 4, 2014, at A1.

the Supreme Court's decision in *Kaley v. United States* in which the Court flatly decided that when asked "whether there is probable cause to think the defendant committed the crime alleged, then the answer is: whatever the grand jury decides."<sup>46</sup> Justice Kagan, who wrote the majority opinion in *Kaley*, declared the Court's near absolute trust in grand jury proceedings, explicitly for the purpose of avoiding the use of the Court's "equitable remedies" after a full trial and guilty verdict.<sup>47</sup> Its attempt to avoid using equity at the end of a full trial led the Court to erode Constitutional rights recognized in the Court's own precedent including the fundamental structural safeguards of the Court's very judgement based on "[c]ommon sense."<sup>48</sup> Now, for the first time, in order to establish positivism the Supreme Court has backed "secret decisions based on only one side of the story."<sup>49</sup>

In *Kaley* the Court's equitable power was withdrawn in order to make way for a mechanical use of grand jury determinations so that only positive law would apply.<sup>50</sup> As a result of *Kaley*, the police are expected to seize any property or funds sufficiently connected or related to an alleged crime in accordance with a criminal forfeiture law without relying on the Court's equitable powers—even if that includes the money set aside to pay the defendant's attorney.<sup>51</sup> The judicial safeguards for civil liberties were stripped, leaving grand jury determinations alone to guard fundamental civil liberties like the right to choose an attorney.<sup>52</sup> However, grand juries were never meant to be such a lone guard.<sup>53</sup> In fact, the Court's feigned embrace

---

<sup>46</sup> 134 S. Ct. 1090, 1105 (2014).

<sup>47</sup> *Id.* at 1102 n. 11 ("But forfeiture applies only to specific assets, so in the likely event that the third party has spent the money, the Government must resort to a State's equitable remedies—which may or may not even be available—to force him to disgorge an equivalent amount.").

<sup>48</sup> *Id.* at 1113 (Roberts, C.J., dissenting) (quoting *Carroll v. President and Comm'rs of Princess Anne*, 393 U. S. 175, 183 (1968)) ("It takes little imagination to see that seizures based entirely on *ex parte* proceedings create a heightened risk of error. Common sense tells us that secret decisions based on only one side of the story will prove inaccurate more often than those made after hearing from both sides. We have thus consistently recognized that the 'fundamental instrument for judicial judgment' is 'an adversary proceeding in which both parties may participate.'"). *C.f.* THOMAS PAINE, COMMON SENSE (1776), available at <http://www.gutenberg.org/files/147/147-h/147-h.htm> (in America we listen for what "[c]ommon sense will tell us.").

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1094.

<sup>52</sup> *Id.* at 1113–14 (Roberts, C.J., dissenting).

<sup>53</sup> *See id.* at 1097.

of positivism in *Kaley* came down just in time for a political firestorm to begin over the failure of a Missouri grand jury to indict Officer Darren Wilson.<sup>54</sup> But, with the political climate shifting, the Supreme Court already created binding precedent in the phrase “the answer is: whatever the grand jury decides.”<sup>55</sup> The Court’s precedent in *Kaley* is so broad that its approach could deliver upheaval to the very fundamental, structural safeguards of the criminal justice system based “on the premise that ‘[t]ruth . . . is best discovered by powerful statements on both sides of the question.’”<sup>56</sup> *Kaley* is only one of the cases in the 2013 term where the Court opened the door to a judicial reality where the Court’s power allegedly disappears in the name of flatly following the law. Lockstep and soldier-like, allegedly following the dictates of Congress, the 2013 Court wantonly undressed itself before sure political upheaval and reactionary politics that could fracture and remove the Court’s independent equitable power permanently.<sup>57</sup>

During the 2013 term, the Supreme Court boldly countenanced no authority above its own in a vain effort to feign positivism. For instance, in *BG Group v. Republic of Argentina* the Court decided to subject the Republic of Argentina to suit in the United States on behalf of the British investor BG Group.<sup>58</sup> The Court ruled that sovereign consent may be implied or inferred through the Court’s interpretation of bilateral investment treaties.<sup>59</sup> The Court boldly inserted its equitable power to superimpose common law contract law on top of international treaties to find that a foreign Republic implied consent.<sup>60</sup> In *BG Group’s* sister case *Lozano v. Montoya Alvarez* the Court blocked equitable tolling when Congress enacted

---

<sup>54</sup> See *id.* at 1090. *Kaley* was decided February 25, 2014, only nine months before the Ferguson grand jury’s failure to indict Officer Wilson on November 24, 2014. See *supra* text accompanying note 38.

<sup>55</sup> *Id.* at 1105.

<sup>56</sup> See, e.g., *Davis v. Ayala*, No. 13–1428 slip op., at 4 (2015) (Sotomayor, J., dissenting) (internal quotation marks omitted) (quoting *United States v. Cronin*, 466 U. S. 648, 655 (1984)) (citing *Kaley v. United States*, No. 12–464, slip op. at 16 (2014) (Roberts, C.J., dissenting)) (“Our entire criminal justice system was founded on the premise that ‘[t]ruth . . . is best discovered by powerful statements on both sides of the question.’ There is no reason to believe that *Batson* hearings are the rare exception to this rule.”).

<sup>57</sup> *Kaley*, 134 S. Ct., at 1092. See also *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014); *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224 (2014).

<sup>58</sup> 134 S. Ct. 1198, 1204 (2014).

<sup>59</sup> *Id.* at 1210.

<sup>60</sup> *Id.* at 1206 (“In answering the question, we shall initially treat the document before us as if it were an ordinary contract between private parties.”).

the terms of a treaty and there is no equitable tolling provision in the statute.<sup>61</sup> *Lozano* decided the custody and citizenship of a child whose mother was in the U.S. and whose father was in England.<sup>62</sup> These rulings not only lost the mystique of comity and grace traditionally applied to treaties, but they also pulled international treaties away from their proper place in the realm of the Law of Nations altogether. In other words, the Court pretended its bench sits comfortably above the Law of Nations in such a way as to fully and dryly interpret treaties as they do the laws under the U.S. Constitution. In *BG Group*, the unnatural result was to make the U.S. Court a stopgap in Argentina's sovereign default to a private party from England.<sup>63</sup> This gave the appearance that the Supreme Court can treat a foreign republic as if it is a mere domestic corporation and treaties as if they are mere contracts.<sup>64</sup> In *Lozano*, the Court decided the citizenship of a child based only on a robotic adherence to treaties and laws without considering the fundamental human rights of the child that flow from the Natural Law and the Law of Nations.<sup>65</sup> The Court's wise consideration of the Natural Law "whose sway extends over those who rule nations" once shielded the Court's decisions from international criticism.<sup>66</sup> Not so today.

In yet another case involving Argentina, *Republic of Argentina v. NML Capital, Ltd.*, the Court decided the issue of sovereign immunity solely by its interpretation of the Foreign Sovereign Immunities Act of 1976.<sup>67</sup> Doing so presumed the U.S. Congress's authority over the other branches and foreign sovereigns to decide the legal immunities of fellow sovereigns.<sup>68</sup> This presumption is bold because without a Natural Law and Law of Nations reasoning, other sovereigns may not be persuaded to fall in line with the Court's pronouncements. Alternatively, if fellow sovereigns are sufficiently angered by the Court's ill-chosen words, the only remedy left is war.<sup>69</sup>

---

<sup>61</sup> 134 S. Ct. 1224, 1236 (2014).

<sup>62</sup> *Id.* at 1230.

<sup>63</sup> See *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1208 (2014).

<sup>64</sup> See *id.*

<sup>65</sup> See *Lozano*, 134 S. Ct. 1224.

<sup>66</sup> Grotius, *supra* note 4, at 5.

<sup>67</sup> 134 S. Ct. 2250, 2253 (2014).

<sup>68</sup> *Id.* at 2256.

<sup>69</sup> See *Kansas v. Nebraska No. 126*, slip op. at 7 (2015) (The resort to war is specifically precluded to the States in case law expounding federalism which internalized other aspects of international law: "In such a circumstance, the downstream State lacks the sovereign's usual power to respond—the capacity to 'make war[,] . . . grant letters of marque and reprisal,'

As in *BG Group*, the Supreme Court's Article III power alone was presumed to hold the sway to dictate to fellow sovereigns.<sup>70</sup> Furthermore the Court found that NML Capital—a privately held international hedge fund—may use orders from U.S. courts to conduct international discovery on Argentina's foreign-held assets.<sup>71</sup> So, the Court's naked power will be thrown behind hedge funds, whose corruption was brought to light in the 2008 market crisis, to make good on all sovereigns worldwide.<sup>72</sup> It is entirely bold and dangerous for the Court to use its power to back international investigations on sovereigns using bare Congressional law as a justification. The Court positively refused to properly engage with the Law of Nations and the Natural Law to inform the international law.<sup>73</sup> The absurd result is a Court that presumed a power to command fellow sovereigns like God.

The Court's international law absurdities fell inward.<sup>74</sup> In *Sprint v. Jacobs* the Court reminded us that *Younger v. Harris* abstentions are "exceptional" but lost track of *Younger*'s contours.<sup>75</sup> *Younger* abstentions exist to respect the role of state courts under the principle of federalism, adopting the international principles of comity and grace.<sup>76</sup> But, rather than engage in a discussion about federalism, the *Jacobs* Court created a flat

---

or even enter into agreements without the consent of Congress." This is obviously not so in cases adjudicating the interests of actual, foreign sovereigns.).

<sup>70</sup> *BG Group*, 134 S. Ct. at 1208.

<sup>71</sup> *NML Capital*, 134 S. Ct. at 2257–58.

<sup>72</sup> *See id.* at 2258.

<sup>73</sup> *See id.*

<sup>74</sup> *See, e.g., Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591, 593–94 (2013) (stating that "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging'") (citations omitted).

<sup>75</sup> *Id.* at 588 (2013) (quoting *Younger v. Harris*, 401 U.S. 37, 56 (1971)).

<sup>76</sup> *Younger*, 401 U.S. at 44–45 ("It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.").

“‘virtually unflagging’” rule.<sup>77</sup> This new rule requires federal courts to hear virtually any and all cases within its jurisdiction.<sup>78</sup>

Then in *Burrage v. United States* the Court added a general duty “to apply the statute as it is written—even if we think some other approach might ‘accor[d] with good policy. . . .’”<sup>79</sup> The entirely new *Jacobs* and *Burrage* rules were repeated throughout the 2013 term and opened a radical reformative discussion of fundamental judicial rules, beginning with prudential standing requirements.<sup>80</sup> This led to the radical reworking of *stare decisis*, general jurisdiction, sovereign and qualified immunity, and the fundamental rule from *Marbury v. Madison*.<sup>81</sup>

Following the *Burrage* and *Jacobs* rules, *Lexmark Int’l, Inc. v. Static Control Components, Inc.* placed prudential standing analyses squarely in the realm of statutory interpretation without equitable consideration by inferring the Administrative Procedure Act (APA) concepts of standing

---

<sup>77</sup> *Jacobs*, 134 S. Ct at 591 (“Jurisdiction existing, this Court has cautioned, a federal court’s ‘obligation’ to hear and decide a case is ‘virtually unflagging.’”) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). *But see* *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (Chief Justice Marshall’s original rule was not flat: “It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should.”).

<sup>78</sup> *But see Cohens*, 19 U.S. at 404 (The *Jacobs* rule does not affirm but rather obfuscates the delicate balancing Chief Justice Marshall held in *Cohens* that was used in *Colorado River Water Conservation* because the *Cohens* rule arose from the Court’s duty to expound Constitutional limitation on the other branches of government: “The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the constitution.”).

<sup>79</sup> 134 S. Ct. 881, 892 (2014) (quoting *Commissioner v. Lundy*, 516 U.S. 235, 252 (1996)).

<sup>80</sup> *Id.* at 889 (citing *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 287, 289–90 (1992) (Scalia, J., concurring)) (Explaining that though proximate cause and zone-of-interest analyses are the “background practice against which Congress legislates,” these matters can be left to “legislative judgment rather than an interpretive” judicial rule. Basically Scalia long desired to leave the fox to guard the henhouse and the Court finally followed his lead in the 2013 term.).

<sup>81</sup> *See Daimler v. Bauman*, 134 S. Ct. 746, 763 (2014); *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct 2250, 2257 (2014); *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803).

when the APA had nothing to do with the claim.<sup>82</sup> *Lexmark* used the *Jacobs* rule to flatly ignore the Separation of Powers controversies that frequently arise in the context of prudential standing.<sup>83</sup> Later, *Jacobs* and *Lexmark* were cited together in *Susan B. Anthony List v. Driehaus* for a beefed up *Jacobs* “virtually unflagging” rule to analyze the injury-in-fact needed for standing—an analysis of traditionally equitable and prudential consideration.<sup>84</sup> Interestingly, the district court in *Susan B. Anthony List* relied on the *Younger* abstention.<sup>85</sup> These Court decisions took prudential standing and conflicts in State and Federal jurisdiction out of equitable consideration and threw it into a mechanical statutory interpretation with the APA grafted in.<sup>86</sup> The Court seemed to bow to the APA, as administrative agencies do.<sup>87</sup> Nonetheless, proximate cause and zone-of-interest analyses of an independent court were changed in the process.<sup>88</sup> Using the APA to mutilate prudential standing was only the tip of the iceberg; For example, the Court also shifted the backdrop of its contract jurisprudence in *Northwest, Inc. v. Ginsberg*, a case involving Congress’s Airline Deregulation Act (ADA).<sup>89</sup> The Court, by the flatly implied judicial interpretation of a law, exempted airlines from traditional contract duties of good faith and fair dealing.<sup>90</sup>

One extremely egregious opinion was *Daimler v. Bauman* which limited general jurisdiction according to corporate law instead of traditional equitable considerations.<sup>91</sup> General jurisdiction should match the sovereign reach of a nation—in the sense that the law of a State should reign absolute

---

<sup>82</sup> 134 S. Ct. 1377, 1382, 1386, 1388–89 (2014) (citing *Sprint Commc’ns, Inc.*, 134 S. Ct. 584, 591 (2013); *Holmes*, 503 U.S. at 265–68; Administrative Procedures Act, Pub. L. No. 79–404, 60 Stat. 237 (1946)).

<sup>83</sup> *Lexmark*, 134 S. Ct. at 1386.

<sup>84</sup> 134 S. Ct. 2334, 2347 (2014).

<sup>85</sup> *Id.* at 2339.

<sup>86</sup> *See, e.g., Lexmark*, 134 S. Ct. at 1382, 1388–89.

<sup>87</sup> *Id.*

<sup>88</sup> *See, e.g., Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1063–64 (2014) (using statutory standards to override prudential standards that were not even discussed); *Paroline v. United States*, 134 S. Ct. 1710, 1719–20 (2014) (subjugating proximate cause considerations to mere statutory interpretation); *Roberts v. United States*, 134 S. Ct. 1854, 1859 (2014) (also subjugating proximate cause considerations to mere statutory interpretation).

<sup>89</sup> 134 S. Ct. 1422, 1429–31 (2014).

<sup>90</sup> *Id.* at 1433.

