

# TRICKLE-DOWN BULLYING AND THE *TRULY* GREAT AMERICAN RESPONSE: CAN RESPONSIBLE RHETORIC IN JUDICIAL ADVOCACY AND DECISION- MAKING HELP HEAL THE DIVISIVENESS OF THE TRUMP PRESIDENCY?

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## I. INTRODUCTION

For at least sixteen months prior to the 2016 presidential election, America witnessed and endured a barrage of personal attacks – bullying – by candidate Donald Trump.<sup>1</sup> Commentator after commentator echoed the concern that such tactics sent a damaging message.<sup>2</sup> Monkey see, monkey do. Within hours of the election, that concern became a stunning reality.<sup>3</sup>

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1. See Jasmine Lee and Kevin Quealy, *The 325 People, Places and Things Donald Trump Has Insulted on Twitter: A Complete List*, N. Y. TIMES (last visited October 9, 2017), <https://www.nytimes.com/interactive/2016/01/28/upshot/donald-trump-twitter-insults.html> (tracking Trump’s Twitter attacks since June 2015 and last updated September 25, 2017).

2. See Mark Hosenball, et. al., *Foreign Diplomats Voicing Alarm to U.S. Officials About Trump*, REUTERS (Mar. 7, 2016, 2:41 PM), <http://www.reuters.com/article/us-usa-election-trump-foreign-idUSMTZSAPEC37O1O8W3>; Benjy Sarlin, et. al., *Donald Trump Pushes Republican Party to Its Breaking Point*, NBC NEWS (Aug. 4, 2016, 2:15 AM), <http://www.nbcnews.com/politics/2016-election/donald-trump-pushes-republican-party-its-breaking-point-n622576> (commenting on the concern expressed by media, fellow Republicans, and foreign officials regarding Trump’s negative rhetoric).

3. See Bryan Moritz, *When Trump Won the Presidency, I Panicked: How Was I Going to Tell My 6-Year-Old Daughter?*, VOX (Nov. 9, 2016, 9:30 AM) <http://www.vox.com/first-person/2016/11/9/13572748/donald-trump-won-hillary-clinton-lost> (sharing one father’s struggle explaining to his daughter that Trump won the election and his fear of the dangers it could bring).

Bigots were instantly emboldened.<sup>4</sup> Hundreds of hate crimes targeting minorities were reported.<sup>5</sup> Social media was on fire with even more accounts of reprehensible conduct validated by a perceived presidential stamp of approval.<sup>6</sup>

For example:

A grammar school teacher related an incident depicting conduct inspired by the infamous TMZ tape where Trump boasted of sexually assaulting women:

[O]ne of my student's aunts had to go pick up her daughter from school today because a boy grabbed her vagina. She's 10. When asked why, he said that *if a president can do it, I can too*. Day 1.<sup>7</sup>

Commentator Shaun King posted a picture of a school in Dewitt, Michigan where high-schoolers formed a physical "wall" blocking Latino students from entering.<sup>8</sup>

There also were accounts of an unabashed resurgence of the use of the word "n\*\*\*\*\*."<sup>9</sup> During a traffic-related argument, a white man who had used the term to bully an African-American explained why:

At least now I can say what I want to say.<sup>10</sup>

The election of a United States president sends a powerful ripple through

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4. See Diana Bruk, *Racism in America Has Only Gotten Worse Since Trump's Victory*, ESQUIRE (Nov. 11, 2016), <http://www.esquire.com/news-politics/news/a50595/acts-of-racism-since-trumps-victory/>.

5. See Hatewatch Staff, *Update: 1,094 Bias-Related Incidents in the Month Following the Election*, SOUTHERN POVERTY LAW CENTER (Dec. 16, 2016), <https://www.splcenter.org/hatewatch/2016/12/16/update-1094-bias-related-incidents-month-following-election> (pointing out that the report covered the period for November 9, 2016 to December 12, 2016); see also Jack Jenkins, "ThinkProgress Has Been Tracking Hate Crimes Since Trump's Election. Here's What We Found.", THINKPROGRESS (Feb. 10, 2017), <https://thinkprogress.org/thinkprogress-has-been-tracking-hate-since-trumps-election-here-s-what-we-found-e0288ed69869>.