<sup>91</sup> 134 S. Ct. 746, 760–62 (2014).

in its own realm or territory.<sup>92</sup> In *Daimler*, the Court limited the reach of State jurisdiction by blocking courts from allowing the investigation of international corporations according to the Alien Tort Statute (ATS), despite their existence within a U.S. State's realm or territorial borders.<sup>93</sup> The ATS is a part of the Judiciary Act of 1789, a founding document.<sup>94</sup> After *Daimler*, courts must not only meet the minimum "fair play and substantial justice" requirement, but they seemingly must also meet the corporate law test for piercing the corporate veil to simply establish its general jurisdiction in cases against international corporations.<sup>95</sup> What's more, the Court used its new *Daimler* rule for international corporations against plaintiffs in *Walden v. Fiore* who had their money wrongfully seized by a federal agent.<sup>96</sup> This dangerously placed the Court's equitable power to expound the tenets of federalism and the Fourteenth Amendment below the controversial civil forfeiture practices of the other branches.

In *Burt v. Titlow* the Court also limited its ability to hear writs of habeas corpus to the high bar set by Congress in the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996.<sup>97</sup> The Court's power to hear writs of habeas corpus comes from the Judiciary Act of 1789 and Article III of the Constitution.<sup>98</sup> Habeas corpus allows the Court to check the power of the

---

<sup>92</sup> STORY, CONFLICT OF LAWS, *supra* note 16, at § 7 ("[A]ll the laws made by a sovereign have no force or authority except within the limits of his domains. But the necessity of the public and general welfare has introduced some exceptions in regard to civil commerce.") (internal quotation marks omitted).

<sup>93</sup> *Id.* at 762–763.

<sup>94</sup> Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. CIN. L. REV. 1, 3 (1990), available at <http://www.c-span.org/video/?9335-1/american-judicial-tradition> ("It is the last of the triad of founding documents along with the Declaration of Independence and the Constitution itself.").

<sup>95</sup> *Daimler*, 134 S. Ct. at 763 (piercing the corporate veil tests are incident to a limited liability policy preference for corporations created by the states, it has no obvious or even tangential connection to general jurisdiction—the Court is in entirely uncharted waters, making up rules for general jurisdiction that never existed before and that have no connection to the definition of general jurisdiction).

<sup>96</sup> 134 S. Ct. 1115, 1121 (2014).

<sup>97</sup> 134 S. Ct. 10, 15–16 (2013) (citing Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214). *Cf.* *Lopez v. Smith* No. 13–946 slip op. at 1 (2014).

<sup>98</sup> Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73; U.S. CONST., art. I, § 9 ("habeas corpus shall not be suspended"); U.S. CONST. art. III, § 2 (the Court has "judicial power" over "all cases, in law and equity" that arise under the Constitution.); *Fay v. Noia*, 372 U.S. 391, 400–01 (1963) ("These are not extravagant expressions. Behind them may be discerned the



President and Congress in the case of a disappeared person held incommunicado by the government.<sup>99</sup> If the Court applies the *Jacobs/Lexmark* and *Burrage* rules, the Court will not check the powers of the other branches when it infers that Congress' intent tells it not to.<sup>100</sup> Using the newly minted AEDPA-infused habeas corpus approach, the Court even refused to consider protecting a man on death row.<sup>101</sup> The remarkable thing is not the fact that the Court decided against habeas corpus petitioners.<sup>102</sup> The remarkable thing is that the Court refused habeas corpus petitions as a matter of statutory limitation on the use of a habeas corpus writ.<sup>103</sup> The Court followed the law of Congress and did not even *consider* using its own Article

---

unceasing contest between personal liberty and government oppression. It is no accident that habeas corpus has, time and again, played a central role in national crises wherein the claims of order and of liberty clash most acutely not only in England in the seventeenth century, but also in America from our very beginnings, and today. Although the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty.”)

<sup>99</sup> See, e.g., *Crowell v. Benson*, 285 U.S. 22, 26–27 (1932).

<sup>100</sup> See, e.g., *Integrity Staffing Solutions, Inc. v. Busk*, No. 13–433, slip op. at 8–9 (2014) (deciding that “the Portal-to-Portal Act evinces Congress’ intent to repudiate *Anderson*’s holding that such walking time was compensable under FLSA [Fair Labor Standards Act]” to avoid even considering the common law prohibitions on indentured servitude and slavery that should remain constitutionally vital and pervasive in the United States especially since the Civil War and the addition of the Thirteenth, Fourteenth and Fifteenth Amendments).

<sup>101</sup> *White v. Woodall*, 134 S. Ct. 1697, 1707 (2014). See *Woods v. Donald*, No. 14–618 slip op. at 4–5 (2015) (per curiam) (even further narrowing the Court’s willingness to hear habeas corpus petitions) (citing *White v. Woodall*, No. 12–794, slip op. at 9 (2014); *Burt v. Titlow*, No. 12–414, slip op. at 1 (2014)); *Davis v. Ayala*, No. 13–1428 slip op. at 4 (2015) (Sotomayor, J., dissenting) (quoting from *Cronic*—the same case *Woods* refused to consider: “Our entire criminal justice system was founded on the premise that ‘[t]ruth . . . is best discovered by powerful statements on both sides of the question.’”) (quoting *United States v. Cronic*, 466 U.S. 648, 655 (1984) (internal quotation marks omitted)) (citing *Kaley v. United States* No. 12–464 slip op. at 16 (2014) (Roberts, C.J., dissenting)).

<sup>102</sup> U.S. CONST., art. I, § 9 (only allowing temporary suspension of the writ “in Cases of Rebellion or Invasion [when] the public safety requires it”); *Burt*, 134 S. Ct. at 15–16 (Refusing to hear habeas corpus claims, not out of public safety concerns arising from Rebellion or Invasion, but by deferring to Congress’ state sovereignty concession in the AEDPA: “AEDPA recognizes a foundational principle of our federal system: . . . This principle [of state sovereignty] applies to claimed violations of constitutional, as well as statutory, rights.”).

<sup>103</sup> *Id.*

III power.<sup>104</sup> Habeas corpus should be a backstop check in the balance of powers to protect the United States from extreme evil.<sup>105</sup> The Court nonetheless subordinated this power to the other branches, even though the habeas corpus writ was purposefully infused with independent Article III powers at the founding of the United States.<sup>106</sup>

The most complex and problematic Separation of Powers case the Court decided in 2013 was *NLRB v. Noel Canning*.<sup>107</sup> In fact *Noel Canning* stands for the most fracturing bifurcation of precedent possible and of all the cases issued in the 2013 term it is the greatest threat to the Court's power.<sup>108</sup> The case ultimately renders the leading Separation of Powers case, *Youngstown Sheet & Tube Co. v. Sawyer*, superfluous.<sup>109</sup> The Court cited to the dicta in Justice Frankfurter's concurrence about a "gloss" on presidential power without regarding the rule.<sup>110</sup> But, unlike Justice Frankfurter, the Court proceeded to provide an actual gloss on presidential power—replacing any need to cite to the holding in *Youngstown*.<sup>111</sup> The Court also drew support

---

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

<sup>105</sup> *Luther v. Borden*, 48 U.S. 1, 52 (1841) (Woodbury, J., dissenting) ("And who could hold for a moment, when the writ of habeas corpus cannot be suspended by the legislature itself, either in the general government or most of the States, without an express constitutional permission, that all other writs and laws could be suspended, and martial law substituted for them over the whole State or country, without any express constitutional license to that effect, in any emergency? Much more is this last improbable, when even the mitigated measure, the suspension of the writ of habeas corpus, has never yet been found proper by Congress, and, it is believed, by neither of the States, since the Federal Constitution was adopted.") (citing U.S. CONST., art. I, § 9; Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1325). *See, e.g.*, John Quincy Adams, Argument before the Supreme Court of the United States at 81, *The Amistad*, 40 U.S. 518 (1841), available at [http://avalon.law.yale.edu/19th\\_century/amistad\\_002.asp](http://avalon.law.yale.edu/19th_century/amistad_002.asp) (citing to the Court's habeas corpus jurisdiction, John Quincy Adams famously became a whistleblower by revealing the secret orders of a sitting President to save the lives of African mutineers on the *Amistad*).

<sup>106</sup> *Burt*, 134 S. Ct. at 16. *See also supra* note 108 and accompanying text.

<sup>107</sup> 134 S. Ct. 2550 (2014).

<sup>108</sup> *See id.* at 2560.

<sup>109</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) ("The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.")

<sup>110</sup> *Noel Canning*, 134 S. Ct. at 2560 (citing *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring)).

<sup>111</sup> *See id.* at 2573.

from the British concept of an unwritten constitution, which contradicts the fundamental principle of the *written* constitution that the Court drew upon in *Marbury v. Madison*.<sup>112</sup> The result was a rule that reads more like the dissent in *Youngstown* than the majority concurrences without overturning precedent or even citing to the *Youngstown* dissent.<sup>113</sup>

To emphasize his reasons for not offering such a gloss, Justice Frankfurter finished his concurrence by quoting Chief Justice John Jay's famous refusal to provide President George Washington with an advisory opinion about his powers beyond the power of the court's "case or controversy" jurisdiction.<sup>114</sup> Ironically, *Noel Canning* is such an impermissible advisory opinion because a reasonable result could have been

---

<sup>112</sup> Compare, *Noel Canning*, 134 S. Ct. at 2573 (citing AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 576–77, n. 16 (2012)), with *Marbury v. Madison*, 5 U.S. 137, 178 (1803) ("Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine . . . reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection."). See also Douglas Cochran, *Can I Get that in Writing? The Absurdity of England's Unwritten Constitution*, MANIFEST TIDSSKRIFT, <http://www.manifesttidsskrift.no/can-i-get-that-in-writing/> (last visited Feb. 20, 2014); Jill Lepore, *The Rule of History: Magna Carta, the Bill of Rights, and the hold of time*, THE NEW YORKER (April 20, 2015), available at <http://www.newyorker.com/magazine/2015/04/20/the-rule-of-history> (giving a history of including where the unwritten laws of England came from) (citing Ranulf de Glanville, *Treatise on the Laws and Customs of the Realm of England* (1112–90)).

<sup>113</sup> Compare *Noel Canning*, 134 S. Ct. at 2561–73 (Addressing the various stages through America's history during which the president made recess appointments, including by President Johnson, during the Great Depression, and during World War II), with *Youngstown*, 343 U.S. at 683–700 (Vinson, J., dissenting) (beginning with George Washington's Declaration of Neutrality and proceeding to Abraham Lincoln's Emancipation Proclamation and then all the way to Presidential uses of power all the way through World Wars I & II concluding that: "History bears out the genius of the Founding Fathers, who created a Government subject to law but not left subject to inertia when vigor and initiative are required.").

<sup>114</sup> *Youngstown*, 343 U.S. at 614 (Frankfurter, J., concurring) (quoting Letter from Supreme Court Justices to George Washington (Aug. 8, 1793), available at <http://founders.archives.gov/documents/Washington/05-13-02-0263> (last visited Feb. 20, 2015)).

worked out between the President and Congress, as the matter was wholly political.<sup>115</sup> Allowing the other branches to work things out would actually preserve “the gloss which life has written upon” the Constitution—a gloss which the Court should only refer to as a reason for the Court to avoid disclaiming “all pretensions” to its jurisdiction.<sup>116</sup> The fundamental rule of *Marbury v. Madison*, which Justice Frankfurter did not mean to unsettle, holds that the written constitution must void unconstitutional exercises of power.<sup>117</sup> But, as Frankfurter noted, the written constitution need not be used by the Court to perfect glosses on minor details of government work that life itself naturally provides.<sup>118</sup> Thus, Justice Frankfurter’s concurrence should be interpreted as an exercise in judicial forbearance under the guidance of Justice Jay that the *Noel Canning* Court did not follow. Even when facing a problem of great importance, Justice Jay waited for a proper case or controversy to preserve the judicial authority of the Supreme Court to speak on the Separation of Powers.<sup>119</sup>

The questions asked in *Noel Canning* posed no such problem of great importance.<sup>120</sup> So, it was not only improper for the Court to answer questions asked to it that fell outside its jurisdiction, but it was *pitiful* for the

---

<sup>115</sup> See, e.g., *Baker v. Carr*, 369 U.S. 186, 198–99 (1962) (noting that political questions give rise to “doubt that it is a case or controversy”).

<sup>116</sup> *Youngstown*, 343 U.S. at 610; *Marbury*, 5 U.S. at 170 (avoiding a “disclaim[er] [of] all pretensions to such a jurisdiction” as an “[a]n extravagance, so absurd and excessive” that it should not be “entertained for a moment”).

<sup>117</sup> *Marbury*, 5 U.S. at 177–78.

<sup>118</sup> *Youngstown*, 343 U.S. at 610.

<sup>119</sup> Compare Letter from Supreme Court Justices to George Washington (Aug. 8, 1793), available at <http://founders.archives.gov/documents/Washington/05-13-02-0263> (refusing to answer George Washington’s cabinet about what it could constitutionally do to stop French military courts opened on American soil to hire and reward American citizens as mercenaries in the French war against England.), with *Glass v. The Sloop Betsey*, 3 U.S. 6, 16 (1794) (deciding in a proper case and controversy that “that no foreign power can of right institute, or erect, any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties, IT IS THEREFORE DECREED AND ADJUDGED that the admiralty jurisdiction, which has been exercised in the United States by the Consuls of France, not being so warranted, is not of right.”).

<sup>120</sup> *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2557 (2014) (The plaintiff did not “reduce to writing and execute a collective-bargaining agreement with a labor union.” The NLRB required the plaintiff to reduce and execute the agreement and make employees whole for any losses.) Not only is this dispute not of great significance, it also should not give the plaintiff standing because it did not create a controversy such that an NLRB board member should have been implicated in a separation of powers determination.

Court to cave in and try to answer such questions that did not even pose a problem of great importance.<sup>121</sup> Further, it is dangerous for the Court to step into the political fray of the other branches of government when political debate could have resolved the issue without the Court.<sup>122</sup> To expound a gloss of Presidential power, the Court allowed the President's Office of Legal Counsel (OLC) great weight as persuasive authority.<sup>123</sup> This is the first Court case to freeze certain Court favored OLC opinions in the Court's *stare decisis* citing to their misunderstanding of dicta in one Justice's concurrence.<sup>124</sup> The obvious danger is that future OLC's and Congresses may not favor the same OLC opinions the Court did. The government is free to change course and shift the sands that the Court built its *stare decisis*

---

<sup>121</sup> Draft of Questions to be Submitted to Justice of the Supreme Court (July 18, 1793) available at <http://founders.archives.gov/documents/Hamilton/01-15-02-0087#ARHN-01-15-02-0087-fn-0001> (Even these 29 questions that arose when Citizen Genêt opened prize courts in the U.S. capital Philadelphia in order to forfeit English merchant ships, refitting them with guns, and enlisting American citizens as French mercenaries, Justice Jay the other Justices refused to answer even one of George Washington's cabinet's questions. These were a questions of great importance, and even in the face of such questions the Supreme Court possessed the greatness of soul to properly refuse to answer them.); *Youngstown*, 343 U.S. at 614 (Frankfurter, J., concurring) ("We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservations of the rights, peace, and dignity of the United States.") (quoting Letter from Supreme Court Justices to George Washington (Aug. 8, 1793), available at <http://founders.archives.gov/documents/Washington/05-13-02-0263> (last visited Feb. 20, 2015)).

<sup>122</sup> See *Marbury*, 5 U.S. at 165–66 (explaining "the President is invested with certain important political powers, in the exercise of which he is to use his own discretion . . .").

<sup>123</sup> *Noel Canning*, 134 S. Ct. at 2559, 2562–63 (*Noel Canning* wantonly refashioned a long settled justification for exercising judicial forbearance as instead a reason to decide a case by misusing Justice Frankfurter's dicta regarding a "gloss" on American constitutional law) (citing *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (affirming the *dismissal* of the suit based on "the great weight" of "[l]ong settled and established practice" between the branches of government)); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 610–611 (1952) (Frankfurter, J., concurring) (Justice Frankfurter's dicta was that there is "a gloss which life has written upon" American constitutional law—with this dicta he justified forbearance from issuing such a gloss from the bench. He also cited to a number of cases also cited in *The Pocket Veto Case*, which used long settled practice (i.e., a gloss provided by the Congress and President) as a reason for the Supreme Court *not* to formulate a judgment)).

<sup>124</sup> See generally *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (citing *Youngstown*, 343 U. S. at 610–11 (Frankfurter, J., concurring)).

upon. When this happens, the Court has no way to recover its rule or the authority it expended making the rule.<sup>125</sup> Many OLC opinions are classified and kept secret, even from the Court, and this has attracted heavy political criticism in the Senate.<sup>126</sup> *Noel Canning* is the debut case for using OLC opinions in this very dangerous way—and with any luck, it will be the last.<sup>127</sup>

A number of cases from the 2013 term curtailed equitable defenses based on a flat statutory interpretation.<sup>128</sup> The best example of this was *Petrella v. Metro-Goldwyn-Mayer, Inc.*<sup>129</sup> In *Petrella*, the equitable defense of laches was entirely removed in any case where a statute of limitations applies.<sup>130</sup> Justice Ginsburg misapplied a rule from previous case law to reach this conclusion; she quoted *County of Oneida v. Oneida Indian Nation of N.Y.*, saying that “application of the equitable defense of laches in an action at law would be novel indeed.”<sup>131</sup> However, in *County of Oneida*, the equitable defense of laches was not preserved, leaving only the action at law in front of the Supreme Court.<sup>132</sup> Laches was novel because the equitable

---

<sup>125</sup> See *Marbury*, 5 U.S. at 177 (explaining that “act[s] of the legislature” usually “bind the courts, and oblige them to give it effect[,]” unless the act is “repugnant to the constitution”).

<sup>126</sup> Letter from Mark Udall & Ron Wyden, U.S. Senators, to Eric Holder, Attorney General (Mar. 15, 2012), available at <https://www.documentcloud.org/documents/325953-85512347-senators-ron-wyden-mark-udall-letter-to.html> (“[T]here is now a significant gap between what most Americans think the law allows and what the government secretly claims the law allows.”). See generally Linda Greenhouse, *When Judges Don’t Know Everything*, THE NEW YORK TIMES, (Oct. 30, 2013), available at [http://www.nytimes.com/2013/10/31/opinion/greenhouse-when-judges-dont-know-everything.html?\\_r=0](http://www.nytimes.com/2013/10/31/opinion/greenhouse-when-judges-dont-know-everything.html?_r=0).

<sup>127</sup> See generally *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

<sup>128</sup> See, e.g., *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224 (2014) (holding that “equitable tolling of one-year period for seeking return of an abducted child . . . is not available”); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) (holding that “laches could not be invoked to preclude adjudication of a claim for damages brought within Copyright Act’s three-year limitations period”).

<sup>129</sup> 134 S. Ct. 1962 (2014).

<sup>130</sup> See *id.* at 1973.

<sup>131</sup> *Id.* at 1973–74 (quoting *County of Oneida v. Oneida Indian Nation of N.Y.* 470 U.S. 226, 244 (1985)) (internal quotation marks omitted). But see *id.* at 1984 (Breyer, J., dissenting) (explaining “*Oneida* did not resolve whether laches was available to the defendants. . .”).

<sup>132</sup> *County of Oneida*, 470 U.S. at 244–45 (“Although it is far from clear that this defense is available in suits such as this one, we do not reach this issue today. . . . While petitioners argued at trial that the Oneidas were guilty of laches, the District Court ruled against them and they did not reassert this defense on appeal.”).

defense was never re-raised on appeal.<sup>133</sup> Thus, *County of Oneida* was not a prohibition against using equitable defenses in statutory cases altogether,<sup>134</sup> though that seemed to be what Justice Ginsburg understood it to be.<sup>135</sup>

The equitable defense of laches traditionally arises alongside discussions about statutes of limitations in equitable disputes over the choice or conflict of laws.<sup>136</sup> In the United States conflicts of law arise frequently between the states, and courts traditionally use their equitable power to draw wisdom from the Law of Nations to decide conflicts according to the concepts of comity and grace in order to settle disputes among states.<sup>137</sup> In the realm of international law, comity and grace generally command a light touch and a general attitude of forbearance to fellow sovereigns because they have “no admitted superior,” and they “give[] the supreme law within its own domain[.]”<sup>138</sup> We usually apply this forbearance to states as if they are national sovereigns out of a deep respect for the U.S. principle of federalism. Unfortunately the decision in *Petrella* to give flat preference to statutes of limitations over equitable defenses could render laches virtually superfluous. This, in turn, could further upset the traditional balance struck by federalism, according to which previous courts engaged with equitable power to apply the light touch approach of comity and grace to the states which they internalized from the international law.

---

<sup>133</sup> *Id.* at 245 (“As a result [of the Oneida Indian Nation not reasserting the defense on appeal], the Court of Appeals did not rule on this claim, and we likewise decline to do so.”).

<sup>134</sup> See *Petrella*, 134 S. Ct. at 1984 (Breyer, J., dissenting).

<sup>135</sup> See *id.* at 1973–74 (holding that “in face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief . . .”).

<sup>136</sup> STORY, CONFLICT OF LAWS, *supra* note 16, at § 317 (“But suppose a negotiable note is made in one country and payable there, and it is afterwards indorsed in another country, and by the law of the former equitable defences are let in, in favour of the maker, and by the latter excluded; what rule is to govern, in regard to the holder?”). See, e.g., *Bakalar v. Vavra*, 619 F.3d 136, 144 (2d Cir. 2010) (deciding the matter of the equitable defense of laches) (citing *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, 98 CIV. 7664 (KMW), 1999 WL 673347 (S.D.N.Y. Aug. 30, 1999) (noting the old *lex situs* rule used to decide choice of law referenced by Joseph Story above, which according to Story was ultimately derived from the Law of Nations).

<sup>137</sup> *Younger v. Harris*, 401 U.S. 37, 56 (1971) (deciding a federalism issue based on the Law of Nations concept of “comity”); *Rhode Island v. Massachusetts*, 12 Pet. 657, 726 (1838) (noting that the equitable allocation of natural resources and territorial boundaries was traditionally decided as “a matter of grace.”).

<sup>138</sup> STORY, CONFLICT OF LAWS, *supra* note 16, at § 8 (This is a “natural principle flowing from the equality and independence of nations.”).

The Court decided in *Heimeshoff v. Hartford Life & Accident Insurance Co.* that even when there is no statute of limitations, the parties could contract their own statute of limitations.<sup>139</sup> Under *Petrella*, the decision in *Heimeshoff* might mean that parties could potentially contract out of equitable defenses. And even when a specific statute of limitations is not prescribed by the law, some states have provisions allowing the court to borrow the statute of limitations prescribed by another state during its choice of law analysis.<sup>140</sup> Taken together, if *Petrella* applies whenever a court finds that a statute of limitations applies (which could be always), then it may render equitable laches virtually superfluous.<sup>141</sup> This will especially be so if *Petrella* is read to categorically obstruct equitable defenses while inevitably (and ironically) expending equitable power during a conflict of laws determination to do so.

Constitutional defenses that are preserved by the Court's equitable power are also being shot down.<sup>142</sup> In *Air Wisconsin Airlines Corp. v. Hoeper* the Court extended the immunity prescribed by the Aviation and Transportation Security Act (ATSA) to airline companies, even when communications to the Transportation Security Administration (TSA) are misleading or untrue.<sup>143</sup> *Air Wisconsin* arose from a defamation suit brought by Hoeper a terminated employee pilot.<sup>144</sup> When Hoeper learned that he would be fired he became angry and yelled at his superiors.<sup>145</sup> The airline,

---

<sup>139</sup> 134 S. Ct. 604 (2013).

<sup>140</sup> See, e.g., The New York Borrowing Statute, N.Y. C.P.L.R. § 202 (McKinney) (2013). (“An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.”). See *DeWeerth v. Baldinger*, 836 F.2d 103, 106 (2d Cir. 1987) (“pursuant to New York’s ‘borrowing’ statute” a court may apply a “foreign jurisdiction’s limitation’s provisions”—also considering that “the equitable defense of laches” requires both “prejudice to the defendant as well as delay.”); *In re Estate of McLaughlin*, 78 A.D.3d 1304, 1305–06 (2010) (citing N.Y. CIV. PRAC. L. & R. § 202 (McKinney)) (This case notes that the New York Borrowing Statute requires the application of another state's statute of limitations if the cause of action accrues outside of New York.). See generally Laurie Frey, *Bakalar v. Vavra and the Art of Conflicts Analysis in New York: Framing a Choice of Law Approach for Moveable Property*, 112 COLUM. L. REV. 1055 (2012).

<sup>141</sup> See *Petrella*, 134 S. Ct. at 1973–74.

<sup>142</sup> See, e.g., *Air Wis. Airlines Corp. v. Hoeper*, 134 S. Ct. 852, 857–58 (2014).

<sup>143</sup> 134 S. Ct. 852, 857–58 (2014).

<sup>144</sup> *Id.* at 859.

<sup>145</sup> *Id.* at 858.



after allowing Hoyer to take his last flight, called TSA and told them that Hoyer was armed and possibly dangerous.<sup>146</sup>

Truth is a defense to defamation suits in order to protect legitimate First Amendment speech.<sup>147</sup> But *Air Wisconsin* imbued the ATSA immunity with a less potent truth defense than the First Amendment would have required, creating immunity for airlines so long as the “gist” of their statements to the TSA are true.<sup>148</sup> Thus, the Court’s constitutional analysis of the truth defense took a back seat to statutory interpretation.<sup>149</sup> Now, statutory immunity will mechanically be applied by judges to dismiss cases before the First Amendment implications can be considered. The Court has again extended immunity apparently intended by Congress, which it should have considered in light of equitable problems with immunity itself and constitutional implications involved in related civil suits.<sup>150</sup> Instead the Court discussed corporate law.<sup>151</sup>

The Court topped their caseload off with the decision in *Burwell v. Hobby Lobby*.<sup>152</sup> The decision in *Hobby Lobby* followed the theme of the 2013 term to limit equity and pretend legal positivism.<sup>153</sup> In a near perfect overlap with the First Amendment, the Religious Freedom Restoration Act (RFRA) was allowed to carry the day without any discussion of the Constitution.<sup>154</sup> However, Justice Ginsburg did note in her dissent that the *Smith* case and pre-*Smith* case law that actually expounded the First Amendment should have decided the suit asking: “Why should decisions of this order be made by Congress or the regulatory authority, and not this

---

<sup>146</sup> *Id.* at 859.

<sup>147</sup> See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516–17 (1991); Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 790–91 (1964).

<sup>148</sup> *Hoyer*, 134 S. Ct. at 861 (citing *Masson*, 501 U.S. at 517). *Masson* was about a magazine story written about a public figure. *Id.* at 499–500.

<sup>149</sup> See *Hoyer*, 134 S. Ct. at 861; *Masson*, 501 U.S. at 517.

<sup>150</sup> *C.f.* *Stanton v. Sims*, No. 12–1217, slip op. at 2 (2013) (per curiam); *Tolan v. Cotton*, No. 13–551, slip op. at 1 (2014) (per curiam); *Plumhoff v. Rickard*, No. 12–1117, slip op. at 1 (2014); *Lane v. Franks*, 134 S. Ct. 2369, 2381 (2014); *Wood v. Moss*, 134 S. Ct. 2056, 2061 (2014).

<sup>151</sup> *Hoyer*, 134 S. Ct. at 864 (citing *TSC Indus., Inc. v. Northway*, 426 U.S. 438, 440–41 (1976) (a case about false or misleading statements to shareholders)).

<sup>152</sup> 134 S. Ct. 2751 (2014).

<sup>153</sup> See generally *id.*

<sup>154</sup> *Id.* at 2785.

Court?”<sup>155</sup> Thus, *Hobby Lobby* is the perfect example of how far the Court has gone feigning positivism, treating its own authority to expound the Constitution as a mere scrap heap in light of Congress’s laws.<sup>156</sup> The people of the United States are left to wonder how the Court would have ruled if the First Amendment had been considered. Certainly, First Amendment case law related to *Smith* might have precluded the suit.<sup>157</sup> But the Court could have alternatively followed *Citizens United v. Federal Elections Commission*, which infamously extended First Amendment rights to corporations.<sup>158</sup> In *Citizens United*, and later in *McCutcheon v. Federal Election Commission*,<sup>159</sup> the Court equated corporate money with human speech by applying First Amendment rights of free speech to corporations as “persons” when they spend money to support a message.<sup>160</sup> If the Court can equate human speech with corporate money, then it is not incomprehensible that the Court may also equate human religious beliefs with corporate management style in future cases.<sup>161</sup> In fact, the Court may

---

<sup>155</sup> *Id.* at 2790 (Ginsburg, J., dissenting) (“Any First Amendment Free Exercise Clause claim Hobby Lobby or Conestoga might assert is foreclosed by this Court’s decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).”). *Cf.* *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1757 (2014) (citing *Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993)) (using the First Amendment to imbue copyright and patent rights immunity from suits instead of properly weighing copyright and patent laws against the First Amendment).

<sup>156</sup> *See Hobby Lobby*, 134 S. Ct. at 2773 (“[T]he results would be absurd if RFRA merely restored this Court’s pre-*Smith* decisions in ossified form and did not allow a plaintiff to raise a RFRA claim.”).

<sup>157</sup> *Id.* at 2790 (Ginsburg, J., dissenting).

<sup>158</sup> 558 U.S. 310, 342 (2010) (“The Court has recognized that First Amendment protection extends to corporations.”) (citations omitted).

<sup>159</sup> 134 S. Ct. 1434 (2014).

<sup>160</sup> *Citizens United*, 558 U.S. at 351 (“All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech.”); *McCutcheon*, 134 S. Ct. at 1441 (“Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition.”).

<sup>161</sup> *Compare Citizens United*, 558 U.S. at 392 (Scalia, J., concurring) (“It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different—or at least it cannot be denied the right to speak on the simplistic ground that it is not ‘an individual American.’”), *with Hobby Lobby*, 134 S. Ct. at 2769–70 (“[A] law that ‘operates so as to make the practice of . . . religious beliefs more expensive’ in

soon find that corporations have whole stores of unexplored human rights that natural persons do not have.<sup>162</sup>

After the Court's efforts to restrain its own equitable power and aggrandize the powers of Congress and the President, exhibited above by only a few of the more exemplary cases from the 2013 term, the Court then revealed its newfound legal positivism as mere pretense. The *Wheaton* injunction signaled just such a revelation because the injunction was issued solely by the power granted in the All Writs Act—a part of the Judiciary Act of 1789.<sup>163</sup> There was no clear law or precedent calling for the use of an injunction in *Wheaton's* case.<sup>164</sup> Thus, the Court simply acted out of its traditional equitable power.<sup>165</sup> The Court has equitable control over when such injunctions are inappropriate, and when there is no clear law or precedent, the Court reserves such injunctions as a “failsafe.”<sup>166</sup> Many cases in the 2013 term, discussed above, strongly affirmed this sentiment.

The 2013 term ended only two days prior to the issuance of an injunction for *Wheaton College* without meeting the high bar of an emergency.<sup>167</sup> Thus the *Wheaton* injunction not only represents a broken promise of maintaining legal positivism made during the 2013 term, but it is also a break from the Court's prudential rules fashioned to ensure that equity upholds the Rule of Law itself.<sup>168</sup> Thus the injunction reveals many existential problems for the Court. To take this one step at a time, *Wheaton's* use of equitable power against so many newly minted cases that found to the contrary casts doubt

---

the context of business activities imposes a burden on the exercise of religion.”) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)).

<sup>162</sup> *Chisholm v. Georgia*, 2 U.S. 419, 455–56 (1793) (Wilson, J.) (It is high time that the Court remember Justice Wilson's wisdom: “*In all our contemplations, however, concerning this feigned and artificial person, we should never forget that, in truth and nature, those who think and speak and act are men.*”) (emphasis added).

<sup>163</sup> *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2808 (2014) (Sotomayor, J., dissenting) (citing All Writs Act, 28 U.S.C. § 1651 (2012)).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 2810.

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

<sup>167</sup> *Id.* at 2809.

<sup>168</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006) (Under the equitable power of the court to hear writs of habeas corpus Justice Stevens proclaimed that “the Executive is bound to comply with the rule of law that prevails in this jurisdiction.” Revealing the peculiar role of the Court's equity with regard to upholding the Rule of Law.); *Fay v. Noia*, 372 U.S. 391, 438 (1963) (habeas corpus is “governed by equitable principles”), *overruled by* *Coleman v. Thompson*, 501 U.S. 722, 774 (Blackmun, J., dissenting) (calling the action of overturning *Noia* “the quintessence of inequity”).

on the doctrine of *stare decisis* itself.<sup>169</sup> By renegotiating the contours of *stare decisis*, the Court also raised a discussion about the Rule of Law.<sup>170</sup> The Rule of Law is the idea that the law rules or reigns over even those with political power in the United States and that the law will be applied equally to all citizens regardless of class or station.<sup>171</sup> So deep is the belief in the Rule of Law in the United States that the words “EQUAL JUSTICE UNDER LAW” are inscribed upon the front of the U.S. Supreme Court building itself.<sup>172</sup>

There were a few cases in the 2013 term where some Justices seemed to sense that something had gone fundamentally wrong regarding *stare decisis*. For instance in *Schuette v. BAMN* Justice Sotomayor dissented:

The plurality’s attempt to rewrite *Hunter* and *Seattle* so as to cast aside the political-process doctrine *sub silentio* is impermissible as a matter of *stare decisis*. Under the doctrine of *stare decisis*, we usually stand by our decisions, even if we disagree with them, because people rely on what we say, and they believe they can take us at our word.<sup>173</sup>

Sotomayor also concurred in *Michigan v. Bay Mills Indian Community* apparently just to emphasize the primacy of *stare decisis*.<sup>174</sup> Similarly Justice Kagan affirmed *stare decisis* precedent in *Bay Mills* calling it “a foundation stone of the rule of law.”<sup>175</sup> Justice Scalia echoed these sentiments in his dissent in *ABC v. Aereo, Inc.* saying that “[t]he rationale for the Court’s ad hoc rule for cable-system lookalikes is so broad that it renders nearly a third of the Court’s opinions superfluous.”<sup>176</sup>

---

<sup>169</sup> See, e.g., *Schuette v. BAMN*, 134 S. Ct. 1623, 1654 (2014).

<sup>170</sup> *Mich. v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014).

<sup>171</sup> *Id.*

<sup>172</sup> *Visitor’s Guide to the Supreme Court*, THE SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/visiting/visitorsguide-supremecourt.aspx> (last visited September 6, 2015).

<sup>173</sup> 134 S. Ct. 1623, 1664 (Sotomayor, J., dissenting). *C.f. Wheaton*, 134 S. Ct. at 2808 (Sotomayor, J., dissenting) (“Those who are bound by our decisions usually believe they can take us at our word. Not so today.”).

<sup>174</sup> 134 S. Ct. 2024, 2040 (2014) (Sotomayor, J., concurring).

<sup>175</sup> *Id.* at 2036.

<sup>176</sup> 134 S. Ct. 2498, 2516 (2014)(Scalia, J., dissenting).

But no Justice was wholehearted in their concern for judicial fundamentals.<sup>177</sup> And in *Halliburton v. Erica P. John Fund, Inc.* Justice Thomas even wrote a concurrence joined by Justices Scalia and Alito to attack the use of “judge-made” causes of action as somehow less than *stare decisis*, citing to his dissent in *Bay Mills*.<sup>178</sup> Justices Thomas, Alito and Scalia’s position was pointedly radical because all common law causes of action are judge-created in the very same way Thomas expressed.<sup>179</sup> Then finally in *Harris v. Quinn* Justice Alito, writing for the majority, did not cite to the *Halliburton* concurrence that he joined, furthering Justice Thomas’s dissenting position in *Bay Mills* which argued for the radical reform of *stare*

---

<sup>177</sup> Justice Stevens was the last Justice to wholeheartedly, though not perfectly, uphold fundamentals. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006) (“the Executive is bound to comply with the rule of law that prevails in this jurisdiction.”); *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting) (“For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.”); *Texas v. Johnson*, 491 U.S. 397, 439 (1989) (Stevens, J., dissenting) (noting that equal liberty is an “irresistible force” that is “worth fighting for.”).

<sup>178</sup> 134 S. Ct. 2398, 2425 (2014) (Thomas, J., concurring) (citing *Bay Mills Indian Cmty.*, 134 S. Ct. at 2045 (Thomas, J., dissenting)).

<sup>179</sup> J. H. Baker, *An Introduction to English Legal History* 80 (3d ed. 1990) (“The expansion of trespass, and especially of the flexible action on the case, provided the common law with a temporary escape from the formulary system, an opportunity to melt down the medieval law and recast it in new moulds. Most of the law as we know it was shaped by this process.” The action known as *trespass on the case* brought new areas of jurisdiction to the royal courts, such as defamation; it filled gaps in the *praecipe* actions, by enabling damages to be awarded for breach of parol contracts, for past nuisances, and for conversion of goods; and finally it enabled the *praecipe* actions themselves to be replaced.); *id.* at 224–25 (attempting to conceptually separate “the equity of the Court of Chancery from the equitable spirit which inheres in the common law” to avoid “confusion” regarding the technical use of equity by lawyers of English law); *id.* at 232–33 (“The equity of the Court of Chancery, like the fictions of the common-law courts, proceeded from the premise that the course of the common law was immutable . . . Equity also affected the law independently of the Chancery. It played a role in certain branches of the common law, . . . this was openly acknowledged under Lord Mansfield CJ, who ‘never liked common law so much as when it was like equity’.”); *id.* at 360–415 (regarding the common law development of covenant, debt, contract, quasi-contract, assumpsit & deceit from trespass on the case); *id.* at 454–67 (regarding the common law development of tort of negligence from trespass on the case); *id.* at 478–492 (nuisance, same); *id.* at 495–506 (defamation, same); C.H.S. Fifoot, *History and Sources of the Common Law: Tort and Contract* 77 (1949).

*decisis*.<sup>180</sup> Instead in *Harris*, Alito and four other Justices decided to make a rule that directly contradicted precedent without officially overruling the previous rule.<sup>181</sup> Without even disputing the majority's creation of a contradictory ad hoc rule as Justice Scalia did in *Aereo*, Justice Kagan's dissent in *Harris* pitifully cited to her newly penned majority precedent in *Bay Mills* re-quoting the same precedent she did in the majority to support the position that *stare decisis* is "a foundation stone of the rule of law" in a dissent.<sup>182</sup> This is how the Supreme Court haphazardly redefined *stare decisis* as ad hoc rulemaking in order to fray its own precedent without any meaningful explanation.<sup>183</sup>

### III. INVOKING JUDICIAL POWERS BEYOND STARE DECISIS

Perhaps in light of the 2013 term and the *Wheaton* injunction *stare decisis* does not apply to the use of equitable power or the common law anymore. The radical Thomas concurrence in *Halliburton* seemed to become the majority view in *Harris*.<sup>184</sup> Thomas' concurrence appeared to rail against the very merger of law and equity in which *stare decisis* was implied into the federal courts' use of equitable power.<sup>185</sup> But the concurrence also reveled in the abolishment of formalism jeering at "the heady days in which this Court assumed common-law powers to create

---

<sup>180</sup> *Harris v. Quinn*, 134 S. Ct. 2618, 2638 n. 19 (2014) ("the dissent's extended discussion of *stare decisis* is beside the point."). See also *Halliburton*, 134 S. Ct. at 2425 (Thomas, J., concurring) (citing *Bay Mills*, 134 S. Ct. at 2037 n. 6 (Thomas, J., dissenting)). But see *Bay Mills*, 134 S. Ct. at 2037 (The majority criticizes Thomas's dissent for "ignoring *stare decisis*").

<sup>181</sup> *Harris*, 134 S. Ct. at 2644. See also *Abood v. Detroit Bd. of Educ.*, 431 U. S. 209 (1977) (this was the case the Court would not overrule in *Harris*).

<sup>182</sup> *Harris*, 134 S. Ct. at 2651 (Kagan, J., dissenting) (internal quotation marks omitted) (quoting *Bay Mills*, 134 S. Ct. at 2036).

<sup>183</sup> See *id.* at 2652 (Kagan, J. dissenting).

<sup>184</sup> Compare *Halliburton*, 134 S. Ct. at 2425 (Thomas, J., concurring) (citing *Bay Mills*, 134 S. Ct. at 2053–54 n. 6 (Thomas, J., dissenting)), with *Harris*, 134 S. Ct. at 2638 n. 19.

<sup>185</sup> *Halliburton*, 134 S. Ct. at 2417 (Thomas, J., concurring) (quoting *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). But see *Malesko*, 534 U.S. at 80 (Stevens, J., dissenting) ("[T]he Court's reliance on state tort law will jeopardize the protection of the full scope of federal constitutional rights."); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729, 731 (2004) ("[T]he door is still ajar . . . For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . . [And] nothing Congress has done is a reason for us to shut the door to the law of nations entirely."); STORY, *supra* note 2, at §§ 9–15 (noting that the ideal of the Rule of Law always weighed equally on both courts of law and equity)).

causes of action.”<sup>186</sup> When formalism was closed in 1938 with Rule 2 of the Federal Rules of Civil Procedure the Court voluntarily chose not to participate in guiding the development of common law and the forms of common law were frozen in time existing today in more or less the same shape as they were in 1938.<sup>187</sup> The Court thus implied the legal doctrine of *stare decisis* to matters of equity and common law in order to stabilize the new informal system in place of formality and judicial discretion.<sup>188</sup> This policy is not without its own absurdities as the Court is forced to rely on old cases about hunting foxes, ducks and whales to address unique new problems arising from airplanes, digital technology and the internet.<sup>189</sup> The Court’s new *Harris* finding destabilizes matters of equity and common law by removing *stare decisis* without reasserting formalism as it did in *Iqbal* and *Twombly*.<sup>190</sup> So the future stability of the common law and equitable power seems to hang solely on the ad hoc discretion of judges who are apparently not supposed to re-engage in a formal discussion of policy based on equitable maxims.<sup>191</sup>

But if *stare decisis* still applies to equitable power and the common law in order to uphold the Rule of Law—as a majority of justices found in *Bay Mills*—then the rules made by the Court cannot continue to be administered unequally as was done in *Harris* when it frayed the rule from *Bay Mills*.<sup>192</sup> This is so because the whole concept of the Rule of Law is that the law

---

<sup>186</sup> *Halliburton*, 134 S. Ct. at 2417 (2014) (Thomas, J., concurring) (internal quotation marks omitted) (quoting *Malesko*, 534 U.S. at 75 (Scalia, J., concurring)).

<sup>187</sup> FED. R. CIV. P. 2 (“There is one form of action—the civil action.”). *See also, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (A case seeming to require a formal standard that a cause of action be pled plausibly on its face. This exemplifies the Court’s voluntary complicity with the Federal Rules, reserving the ability to unilaterally modify them.); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007) (A case that also heightened formal standards to “plausible” from possible on its face—supporting the same conclusion that the Court voluntarily complies with the Federal Rules reserving the power to modify them unilaterally.).

<sup>188</sup> *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 166, 169–70 (1939).

<sup>189</sup> *See, e.g.*, *United States v. Schultz*, 333 F.3d 393, 405 (2d Cir. 2003) (deciding that Egypt had to have taken possessory interest over the artifacts to claim them under its patrimony law—this is the same as the old rules for hunting wild animals).

<sup>190</sup> *See Iqbal*, 556 U.S. at 678–79; *Twombly*, 550 U.S. at 546.

<sup>191</sup> *See What is the Rule of Law?*, WORLD JUSTICE PROJECT, <http://worldjusticeproject.org/what-rule-law> (last visited Mar. 6, 2015).

<sup>192</sup> *See id.*; *Missouri v. Jenkins*, 515 U.S. 70, 127–28 (1995) (Thomas, J., concurring) (admitting that the American skepticism of equitable power has to do with arbitrary rule that would violate the rule of law). *See also* STORY, *supra* note 2, at §§ 9–15.

governs men and not the other way around.<sup>193</sup> In other words, no one—not even the President—is above the law.<sup>194</sup> This principle is ensured by an equal administration of the law. As Marcus Cicero anciently quipped, “we are all slaves to the law so that we might be free.”<sup>195</sup> This principle of the Rule of Law was clearly adopted by the founders when they established the Separation of Powers to create a “government of laws and not of men.”<sup>196</sup> In fact the Rule of Law is a principle that can make or break government legitimacy. Bifurcating or fraying Court precedent by failing to overturn logically incoherent precedents as the Court did in *Noel Canning*, *Harris*, and *Hobby Lobby* injures the Court’s ability to uphold the Rule of Law by betraying the long held concept of binding *stare decisis*.<sup>197</sup> Bifurcating or fraying rules on an ad hoc basis creates an incoherent system where the administration of the law is inherently unequal.<sup>198</sup> Justice Sotomayor’s

---

<sup>193</sup> PAINE, *supra* note 48, at 99 (“[I]n America, THE LAW IS KING. For as in absolute governments the king is law, so in free countries the law OUGHT to be king; and there ought to be no other.”); Susan B. Anthony, *Is it a Crime for a U.S. Citizen to Vote?*, Speech (Jan. 16, 1873), in II THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY, AGAINST AN ARISTOCRACY OF SEX 555 (Ann D. Gordon, ed., Rutgers Univ. Press 2000) (wielding the Rule of Law to advocate for the day when “all United States citizens shall be recognized as equals before the law”). See Plato, *Laws* 4.715d (“Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.”); Aristotle, *Politics* 3.16 (“it is more proper that law should govern than any one of the citizens”); Marcus Tullius Cicero, *In Defence of Cluentius*, in THE SPEECHES 379 (H.G. Hodge, trans.) (1966) (“we are all servants to the law so that we might be free”).

<sup>194</sup> *Id.*

<sup>195</sup> Marcus Tullius Cicero, *In Defence of Cluentius*, in THE SPEECHES 379 (H.G. Hodge, trans.) (1966).

<sup>196</sup> MASS. CONST. pt. I, art. XXX (“In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”).

<sup>197</sup> See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2577–78 (2014); *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014).

<sup>198</sup> Some Justices especially feared the unequal application of the law in terms of unequally administered religious exemptions to duly enacted laws regarding *Hobby Lobby*. See *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2808 (2014) (Sotomayor, J., dissenting) (“After expressly relying on the availability of the religious-nonprofit accommodation to hold that the contraceptive coverage requirement violates RFRA as applied to closely held for-



dissent in the *Wheaton* injunction brought this issue fully into light when she said: “Those who are bound by our decisions usually take us at our word. Not so today.”<sup>199</sup> But the scope of the Court’s new practice of fraying its binding precedent into uncertain half-truths is total.

With the *Wheaton* injunction the Court chose a wholly original path, throwing its bare Article III equitable powers weakened by its own 2013 precedent against the Article I & II powers of Congress and the President. The Court’s feigned positivist subordination to Article I & II powers, which was apparent in many 2013 cases, was thus revealed as a farce when the *Wheaton* injunction unilaterally protected a corporate person’s decision to defy the commands of the other branches.<sup>200</sup> All new lines of Court precedent created in 2013 that seemed to limit equity with positivist notions are now only partly true. The *Wheaton* injunction poses a high risk to the Court’s power and its continued independence from the legislative and executive powers.<sup>201</sup> The continued existence of Christian colleges like Wheaton College in the United States also hangs in the balance. If the American people realize that the Supreme Court’s decisions can be deformed to administer the law unequally and arbitrarily among citizens, there may be pervasive demands from the people to disband or reform the Court itself. If Christian colleges are seen as unfairly benefiting from unequally administered laws, strong demands for regulating or illegalizing Christian colleges may also arise.

Reforming the Court would require fundamental changes to the Judiciary Act of 1789—an act that has remained relatively unchanged since

---

profit corporations, the Court now, as the dissent in *Hobby Lobby* feared it might, retreats from that position.”) (citing *Hobby Lobby*, 134 S. Ct. at 2801–802 (2014) (Ginsburg, J., dissenting)).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 2807.

<sup>201</sup> Adams, *Thoughts*, *supra* note 30 (Outlining aspects of judicial independence: “Their minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men. To these ends, they should hold estates for life in their offices; or, in other words, their commissions should be during good behavior, and their salaries ascertained and established by law.”); U.S. Const. art. III (following Adams’ instructions to give the Justices of the Supreme Court life tenure, during “good Behavior.”). See Katie Zezima, *Ted Cruz calls for judicial elections for Supreme Court justices*, THE WASHINGTON POST, June 27, 2015, <http://www.washingtonpost.com/news/post-politics/wp/2015/06/27/ted-cruz-calls-for-judicial-retention-elections-for-supreme-court-justices/> (giving the example of Ted Cruz’s radical proposal to end judicial independence).

the founding of the United States.<sup>202</sup> But what does this mean? As the Constitution currently stands the Supreme Court sits “in Law and Equity.”<sup>203</sup> Law is created formally by Congress and through the Court’s common law procedures.<sup>204</sup> Equity flows directly from the Natural Law.<sup>205</sup> The Court’s equitable powers were recognized by the first Congress in the Judiciary Act of 1789.<sup>206</sup> Equitable powers include those generally wielded directly by an English monarch, including the power to issue writs of *scire facias*, *certiorari*, *mandamus* and habeas corpus.<sup>207</sup> Courts long considered domestic and international policy through equitable power by interacting with the fabric of international law known as the Law of Nations.<sup>208</sup> But in

---

<sup>202</sup> See generally Judiciary Act of 1789, 1 Stat. 73. *C.f.* Katie Zezima, *supra* note 201; Adams, *Thoughts*, *supra* note 30 (Outlining aspects of judicial independence: “Their minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men. To these ends, they should hold estates for life in their offices; or, in other words, their commissions should be during good behavior, and their salaries ascertained and established by law.”).

<sup>203</sup> U.S. CONST. art. III, § 2.

<sup>204</sup> See generally Adams, *Thoughts*, *supra* note 30.

<sup>205</sup> See STORY, *supra* note 2, at 1.

<sup>206</sup> See Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73.

<sup>207</sup> *Ex parte Bollman*, 8 U.S. 75, 105 (1807) (quoting the Judiciary Act of 1789, ch. 20, §14, 1 Stat. 73) (the court’s equitable power is broad and includes “all other writs not specially provided for by statute”). *But see* FED. R. CIV. P. 81(b) (boldly claiming that “[t]he writs of *scire facias* and *mandamus* are abolished” when the Civil Rules Committee may not have the power to abolish these writs.).

<sup>208</sup> See U.S. CONST. art. 1, § 8, cl. 10; STORY, CONFLICT OF LAWS, *supra* note 16, at §§ 2–3 (noting that discussion over the Law of Nations facilitated talk about “general or universal rights and obligations” and that the Law of Nations arose from “the natural convenience” and “the general comity” of nations over the centuries after Jesus Christ of Nazareth came to this world.). *C.f.* Amy H. Kastely, *Cicero’s De Legibus: Law and Talking Justly Toward a Just Community*, 3 YALE JOURNAL OF LAW & THE HUMANITIES 1, 15 (1991) (Noting a discussion of fundamental, natural human rights that came before Jesus Christ of Nazareth recognized by Cicero who suggested that legal citizenship in an ancient polis reified the “common citizenship of all of us”—that is, the natural citizenship of all human beings as a mere incident of birth.) (citing Marcus Tullius Cicero, *De Legibus* 2.2.5); SARAH SPENGE MAN, SAINT AUGUSTINE AND HANNAH ARENDT ON LOVE OF THE WORLD: AN INVESTIGATION INTO ARENDT’S RELIANCE ON AND REFUTATION OF AUGUSTINIAN PHILOSOPHY 363–64 (2014) (“This is why *legal* equality is so important—because it permits us to acknowledge each other as equals before the law, entitled to certain rights of citizenship, while also allowing a space for human distinctiveness. Human differences have to be allowed to *be* in the private realm. . . . Belonging to a human community is so significant for Arendt because it enables

2013, the Court tried to apply the law as it is without considering equitable policy or fundamental principles, making use of the newly minted promise to abide by positivism in *Burrage*.<sup>209</sup> The Court also stepped away from the venerated tradition of equity by replacing the Law of Nations with the wholly novel rule from *Jacobs*, which pretended comity and grace could be reduced to a mere matter of statutory interpretation.<sup>210</sup>

In *Marbury v. Madison*, the Court famously overturned the Judiciary Act's writ of mandamus using Article III power—emphasizing the independent power of the U.S. Supreme Court.<sup>211</sup> *Marbury* revealed the mysterious nature of the Supreme Court's powers as both vested by the constitution and enabled by legislation.<sup>212</sup> Thus, Justice Sandra Day O'Connor conceived of the Judiciary Act as the third of three founding documents.<sup>213</sup> Most importantly, the equitable powers are an important check in the delicate balance of powers set by the U.S. Constitution.<sup>214</sup> Notably, founder Thomas Jefferson particularly despised the Court's equitable powers because they reminded him of monarchy.<sup>215</sup> Despite

---

each individual human person to have legal equality and the opportunity to demonstrate through speech and action who he is as a unique person.”).

<sup>209</sup> See *Burrage v. United States*, 134 S. Ct. 881, 887–92 (2014).

<sup>210</sup> See *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (quoting *Younger v. Harris*, 401 U.S. 37, 43–44 (1971)).

<sup>211</sup> *Marbury v. Madison*, 5 U.S. 137, 176–80 (1803).

<sup>212</sup> See *id.* at 178.

<sup>213</sup> See O'Connor, *supra* note 94, at 3 (The Judiciary Act of 1789 “is the last of the triad of founding documents along with the Declaration of Independence and the Constitution itself. The Declaration of Independence made clear that our Revolution sought to defend our nation's most basic liberties and values. Our Constitution gave form to the government that would protect those liberties and the common good. That government would succeed and those liberties would be protected only through the nation's commitment to the legal process and the rule of law. The Judiciary Act fulfilled that commitment. For two hundred years we have remained committed to the Rule of Law.”).

<sup>214</sup> See *id.* at 10. Adams, *Thoughts*, *supra* note 30.

<sup>215</sup> Letter from Thomas Jefferson to Albert Gallatin (August 2, 1823) available at <http://founders.archives.gov/documents/Jefferson/98-01-02-3667> (Jefferson was of the opinion that his anti-slavery, political opponents from the North would use the federal judiciary to “monarchize this nation” if they could. He also describes a robust federal court “as a premier pas [first step] to monarchy.” Monarchizing the nation to Jefferson apparently included freeing African slaves. Jefferson continued: “*The judges, as before, are at their head, and are their entering wedge.*”) (paraphrasing Isaiah 11:6 in this oddly apocalyptic passage) (emphasis added). See also Letter from Thomas Jefferson to George Hay (June 2, 1807) available at <http://founders.archives.gov/documents/Jefferson/99-01-02-5683> (“I

Jefferson's distaste for the Court, the independent use of equity by the American Court is generally regarded as the United States' greatest addition to political science.<sup>216</sup> As Hannah Arendt wisely recognized, the United States successfully separated the power and authority of the law by establishing the independence of the Court.<sup>217</sup> The Court's precedent on the use of equitable powers has thus been thoroughly based on prudence, and it strictly adhered to a doctrine of judicial forbearance to protect its power from the political criticism of the other branches.<sup>218</sup> Accordingly, the Supreme Court refused to be "reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law."<sup>219</sup>

---

observe that the case of *Marbury v. Madison* has been cited, and I think it material to stop at the threshold the citing that case as authority & to have it denied to be law. . . . I have long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public & denounced as not law: & I think the present a fortunate one because it occupies such a place in the public attention." *Compare* *Brom & Bett v. Ashley* (Mass., 1781) (Massachusetts ended slavery through its courts' recognition of fundamental human rights after the Revolution—justifying Jefferson's hypocritical fears that an empowered federal judiciary would end slavery throughout the United States) and Thomas Jefferson, *Kentucky Resolutions of 1798*, available at <http://www.constitution.org/cons/kent1798.htm> (not passed into law) (anonymously and hypocritically attempting to convince the State of Kentucky to declare federal law null and void as a matter natural rights—Kentucky wisely bowed to federal law), with Mike Huckabee, *End Judicial Supremacy*, ABC'S THIS WEEK (June 6, 2015) available at <https://www.facebook.com/mikehuckabee/videos/10153243237022869/> (posted by Mike Huckabee) (Vocally supporting Kim Davis, a Kentucky government employee who refused to grant gays and lesbians marriage licenses after the Supreme Court decided there was a fundamental human right to marry saying: "And to say that we need to surrender to judicial supremacy is to do what Jefferson warned against, which is in essence to surrender to judicial tyranny.").

<sup>216</sup> See HANNAH ARENDT, *ON REVOLUTION* 200 (1963).

<sup>217</sup> *Id.* at 201.

<sup>218</sup> *Bush v. Gore*, 531 U.S. 98 (2000) (this was a prime example of judicial activism, pulling the case right out from under the Florida courts to decide an extremely political question); Andrew Rosenthal, *O'Connor Regrets Bush v. Gore*, THE NEW YORK TIMES, (April 29, 2013), available at <http://takingnote.blogs.nytimes.com/2013/04/29/oconnor-regrets-bush-v-gore/> (admitting that *Bush v. Gore* hurt the Court's reputation and that the Court should have denied cert because of how political the question was). *C.f.*, Zezima, *supra* note 203.

<sup>219</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

The Court's equitable power is meant to check the executive and legislative powers in order to secure the rights of natural persons.<sup>220</sup> In fact, the 2013 Court officially turned its back on the very balance of powers that established its legitimacy.<sup>221</sup> One important purpose of the Court's equitable powers is to preserve the independent seat it holds in the balance of powers.<sup>222</sup> But today the Court is using its equitable powers to undermine even the fundamental doctrines of *stare decisis* and the Rule of Law.<sup>223</sup> The Court issued at least one advisory opinion in *Noel Canning*, aggrandizing the President's role by citing to the Office of Legal Counsel opinions as persuasive authority.<sup>224</sup> The Court further aggrandized the role of Congress by reducing matters of equity, constitutional interpretation, and fundamental

---

<sup>220</sup> Adams, *Thoughts*, *supra* note 30; *Chisholm v. Georgia*, 2 U.S. 419, 473, 476 (1793) (Opinion of Jay, C.J.) (deciding not to limit the Court's jurisdiction because it "would not correspond with the equal rights we claim, with the equality we profess to admire and maintain, and with that popular sovereignty in which every citizen partakes . . . it would not be equal or wise to let any one State decide and measure out the justice due to others . . . . Because, in cases where some citizens of one State have demands against all the citizens of another State, the cause of liberty and the rights of men forbid that the latter should be the sole judges of the justice due to the latter, and true Republican government requires that free and equal citizens should have free, fair, and equal justice."); U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them . . . from domestic violence.").

<sup>221</sup> See, e.g., *Burrage v. United States*, 134 S. Ct. 881, 892 (2014).

<sup>222</sup> Adams, *Thoughts*, *supra* note 30; *Chisholm v. Georgia* 2 U.S. 419, 465 (1793) (Opinion of Wilson, J.) (exercising a "superintending judicial authority" in order "to establish justice" saying: "By such exercise and establishment [of the judicial branch], the law of nations, the rule between contending states, will be enforced among the several states in the same manner as municipal law.") (citing U.S. CONST. pmb.).

<sup>223</sup> See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2037 (2014) (The majority based its decision solely upon *stare decisis*, deciding that the principle of *stare decisis* was enough to affirm precedent according to the Rule of Law. The minority seemed to argue that something more than *stare decisis* was required to affirm precedent, like legislation. It ignored the traditional, underlying connection between *stare decisis* and the Rule of Law. The minority in *Bay Mills* became the majority in *Harris v. Quinn*, 134 S. Ct. 2618 (2014)); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2425 (2014) (Thomas, J., concurring) (citing *Bay Mills*, 134 S. Ct. at 2053–54 n. 6 (Thomas, J., dissenting)); *Harris*, 134 S. Ct. at 2638 n. 19 (The majority ignored any discussion of *stare decisis* and the Rule of Law.).

<sup>224</sup> See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2562 (2014).

principles to the mere auspices of statutory interpretation.<sup>225</sup> In many cases the Court essentially stopped using its Article III authority “to say what the law is” in order to limit the laws of Congress and the executive actions of the President with the Constitution.<sup>226</sup> The result is the bifurcation and fraying of the Court’s precedent by the radical reformation of *stare decisis* that will deeply injure the Court’s ability to uphold the Rule of Law. *Hobby Lobby* is the quintessential case regarding the new trend of “giving to the [L]egislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits.”<sup>227</sup>

*A. Equitable Power as of 2013 SCOTUS Review*

The Court issued *Hobby Lobby* to extend a personhood right of religious liberty to closely held, for-profit corporations through the Religious Freedom Restoration Act (RFRA).<sup>228</sup> Instead of relying on previous case law and the First Amendment, the Court pioneered a new course.<sup>229</sup> In fact, the Court used *Hobby Lobby* to support its recently made promise to be positivist in *Burrage* by saying, “The wisdom of Congress’s judgment [even when they are attempting to expound the First Amendment] on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the HHS contraceptive mandate is

---

<sup>225</sup> See *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. . . . Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare that, if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.”).

<sup>226</sup> *Id.* at 177.

<sup>227</sup> Compare, *Marbury*, 5 U.S. at 178, with *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772 (2014) (“[N]othing in the text of RFRA as originally enacted suggested that the statutory phrase ‘exercise of religion under the First Amendment’ was meant to be tied to this Court’s pre-*Smith* interpretation of that Amendment.” This is a prime example of how bifurcating or fraying a constitutional ruling controverts the principle of the written constitution in the United States that was recognized by the Supreme Court in *Marbury*.)

<sup>228</sup> *Hobby Lobby*, 134 S. Ct. at 2775.

<sup>229</sup> See *id.* at 2785.

unlawful.”<sup>230</sup> Therefore, the Court used the Dictionary Act to define the word “person” to include for-profit corporations.<sup>231</sup> In doing so the Court pretended that it had no authority or independent duty to expound the First Amendment’s definition of “person.”<sup>232</sup> Now the Court has two definitions for “person” regarding religious free exercise, one apparently provided by Congress and the other by the Constitution.<sup>233</sup> The Court could have relied upon its decisions in *Citizens United v. Federal Election Commission* and *McCutcheon v. Federal Election Commission* to extend more First Amendment rights to corporate persons.<sup>234</sup> However, by taking the path it did the Court artificially backed Congress’s authority to expound the Constitution without checking congressional power with the Court’s Article III authority to expound the Constitution itself.

Puritanical belief once attempted to combine the church with the colonial government systems that were administered by the English King’s corporations.<sup>235</sup> Then the First Amendment purposely and deliberately

---

<sup>230</sup> *Id.* at 2785 (citing Religious Freedom Restoration Act, 42 U.S.C. §§2000bb–2000bb-4 (2012)).

<sup>231</sup> *Id.* at 2793 (citing The Dictionary Act, 1 U.S. C. § 1 (2012)).

<sup>232</sup> *But see Marbury*, 5 U.S. at 178 (*Hobby Lobby* maintains “that courts must close their eyes on the constitution, and see only the law.” And this “subvert[s] the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory.”).

<sup>233</sup> *See Employment Div. v. Smith*, 494 U.S. 872, 901 (1990) (expressly not departing “from settled First Amendment jurisprudence” regarding the rights of a “person”) (citing U.S. CONST. amend. I); *Hobby Lobby*, 134 S. Ct. at 2793 (making a rule about free religious exercise regarding a corporate “person” without conforming it to the constitution). *Cf.* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (Souter, J., dissenting) (recognizing that “we have two Eleventh Amendments, the one ratified in 1795, the other (so-called) invented by the Court nearly a century later in *Hans v. Louisiana*, 134 U.S. 1 (1890).”) (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)) (deciding that the Eleventh Amendment effectively reversed the majority opinions of *Chisholm v. Georgia* but made a ruling by affirming a concept of state sovereignty rejected by *Chisholm* without conforming it to the Eleventh Amendment. Thus *Hans* gave life to a whole branch of state sovereignty case law that is un contemplated by the constitution (and that should have been foreclosed by the result of the Civil War) similar to how *Hobby Lobby* gave life to a new branch of religious exercise freedoms not contemplated by the constitution (and that should have been foreclosed by the unanimous rejection of the Puritan experiment in 1776).).

<sup>234</sup> *Citizens United v. Fed. Elections Comm’n*, 130 S. Ct. 876, 917 (2010); *McCutcheon v. Fed. Elections Comm’n*, 134 S. Ct. 1434, 1462 (2014).

<sup>235</sup> *See* THOMAS PAINE, OF CONSTITUTIONS, GOVERNMENTS, AND CHARTERS 456–58 (1805) [hereinafter PAINE, OF CONSTITUTIONS] (Paine argued that the power of the

abolished this combination.<sup>236</sup> It seems that *Hobby Lobby* reopened the door to judiciary-backed management of employees according to their employers' religious beliefs. All the while the charter power of the states that creates all corporations is the same type the English King first used to create townships, colonies, universities, and churches in the new world.<sup>237</sup> If *Hobby Lobby* truly does have the broad reach Erwin Chemerinsky and others fear it has, these long settled issues of the separation of church and state and the equal liberty of workers and employees could resurface anew.<sup>238</sup> In fact the *Wheaton* injunction seems to stand for the right of corporations to subsume the rights of female employees, even when those rights were clearly protected by a duly enacted law.<sup>239</sup> The similarities of this with the Puritan use of corporate courts to banish women went unconsidered.<sup>240</sup> The slave-trade era struggles with the word "person" are

---

government to issue charters to create corporations "is unconstitutional, and when obtained by bribery and corruption is criminal. It is also contrary to the intention and principle of annual elections." In short he felt that the charter problem arose from "[t]he general defect in all the [State] constitutions" which was "that they are modelled too much after the system, if it can be called a system, of the English Government, which in practice is the most corrupt system in existence, for it is corruption systematized.")

<sup>236</sup> U.S. CONST. amend. I. See also U.S. CONST. art. VI (abolishing "religious tests").

<sup>237</sup> See PAINE, OF CONSTITUTIONS, *supra* note 235. Bubble Act 1720, 6 Geo. I, c. 18 (Eng.) (repealed 1825) (according to this act corporate law was centralized under the Crown by nationalizing most corporations and abolishing most shareholding corporations in order to end the corruption that occurred in 1720 due to the speculation due to the English South Sea Company and the French Mississippi Company).

<sup>238</sup> Erwin Chemerinsky, *The Broad Reach of the Narrow Hobby Lobby Ruling*, L.A. TIMES, June 30, 2014, available at <http://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-hobby-lobby-supreme-court-20140701-story.html>.

<sup>239</sup> See *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2809–10 (2014).

<sup>240</sup> See THE EXAMINATION OF MRS. ANNE HUTCHINSON AT THE COURT AT NEWTON (1637), available at <http://www.constitution.org/primarysources/hutchinson.html> (Reverend Winthrop stated: "I am persuaded that the revelation she brings forth is delusion. . . . Mrs. Hutchinson, the sentence of the court you hear is that you are banished from out of our jurisdiction as being a woman not fit for our society, and are to be imprisoned till the court shall send you away."); EVE LAPLANTE, AMERICAN JEZEBEL: THE UNCOMMON LIFE OF ANNE HUTCHINSON, THE WOMAN WHO DEFIED THE PURITANS 127, 181, 184 (2004) (At Anne Hutchinson's Church trial William Coddington said, "I do not, for my own part, see any equity in the court in all your proceedings." And Church elder Thomas Oliver stated: "All things in the church should be done with one heart and one soul and one consent: any and every act done by the church may be as the act of one man." And thus the church may not "proceed to any censure when all the members do not consent thereto."). *C.f.* Hosanna-Tabor



conveniently forgotten while the Court has renewed its creative license to define that term.<sup>241</sup> Matters become even more dismal when the Supreme Court expounds the First Amendment while showing signs of a deep misunderstanding of Internet technology. Moreover, the Court is poised to overturn *Red Lion*—indicating an understanding of end-user Internet speech as not meriting First Amendment protection.<sup>242</sup>

The disingenuous result of *Hobby Lobby* was to pretend the Supreme Court is a mere administrative agency “to enforce RFRA as written” on a matter of perfect and direct overlap with the Constitution, giving life to an arbitrary and unconstitutional concept of religious liberty.<sup>243</sup> With this

---

Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 694 (2012) (a female minister was fired and the First Amendment extinguished her employment discrimination claim so the Church could choose its shepherds—but who is the Church? Unanimity? Majority? Central Authority? And should the Court speak on such things that were debated during the Puritan experiment and long since settled?).

<sup>241</sup> See Adams, *supra* note 105, at 17, 23 (“First, they are demanded as persons, as the subjects of Spain, to be delivered up as criminals, to be tried for their lives, and liable to be executed on the gibbet. Then they are demanded as chattels, the same as so many bogs of coffee, or bales of cotton, belonging to owners, who have a right to be indemnified for any injury to their property. . . . According to the construction of the Spanish minister, the merchandise were the robbers, and the robbers were the merchandise. The merchandise was rescued out of its own hands, and the robbers were rescued out of the hands of the robbers. . . . Can a greater absurdity be imagined in construction than this, which applies the double character of robbers and of merchandise to human beings?”).

<sup>242</sup> See, e.g., McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014) (“With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment’s purpose ‘to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,’ this aspect of traditional public fora is a virtue, not a vice.”) (quoting *Red Lion Broad. Co. v. FCC*, 395 U. S. 367, 390 (1969)). The court cites to another case that is quoting *Red Lion* directly. The problem is that *Red Lion* found speech facilitated by communications technology did achieve First Amendment mandates, while the Court is citing to *Red Lion* to say the opposite. See also Schuette v. BAMN, 134 S. Ct. 1623, 1644 (2014) (citing *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603, 610 (1990) (“It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”) (quoting *Red Lion*, 395 U.S. at 390)). See also Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 713, 778 (1986). Cf. Joshua J. Schroeder, *Bringing America Back to the Future: Reclaiming a Principle of Honesty in Property and IP Law*, 35 HAMLINE J. PUB. L. & POL’Y 1, 90–91 (2014).

<sup>243</sup> *Hobby Lobby*, 134 S. Ct. at 2751, 2785. Cf. *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44, 74 (1996) (Souter, J., dissenting) (recognizing that “we have two Eleventh

opinion, the Court tied its own hands in regard to its equitable power to expound the rights of the Constitution and refused to speak to the fundamental human rights that flow beneath it.<sup>244</sup> But only four days after releasing *Hobby Lobby*, any illusion that the Court would actually keep its hands tied was obliterated by the *Wheaton* injunction.<sup>245</sup> That said, there were warning signs that the Court was being disingenuous to feign subordination to Congressional law. One example is *Scialabba v. Cuellar de Osorio* in which Justice Sotomayor dissented by citing the *Burrage* rule while a plurality decided to give *Chevron* deference to an agency in defining wholly ambiguous statutory terms instead of following *Burrage*.<sup>246</sup> Another example is *Abramski v. United States* where Justice Scalia dissented by citing to the *Burrage* rule in order to argue for application of the rule of lenity to ambiguous criminal statutes.<sup>247</sup> Finally, the Court never explained why RFRA was given overriding authority over the ACA in *Hobby Lobby* and not the other way around. Perhaps the Court should have considered the rules about conflicting federal laws it made in *POM Wonderful, LLC v. The Coca-Cola Co.* and *Dastar Corp. v. Twentieth Century Fox Film Corp.*<sup>248</sup>

With the *Jacobs* rule that the Court has a “virtually unflagging” responsibility to hear cases within its jurisdiction, the Court simply stopped applying the age old doctrine of judicial forbearance.<sup>249</sup> The doctrines of

---

Amendments, the one ratified in 1795, the other (so-called) invented by the Court nearly a century later in *Hans v. Louisiana*, 134 U.S. 1 (1890).”)

<sup>244</sup> See *Hobby Lobby*, 134 S. Ct. at 2751, 2785.

<sup>245</sup> See *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2806 (2014).

<sup>246</sup> 134 S. Ct. 2191, 2192, 2223 (2014) (Sotomayor, J., dissenting). *C.f.* *Chickasaw Nation v. United States*, 534 U.S. 84, 99 (2001) (O’Connor, J., dissenting) (“Both approaches therefore require rewriting the statute. . . . Neither of these rewritings is necessarily more ‘serious’ than the other: At most, each involves doing no more than reversing a change made in committee.”); *Ng Fung Ho v. White*, 259 U.S. 276 (1922) (a case in which the Court took immigration issues out of the hands of agency authority as a matter of Fifth Amendment rights requiring a jury trial).

<sup>247</sup> 134 S. Ct. 2259, 2280–81 (2014) (Scalia, J., dissenting). *But see* *Robers v. United States*, 134 S. Ct. 1854, 1855 (2014) (refusing to apply the rule of lenity in an arguably ambiguous criminal statute).

<sup>248</sup> *POM Wonderful, LLC v. The Coca-Cola Co.*, 134 S. Ct. 2228, 2233 (2014) (decided that the Lanham Act and the Federal Food, Drug, and Cosmetic Act are reconcilable and may both coexist without a problem and therefore neither statute needed to be modified); *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 23, 33–37 (2003) (decided that the Visual Artists Rights Act of the Copyright Law removed rights formally recognized under the unrelated and previously enacted rights against false advertising under the Lanham Act).

<sup>249</sup> See *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013).

judicial forbearance and prudence were created to protect the independent authority of the Supreme Court when Separation of Powers disputes arise with the other branches or in the public debate.<sup>250</sup> In fact the imprudent use of equitable power can put the Court's overall powers in real, political danger. The recent decision in *Noel Canning* is just such an "extravagance so absurd and excessive" that it amounts to judicial imprudence.<sup>251</sup> The Court's application of corporate law principles to general jurisdiction in *Daimler v. Bauman* egregiously "disclaim[s] all pretensions to such a jurisdiction" when the Court might be wiser to remain silent.<sup>252</sup> Admittedly, when the Court has the support of the other branches of government a carefully considered use of equity can be very powerful. Such was the case in *Brown v. Board of Education* where the Court ordered the desegregation of a school in Little Rock, and the President and Congress enforced the Court's injunction without inter-branch dispute.<sup>253</sup> However, the equitable injunctions by the Court are sometimes not supported by Congress and the President.<sup>254</sup> Long forgotten are the lessons learned in the days when

---

<sup>250</sup> See *Marbury v. Madison*, 5 U.S. 137, 170 (1803) ("It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction [over political actions taken by the other branches]. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the Court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.").

<sup>251</sup> *Marbury*, 5 U.S. at 170; *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

<sup>252</sup> *Marbury*, 5 U.S. at 170; *Daimler v. Bauman*, 134 S. Ct. 746, 763 (2014).

<sup>253</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>254</sup> Compare *Worcester v. Georgia*, 31 U.S. 515, 529 (1832), with Jeffrey Rosen, *The Supreme Court: The First Hundred Years*, PBS, available at <http://www.pbs.org/wnet/supremecourt/antebellum/history2.html> (last visited Feb. 14, 2015) (Andrew Jackson responded to the Court's decision in *Worcester* by saying: "John Marshall has made his decision, now let him enforce it."). Compare *The Antelope*, 23 U.S. 66, 126 (1825), with Adams, *supra* note 105, at 73 ("[*The Antelope*] was the most solemn and awful decision that ever was given by any Court. The Judges did not deliver their opinions for publication, or the reasons, because the court was divided."). Compare *The Amistad*, 40 U.S. 518, 528 (1841), with Adams, *supra* note 105, at 43, 76 ("Is there a law of Habeas Corpus in the land? Has the expunging process of black lines passed upon these two Declarations of Independence in their gilded frames? Has the 4th of July, '76, become a day of ignominy and reproach? . . . So the Spanish minister says his government has no ship to receive these people, and the President must therefore go further, and as he is responsible for the safe-keeping and delivery of the men, he must not only deliver them up, but ship them off in a national vessel,

Southern courts operated under a state of constant insurrection to the federal government.<sup>255</sup> As a result, the 2013 term features a Court that is utterly cavalier in light of its own history.

The state of equity after the succession of cases in the 2013 term is feigned subordination to the laws of Congress as if every law can amend the Article III infused Judiciary Act of 1789 in one hand and then insurrection against that very concept in the other.<sup>256</sup> In fact, the Court likened itself to an administrative agency instead of an independent check on the other powers of government and then failed to fit the bill. The Court also attempted to pretend that equity is wholly devoid of its Natural Law origins, and now solely depends on the Natural Law's covering.<sup>257</sup> The Court misunderstood its place below the Constitution, the Law of Nations, and the Natural Law and did not cite to those bodies of law, and instead dictated to American citizens and foreign sovereigns alike. In fact the Court did not even consider using its equitable power to protect natural rights when it should have. But at the same time it expended considerable equitable power to limit its use of equitable power during the Court's statutory and treaty interpretation. Strangely the Court even allowed fundamental issues considered to be the backdrop of the law to be unnaturally dictated by statutes. This included limiting access to the writ of habeas corpus, equitable defenses, sovereign immunity, traditional contractual duties, general jurisdiction, prudential standing, and even the obstruction of the authority of the Court's *stare decisis*.<sup>258</sup> This led the Court into conflict with the Rule of Law itself and its Constitutional role of being a meaningful check in the balance of powers.

---

so that there may be no Habeas Corpus from the State Courts coming to the rescue as soon as they are out of the control of the judiciary.”).

<sup>255</sup> Adams, *supra* note 105, at 96 (“Upon this plain and simple statement of facts, can we choose but exclaim, if ever [a] soul of an American citizen was polluted with the blackest and largest participation in the African slave-trade, when the laws of his country had pronounced it piracy, punishable with death, it was that of this same John Smith. He had renounced and violated those rights, by taking a commission from Artigas to plunder the merchants and mariners of nations in friendship with his own; and yet he claimed the protection of that same country which he had abandoned and betrayed. Why was he not indicted upon the act of 15th May, 1820, so recently enacted before the commission of his last and most atrocious crime?”).

<sup>256</sup> See *supra* text accompanying note 238.

<sup>257</sup> See *supra* text accompanying notes 12–31.

<sup>258</sup> See *supra* text accompanying notes 84–87.

*B. The Significance of the Wheaton Injunction*

Wheaton College is a non-profit religious corporation.<sup>259</sup> By law it already has a religious exemption under the Affordable Care Act and did not need to rely on *Hobby Lobby* to be exempt from paying for contraceptive coverage.<sup>260</sup> In fact the Wheaton College request for an injunction was a wholly original request for a new and risky use of judicial equitable power. The Court was asked to enforce Wheaton's decision to clog government-provided contraceptive insurance to female employees of Wheaton College in violation of federal law.<sup>261</sup> By issuing the injunction requested by Wheaton the Court set its bare Article III equitable powers behind a decision by a corporation to defy federal regulations.<sup>262</sup> The Court set its bare equitable powers against the Article I & II powers, the rights of the women employees, the Rule of Law, and against the Court's own First Amendment precedent.<sup>263</sup> The injunction was not made by any power granted through RFRA, even if the case may eventually be decided by RFRA.<sup>264</sup> Rather, the injunction was granted solely pursuant to the equitable power of the Court recognized by the Judiciary Act (Sotomayor's dissent referred to the All Writs Act which was originally contained within the Judiciary Act).<sup>265</sup> The Court boldly protected Wheaton's violation of the ACA—a duly enacted law—without any settled law supporting its injunction.<sup>266</sup>

With the *Wheaton* injunction, the Supreme Court revealed its legal positivist approach as a mirage. The Court's apparent commitment in *Burrage* and *Jacobs* that was repeated throughout the 2013 term is a revealed

---

<sup>259</sup> *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2808 (2014) (Sotomayor, J., dissenting).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 2808.

<sup>262</sup> *Id.* at 2810 (Sotomayor, J., dissenting).

<sup>263</sup> *See, e.g., Emp't Div., Dept. of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990) (applying the traditional First Amendment test to a result Congress did not like—if RFRA overruled the result of this case, surely it did not and could not overrule the First Amendment test itself or the principle from *Marbury v. Madison* that the First Amendment has supremacy over the laws of Congress regarding matters of religious freedom).

<sup>264</sup> *Id.* at 2808.

<sup>265</sup> *Id.* at 2810 (citing All Writs Act, 28 U.S.C. §1651(a) (2012)).

<sup>266</sup> *Compare, Smith*, 494 U.S. at 877 (holding that the “right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes’”) (internal citations omitted), *with Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (recognizing a First Amendment right for a Church to choose the ministers “who will personify its beliefs”).

farce. This is a problem for a number of reasons. First, as Justice Sotomayor suspected, the *Wheaton* injunction deeply injured the Court's credibility.<sup>267</sup> After the injunction the Court's precedent about equity becomes wholly doubtful. Instead of binding precedent the Court's *stare decisis* now gives way to rules made on an ad hoc basis. Thus no one can be sure when equitable power will be expended next. This creates uncertainty in every sort of way. All citizens and corporations depend on the stability of the Court's precedent in all areas of law to make all manner of business and personal decisions.<sup>268</sup> In fact the mere existence of people who "relied reasonably on [a] rule's continued application" is enough to affirm precedent.<sup>269</sup> This is so because legal uncertainty carries untold costs and harms straight into the heart of society.<sup>270</sup> Public trust in the institution hangs in the balance. Everything from market crashes to vigilante justice could result from legal uncertainty.<sup>271</sup> If the breach of legal certainty is big enough mob violence

---

<sup>267</sup> See *Wheaton Coll.*, 134 S. Ct. at 2808 (Sotomayor, J., dissenting).

<sup>268</sup> See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854–56 (1992) ("The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. . . . Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. . . . [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. . . . The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application."); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."); *Cf. Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (reasoning that "[the] Court does not overturn its precedents lightly").

<sup>269</sup> *Casey*, 505 U.S. at 855.

<sup>270</sup> See *id.* at 836 ("Only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance . . . at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law.").

<sup>271</sup> *Chisholm v. Georgia*, 2 U.S. 419, 465 (1793) (Wilson, J.) (The third objective met by establishing the constitution was "'to ensure domestic tranquility.' This tranquility is most likely to be disturbed by controversies between the states. These consequences will be most peaceably and effectually decided by the establishment and by the exercise of a

will break out.<sup>272</sup> Lasting reform to end judicial independence could be foisted upon the Judicial Branch to avoid these harms.<sup>273</sup> Justice Sotomayor confirmed the reality of legal uncertainty when she noted that “Wheaton’s application comes nowhere near the high bar necessary to warrant an emergency injunction from this Court.”<sup>274</sup> The Court ventured into a minefield when it contradicted the authority of its own *stare decisis*, using an equitable injunction before a case or controversy was heard by the Court.<sup>275</sup>

---

superintending judicial authority. By such exercise and establishment, the law of nations, the rule between contending states, will be enforced among the several states in the same manner as municipal law.” (quoting U.S. CONST. pmb. (the purposes for ordaining and establishing the U.S. Constitution were “to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity”). *C.f.* U.S. Const. amend. XI (This amendment removed the federal courts’ jurisdiction over some matters brought against the states in the wake of *Chisholm*. Then, under the Eleventh Amendment’s removal of the judicial authority to provide legal certainty, the Civil War broke out almost ending this country. In fact cutting back the finding in *Chisholm* had a peculiar role in the precipitation of the Civil War. Thus the fact of the Civil War lends special weight to Justice Wilson’s opinion in *Chisholm* defending a “superintending judicial authority” because the exercise of judicial power could have kept the peace.).

<sup>272</sup> See, e.g., Scott Calvert & Joe Palazzolo, *After Baltimore Riots, Focus Turns to New Prosecutor*, THE WALL STREET JOURNAL (April 30, 2015), <http://www.wsj.com/articles/after-baltimore-riots-focus-turns-to-new-prosecutor-1430356697>. *C.f.* *Chisholm v. Georgia* 2 U.S. 419, 465 (1793) (Wilson, J.) (quoting U.S. CONST. prbl.) (noting that establishing a “superintending judicial authority” is the best way to “ensure domestic tranquility”).

<sup>273</sup> Adams, *Thoughts*, *supra* note 30 (defining the judicial independence that was eventually inserted into Article III of the Constitution). See Zezima, *supra* note 202. Huckabee, *supra* note 215 (arguing to “end judicial supremacy” saying: “And to say that we need to surrender to judicial supremacy is to do what Jefferson warned against, which is in essence to surrender to judicial tyranny.”); Letter from Thomas Jefferson to George Hay (June 2, 1807), *available at* <http://founders.archives.gov/documents/Jefferson/99-01-02-5683> (In truth, Thomas Jefferson hypocritically tried to lead such a reform: “I have long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public & denounced as not law . . .”).

<sup>274</sup> *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2808 (2014) (Sotomayor, J., dissenting).

<sup>275</sup> *Id.* *C.f.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting) (fearing the court had entered into a minefield—but not opining on the true minefield the court had entered into); *Kaley v. United States*, No. 12–464, slip op. at 20 (2014) (*Kaley* removed the adversarial process to avoid using equity, but the Wheaton injunction avoided the adversarial process in order to issue an emergency equitable order.).

Second, the Wheaton injunction flies in the face of the U.S. principles of legitimate government.<sup>276</sup> The new nation known as the United States was born decrying a proprietary corporate backdrop (i.e. the Virginia Company, etc.) by declaring the rights of natural persons.<sup>277</sup> So it is fascinating to see the Court expanding the religious rights meant for natural persons to the legal fictions known as corporations.<sup>278</sup> Corporations were used by the King of England to claim natural resources and to tax colonists—grievances that led up to the American Revolution.<sup>279</sup> In fact churches were among the corporations controlled by the King.<sup>280</sup> When the United States

---

<sup>276</sup> See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath sh[own], that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.”).

<sup>277</sup> *Id.* See also, e.g., *Adams’ Minutes of the Argument, Court of Vice Admiralty, Boston, 8 March 1773, Surveyor General vs. Loggs*, THE ADAMS PAPERS: DIGITAL EDITIONS: LEGAL PAPERS OF JOHN ADAMS, VOLUME 2, <http://www.masshist.org/publications/apde2/view?id=ADMS-05-02-02-0007-0003-0002> (last visited Mar. 3, 2015) [hereinafter LEGAL PAPERS OF JOHN ADAMS] (“Indian Natives had under God a Right to the Soil. That no good Title could be acquired by sovereign or subject, without obtaining it from the Natives.” Thus it was improper for the King to claim wood from colonists through incorporation by his charter power.); *Chisholm v. Georgia* 2 U.S. 419, 455–56 (1793) (Opinion of Wilson, J.) (“By a ‘state,’ I mean a complete body of free persons united together for their common benefit to enjoy peaceably what is their own and to do justice to others. It is an artificial person. It has its affairs and its interests; it has its rule; it has its rights; and it has its obligations. It may acquire property distinct from that of its members. It may incur debts to be discharged out of the public stock, not out of private fortunes of individuals. It may be bound by contracts, and for damages arising from the breach of those contracts. *In all our contemplations, however, concerning this feigned and artificial person, we should never forget that, in truth and nature, those who think and speak and act are men.*”) (emphasis added).

<sup>278</sup> See, e.g., *Hobby Lobby*, 134 S. Ct. at 2755.

<sup>279</sup> See, e.g., THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776).

<sup>280</sup> Bubble Act 1720, 6 Geo. I, c. 18 (Eng.) (repealed 1825) (This act centralized the authority to issue charters under the English Crown and was enacted due to the South Sea Crisis—a market crisis with many similarities with the housing market crash in 2008. As a result all the corporations known to the English colonists of 1776 were known to be the King’s, including church corporations.). *C.f.* *Campbell v. Hall*, 1 Cowp. 204 (1774) (Eng.) (deciding that the monarch can make and remake the constitutions of its colonies as a matter of its charter power by conquest) (aff’d in *Bancoult v. Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 ([2007] EWCA Civ 798) (Eng.) (Opinion of Lord Hoffman) (If there was anything from the British common law overturned by the American Revolution in the United States it is this line of reasoning that quotes *Campbell* to say “no



was born and the First Amendment was ratified, church corporations were separated from government control for the first time.<sup>281</sup> Thus, in the early opinions of the U.S. Supreme Court the personhood of corporations was discussed in order to develop independent law to ensure that money and property donated to churches and other charitable organizations would not end up in the private possession of a director or board member of such a corporation.<sup>282</sup> This was accomplished by applying trust principles and the Court examined the charter forming the corporation to determine whether a corporation should hold property indefinitely, as if it were an immortal person.<sup>283</sup> Throughout these analyses corporations were considered persons only in contemplation of the law.<sup>284</sup> In other words, corporations were only persons inasmuch as they needed to be in order to fulfill the purposes of the charter (treating the charter purpose similarly to a trust purpose).<sup>285</sup> Finally, the Court reserved the power to reform corporations, or even revoke their charters, if they were not managed according to the charter's purposes.<sup>286</sup>

---

question was ever started before, but that the King has a right to a legislative authority over a conquered country." According to this sheer power exercised over English colonies, the monarch issues Orders in Council to make and remake the constitutions of its conquered territories. In this case the Queen issued an Order in Council in order to keep the Chagossians banished from their home land in order for the English government to keep leasing their island to the United States as a military outpost in the Indian Ocean. This is part and parcel of what the English government counts as a part of its charter power over corporations.).

<sup>281</sup> *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 876–77 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious beliefs as such.'") (emphasis omitted) (internal citations omitted).

<sup>282</sup> *See Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 544–45, 574–75, 643 (1819).

<sup>283</sup> *Id.* at 636 ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.").

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 637, 643–44 (The object of a corporation is "the sole consideration of the grant" and thus achieving its purposes should be "difficult, perhaps unattainable, without the aid of a charter of incorporation."). *C.f.* IRS, 7.25.3.3.6.4 (2/23/1999), available at [http://www.irs.gov/irm/part7/irm\\_07-025-003.html](http://www.irs.gov/irm/part7/irm_07-025-003.html) (acknowledging the operation of *cy pres* doctrine as a matter of state law to reform corporations as near as possible to their charter's stated purpose).

Charters are always created and granted by the government alone.<sup>287</sup> And corporate shareholders and directors who benefit from the limited liability common to many corporate charters today are benefiting solely from the public policy preferences of the state.<sup>288</sup>

Instead of beginning with the public policy goals furthered by the states' charter powers, the Court now begins with the legal fiction of the corporation as person.<sup>289</sup> Then, instead of using the metaphor of "corporate person" for the limited purpose of ensuring the aims of a charter are followed, the Court bends over backward to extend personhood rights to corporations, as if they are natural persons.<sup>290</sup> This resembles the old British version of corporations, to which John Adams argued God would never have granted natural rights.<sup>291</sup> Puritanical religion made use of these corporations to impose their own religious views on the masses, but Puritanical coercion was finally abolished by the First Amendment.<sup>292</sup> Granting Wheaton the ability to impose its religious views upon its employees is reminiscent of the puritanical coercion abolished by the First Amendment.<sup>293</sup> Puritans like the English dictator Oliver Cromwell and his advisor John Selden conceived of religious liberty as a strong and rich man's liberty to take away the liberty of the weak and poor.<sup>294</sup> This concept of liberty is an oxymoron that was

---

<sup>287</sup> *Id.* at 637.

<sup>288</sup> See Chemerinsky, *supra* note 238 (Dean Erwin Chemerinsky of UC Irvine Law School makes this point and would have used the charter purpose in his analysis of corporate rights).

<sup>289</sup> See *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310 (2010). *But see Woodward*, 17 U.S. at 636.

<sup>290</sup> See *Citizens United*, 558 U.S. at 312.

<sup>291</sup> See LEGAL PAPERS OF JOHN ADAMS *supra* note 277, at 267; *Chisholm v. Georgia* 2 U.S. 419, 455–56 (1793) (Wilson, J.).

<sup>292</sup> Thomas Jefferson, *A Bill for Establishing Religious Freedom*, in THOMAS JEFFERSON: WRITINGS 347 (Library of America, ed. 1984) [hereinafter JEFFERSON: WRITINGS] (the purpose of speech and religion protections are to safeguard the truth's "natural weapons [of] free argument and debate.").

<sup>293</sup> ROGER WILLIAMS, THE BLOODY TENENT OF PERSECUTION 3 (Samuel L. Caldwell ed., 1867) ("It is the will and command of God, that (since the coming [*sic*] of his Sonne the Lord Jesus) a permission of the most paganish, Jewish, Turkish, or Antichristian consciences and worships, be granted to all men in all nations and countries: and they are only to be fought against with that sword which is only (in Soule matters) able to conquer, to wit, the sword of Gods Spirit, the Word of God.").

<sup>294</sup> REID BARBOUR, JOHN SELDEN: MEASURES OF THE HOLY COMMONWEALTH IN SEVENTEENTH-CENTURY ENGLAND 14 (2003) (Selden envisioned an English Sanhedrin inspired by ancient Jewish society to "prosecute the sectarian acts of zeal . . . [which was] violent zeal in the welfare of religious society.").

abolished in the United States and must be guarded against for as long as the First Amendment is in force.<sup>295</sup>

In short, the *Wheaton* injunction resulted in deeply troubling questions about where the Court is actually going. The Court is not genuinely committed to legal positivism, but it seems to be radically reforming fundamentals like *stare decisis*.<sup>296</sup> The Court now keeps two separate definitions of “person” regarding an exercise of religious belief—one for RFRA, and the other for the First Amendment.<sup>297</sup> However, as long as the First Amendment is in force the Court cannot interpret RFRA to usher in anti-American Puritanical or British forms of liberty and corporate law that have long been abolished here.<sup>298</sup> As long as Articles I–III of the Constitution remain in force, the Court cannot remove itself from being a check in the balance of powers even if Congress demands it.<sup>299</sup> The Court also cannot administer the law unequally even if some clients argue that there are two different layers of religious protection since RFRA was enacted.<sup>300</sup> The duty to administer the law equally comes from the Rule of Law principle that informs *stare decisis*, prudential standing requirements, general jurisdiction principles, and Constitutional precedent. These fundamentals cannot be upheld one day and overturned the next.<sup>301</sup> They

---

<sup>295</sup> LAPLANTE, *supra* note 240, at 127, 181, 184. See Edward Fry, *Life of John Selden*, in TABLE TALK OF JOHN SELDEN 177 (Frederick Pollock ed., 1927) (The Puritans who championed this idea of liberty in England also laid the foundations of legal positivism. In fact Selden’s scathing comments on equity regarding the “Chancellor’s foot,” existed to remove any obstruction a judge might create against the “violent zeal” Selden imagined a legislature should prosecute in the name of Puritanical radical religion.).

<sup>296</sup> See *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2808 (2014) (Sotomayor, J., dissenting).

<sup>297</sup> See *Chisholm v. Georgia*, 2 U.S. 419, 455–56 (1793) (Wilson, J.) (“By a ‘state,’ I mean a complete body of free persons united together for their common benefit to enjoy peaceably what is their own and to do justice to others. It is an artificial person. It has its affairs and its interests; it has its rule; it has its rights; and it has its obligations. It may acquire property distinct from that of its members. It may incur debts to be discharged out of the public stock, not out of private fortunes of individuals. It may be bound by contracts, and for damages arising from the breach of those contracts. *In all our contemplations, however, concerning this feigned and artificial person, we should never forget that, in truth and nature, those who think and speak and act are men.*”) (emphasis added).

<sup>298</sup> See *id.*

<sup>299</sup> See U.S. CONST. arts. I–III.

<sup>300</sup> See *supra* notes 233, 297, and accompanying text.

<sup>301</sup> See *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2036 (2014) (Opinion of Kagan, J.) (“*stare decisis* is a foundation stone of the rule of law”); *Harris v. Quinn*, 134

also cannot be specifically tailored to each and every party as the Court sees fit.<sup>302</sup> To administer the law equally, the Court has to make rules and live by them consistently.<sup>303</sup> Congress cannot be a stopgap for the Court in this respect.<sup>304</sup> Congress legislates upon the presumption that the Courts will continue to wield their traditional equitable powers to preserve their own Article III authority over the basic rules of jurisdiction, standing, federalism and Constitutional rights—all of which hang upon the continued affirmation of the doctrine of *stare decisis*.<sup>305</sup>

#### IV. CONCLUSION: RESTORING STARE DECISIS, THE RULE OF LAW AND THE WRITTEN CONSTITUTION

No American lawyer should tread lightly into a discussion of the judicial legitimacy of the Supreme Court.<sup>306</sup> The risks are high. But the duty to expound the truth is naturally placed within the very being of every man and woman who Nature's God created to live and work in a free government.<sup>307</sup> The fundamental principles expounded by the Court in *Marbury v. Madison* have been unsettled.<sup>308</sup> And the Court initiated a radical reform of *stare decisis* to fray and bifurcate its precedent with ad hoc rulemaking in its 2013

---

S. Ct. 2618, 2651 (2014) (Kagan, J., dissenting) ("*stare decisis* . . . is a foundation stone of the rule of law.") (quoting *Bay Mills* 134 S. Ct. at 2036) (internal quotation marks omitted).

<sup>302</sup> *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2813–15 (2014) (Sotomayor, J., dissenting).

<sup>303</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854–56 (1992).

<sup>304</sup> See U.S. CONST. art. I.

<sup>305</sup> *Pennhurst State School Hosp. v. Halderman*, 465 U.S. 89, 165 (1984) (Stevens, J., dissenting) ("Throughout its history this Court has derived strength from institutional self-discipline. Adherence to settled doctrine is presumptively the correct course. Departures are, of course, occasionally required by changes in the fabric of our society. When a court, rather than a legislature, initiates such a departure, it has a special obligation to justify the new course on which it has embarked.") (citing *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420–21 (1983) ("[T]he doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law.")).

<sup>306</sup> See *supra* text accompanying notes 23–24.

<sup>307</sup> Letter from John Jay, Chief Justice, to Alexander Hamilton, Secretary of the Treasury (Nov. 26, 1793), in XV THE PAPERS OF ALEXANDER HAMILTON 412–13 (Harold C. Syrett, ed., Columbia Univ. Press 1969). ("It is generally understood that you and Mr. Jefferson are not perfectly pleased with each other, but surely he has more magnanimity than to be influenced by that consideration to suppress Truth, or what is the same Thing refusing his Testimony to it. Men may be hostile to each other in politics and yet be incapable of such conduct.").

<sup>308</sup> See, *supra* notes 120, 264, 267, 269 and accompanying text.

term.<sup>309</sup> Many will find this discussion dangerous, and it is. Thus, one must proceed only with the maximum care possible and with the highest respect for the institution one can feasibly render. But one must nonetheless proceed. The Declaration of Independence specifically expounded the Natural Law—a document decried by British positivists who claimed it appealed improperly to heaven because of their own deep-seated atheistic religious views.<sup>310</sup> The Supreme Court has since taken to citing the English critics of the American Revolution in a dangerous bout of hypocrisy, stooping to a pretended adoption of their legal positivist positions that are, in fact, hypocritical toward even Great Britain's Natural Law origins.<sup>311</sup>

This Article is thus entered into the tribunals of the Natural Law, unto the wise and devout within the American legal community for the safeguarding of the judicial department of the United States, for the continued legitimacy of the United States government, and in support of all governments with written constitutions. The fundamental holding of *Marbury v. Madison*, drawn from the very fact of the written U.S. Constitution, must be reaffirmed with all due haste.<sup>312</sup> The Rule of Law and

---

<sup>309</sup> See, *supra* notes 124, 195, 210, 212, 238–39 and accompanying text.

<sup>310</sup> Bentham, *supra* note 3. *Cf.* *BG Group v. Republic of Argentina*, 134 S. Ct. 1198, 1208–09 (2014); *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014).

<sup>311</sup> See, *supra* note 2, 327–28 and accompanying text. See, *e.g.*, Lepore, *supra* note 112 (noting that Oliver Cromwell supposedly called the Magna Carta the “magna farta” and that “he also called the Petition of Right the ‘Petition of Shite.’”). *Cf.* Jeremy Bentham, *Plan of Parliamentary Reform, In the form of a Catechism, with Reasons for each Article: With an Introduction, Showing the Necessity of Radical, and the Inadequacy of Moderate, Reform* (1817) (Bentham argued that the only way to combat corruption is Cromwellian despotism and Puritanical madness—so he modeled his atheism on the Puritans: “In that was corruption at that time rooted out, because there existed a *Cromwell*, and there existed *puritans*: neither in that way—nor, much it is to be feared, without convulsion, in any way—will corruption at this time be rooted out: for we have now *no Cromwell*: we have now *no puritans*.”); Jeremy Bentham, letter to the Duke of Wellington Dec. 12, 1828 (“Listen to me: your name will—ay, shall be greater than Cromwell’s. Already you are, as in his day he was, the hero of war. Listen to me, and you will be what he tried to be, but could not make himself—the hero of peace,—of that peace which is the child of Justice.”). *But see* WILLIAMS, *supra* note 326, at 3 (Jeremy Bentham, and the Puritans before who were anxious to declare themselves the hero of peace and child of justice, are “not required or accepted by the Jesus Christ the Prince of Peace.” Jesus is the child of Justice.); *Isaiah* 9:6 (“For unto us a child is born, unto us a son is given: *and the government shall be upon his shoulders*: and his name shall be called Wonderful, Counselor, The Mighty God, The Everlasting Father, The Prince of Peace.”) (emphasis added).

<sup>312</sup> See *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803).

*stare decisis* must be reaffirmed in both law and equity.<sup>313</sup> Any rules that have been bifurcated or frayed as a result of the recent unsettling of the fundamental principles of law and equity should be realigned with the principle of *stare decisis*.<sup>314</sup> This would foreclose the concept that any law from Congress could circumvent the authority of the Supreme Court's precedent about the written Constitution. And finally, the principles and ideals of the Declaration of Independence must be lifted up as a guiding light through these difficult days.

The avenues of Natural Law and the Law of Nations should therefore be reopened for exploration by judges and counsels alike. Such an exploration will work to safeguard the legitimacy and international potency of the law set forth by the Supreme Court. And invoking the forums of Natural Law will redouble a commitment of the legal community to the traditions of human dignity and liberty that the founders started in 1776 by signing a document that expounded self-evident truths and "unalienable rights" flowing from the "Laws of Nature and Nature's God" to cover all the people of the world, to protect them from tyrants and to secure rights for them against enemies of the public liberty.<sup>315</sup> In fact, positivism has long been denounced through the Laws of Nature as a "delusion that is as old as it is detestable" from which the rich and powerful "try to persuade themselves, that justice and injustice are distinguished . . . not by their own nature, but in some fashion merely by the opinion and the custom of mankind."<sup>316</sup> So lawyers—it is time to become explorers for the self-evident truths of natural human dignity. It is time to stand against positivism and arbitrary power. For the United States was born proclaiming natural liberty and defending the natural rights of human beings.<sup>317</sup> It is the oldest and most venerable American tradition, and it is the cornerstone of Constitutional law.<sup>318</sup>

---

<sup>313</sup> See *supra* notes 284–285 and accompanying text; STORY, *supra* note 2, at §§ 1–24.

<sup>314</sup> See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560, 2573 (2014); *Harris v. Quinn*, 134 S. Ct. 2618, 2638 & n. 19 (2014); *ABC v. Aereo, Inc.*, 134 S. Ct. 2498, 2511 (2014); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2784–85 (2014).

<sup>315</sup> THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

<sup>316</sup> GROTIUS, *supra* note 4, at 1.

<sup>317</sup> See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>318</sup> Story, *supra* note 2, at § 212 ("The Declaration of Independence has accordingly always been treated as an act of paramount and sovereign authority, complete and perfect *per se*, and *ipso facto* working an entire dissolution of all political connection with, and allegiance to, Great Britain; and this, not merely as a practical fact, but in a legal and constitutional view of the matter by courts of justice.").

There is still much work to be done unearthing self-evident truths and natural rights that have since been buried by lawyers, interested parties, and now, the Supreme Court—in the name of positivism and in the interest of satisfying a hunger for arbitrary power.<sup>319</sup> There are also new challenges bubbling up from Internet and computer technology about human rights to privacy, security, and speech that must be answered.<sup>320</sup> So lawyers—dare to explore the vastness of human dignity.<sup>321</sup> Dare to help clients declare their natural rights recognized by the Declaration of Independence that are reserved to them by the Ninth Amendment.<sup>322</sup> The equitable power of the Court, whether or not the Court chooses to recognize it this term, was made to expound new and heretofore unexplored truths captured all the while by the “Laws of Nature and Nature’s God.”<sup>323</sup> There are few things more

---

<sup>319</sup> See, e.g., Bill Chapell, ‘Black Lives Matter,’ *NYC Mayor Says After Grand Jury Doesn’t Indict Officer*, NPR (Dec. 3, 2014, 2:54 PM), <http://www.npr.org/blogs/thetwo-way/2014/12/03/368249828/reports-nyc-grand-jury-does-not-indict-officer-in-chokehold-case> (saying “black lives matter . . . [and] it should be self-evident”); Ron J. Williams, *The System Isn’t Going to Fix Itself—It’s Time for Us to Police the Police*, WIRED (Dec. 6, 2014, 6:00 AM), <http://www.wired.com/2014/12/declaration-interdependence/> (“We need each other to protect these rights supposedly endowed by the Creator to us all.”).

<sup>320</sup> See Philip Bump, *Snowden Grants Everyone Online an Exclusive Interview*, THE WIRE (June 17, 2013, 11:10 AM), <http://www.thewire.com/national/2013/06/edwards-snowden-guardian-interview-live/66306/> (“the consent of the governed is not consent if it is not informed”) (citing THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)); Susan B. Anthony, *Is it a Crime for a U.S. Citizen to Vote?*, Speech (Jan. 16, 1873), in II THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY, AGAINST AN ARISTOCRACY OF SEX 555 (Ann D. Gordon, ed., Rutgers Univ. Press 2000). (“[H]ow can the ‘consent of the governed’ be given, if the right to vote be denied?”).

<sup>321</sup> See Frederick Douglass, *What to the Slave is the Fourth of July?*, Speech (July 5, 1852), in THE OXFORD: FREDRICK DOUGLAS READER 112 (William L. Andrews, ed., Oxford Univ. Press 1996). (Frederick Douglass argued the principles of the Declaration of Independence are “saving principles” and that we should “[s]tand by those principles, be true to them on all occasions, in all places, against all foes, and at whatever cost.”).

<sup>322</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST., amend. IX (this amendment solely exists to say that the enumeration of rights in the Constitution cannot “deny or disparage” those retained by the people). See also James Madison, Amendments to the Constitution, Speech in Congress (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 205 (Charles F. Hobson, et. al. eds., Univ. Press of Virginia 1979) (“the great residuum being the rights of the people”).

<sup>323</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). See also Susan B. Anthony, *Sentencing in the Case of United States vs Susan B. Anthony* (1873), <http://law2.umkc.edu/faculty/projects/ftrials/anthony/sentencing.html> (“[E]quality of rights [is] the national

honorable and patriotic than dedicating time and energy to the protection and explanation of these fundamental human rights.<sup>324</sup> In light of the problematic decisions coming down from the Supreme Court let us sink into the words of the Christmas angels: “Be not afraid.”<sup>325</sup> And draw counsel from a wise judge that suggested this year: “Let us look less to the sky to see what might fall; rather, let us look to each other . . . and rise.”<sup>326</sup>

---

guarantee . . . But failing to get this justice—failing, even, to get a trial by a jury *not* of my peers—I ask not leniency at your hands—but rather the full rigors of the law.”); STORY, *supra* note 2, at §§ 1–24 (equitable power expounds these rights at *appropriate times*).

<sup>324</sup> See John Adams, Diary (Mar. 5, 1773), in II THE WORKS OF JOHN ADAMS 317 (1850) (Referring to his legal defense of the Redcoats accused for murdering civilians during the Boston Massacre: “It was, however, one of the most gallant, generous, manly and disinterested actions of my whole life, and one of the best pieces of service I ever rendered my Country. Judgment of death against those soldiers would have been as foul a stain upon this country as the executions of the quakers or witches, anciently.”).

<sup>325</sup> Luke 2:10 (American Standard Version).

<sup>326</sup> Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1147 (D. Or.2014).