6. See Bruk, *supra* note 4 (recounting an unprecedented level of hate based violence reported in the first three days President Trump's presidency).

7. *Id.*

8. *Id.*

9. *Id.*

10. See *id.* (noting that another post paints the picture of white students chanting old-school epitaphs targeting African-American and Jewish students: Cotton Picker, You're a N\*\*\*\*\*, Heil Hitler).

the electorate and even the world.<sup>11</sup> Who we choose as president – and how that president acts – sets a standard by which others conduct themselves. Perhaps the most important effect is on our children.<sup>12</sup>

Trickle-down bullying can be explained in part by the science surrounding “system one” thinking, which arises from immediate perceptions or impressions, rather than reason and logic.<sup>13</sup> Put simply, a parent can spend hours trying to explain to a child that a Trump presidency does not make bullying, let alone, prejudice, acceptable.<sup>14</sup> That same parent can even point to logical arguments, such as that millions more Americans voted for Hillary Clinton than they voted for Trump.<sup>15</sup> Others presume that millions of those who voted for Trump did so for reasons other than his bullying or his actual or perceived biased views.<sup>16</sup> But, a child knows what a child sees. Despite

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11. See Barack Obama is ‘President of the World’, CNN POLITICS: ELECTION CENTER 2008 (Nov. 5, 2008), <http://www.cnn.com/2008/POLITICS/11/05/international.press.reaction/index.html> (surveying the myriad of coverage by international press sources to President Obama’s victory); see also Michael J. Boskin, *Opinion: How the Next President Will Impact the Global Economy*, MARKETWATCH (Feb. 26, 2016), <http://www.marketwatch.com/story/how-the-next-president-will-impact-the-global-economy-2016-02-26> (discussing the 2016 presidential election’s potential impact on the global economy).

12. See Albert Samaha, Mike Hayes, and Talal Ansari, *Kids are Quoting Trump to Bully Their Classmates and Teachers Don’t Know What to Do About It*, BUZZFEEDNEWS (Jun. 6, 2017), [https://www.buzzfeed.com/albertsamaha/kids-are-quoting-trump-to-bully-their-classmates?utm\\_term=.ew0E750PB#.goKxR910X](https://www.buzzfeed.com/albertsamaha/kids-are-quoting-trump-to-bully-their-classmates?utm_term=.ew0E750PB#.goKxR910X) (describing incidents of K-12 students invoking Trump’s words to bully classmates and asking “[I]f the President can say it, why can’t they?”).

13. See Nicole E. Negowetti, *Judicial Decisionmaking, Empathy and the Limits of Perception*, 47 AKRON L. REV. 693, 705 (2014).

14. See Travis M. Andrews, *‘How Do I Explain This to My Children?’: Van Jones Gives Voice to the ‘Nightmare’ Some are Feeling*, WASH. POST (Nov. 9, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/11/09/how-do-i-explain-this-to-my-children-van-jones-gives-voice-to-the-nightmare-some-are-feeling/?utm\\_term=.df32da785ec1](https://www.washingtonpost.com/news/morning-mix/wp/2016/11/09/how-do-i-explain-this-to-my-children-van-jones-gives-voice-to-the-nightmare-some-are-feeling/?utm_term=.df32da785ec1) (examining news anchor Van Jones’ visible distress as the prospect of explaining the social impact of President Trump’s victory to his children in light of the then President-elect’s divisive rhetoric).

15. See Kenneth P. Doyle, *Clinton Won Popular Vote by More Than 2.8 Million: FEC*, BLOOMBERG (Feb. 14, 2017), <https://www.bna.com/clinton-won-popular-n57982083769/> (emphasizing that Clinton beat Trump by more than 2.8 million votes in the popular vote according to an official tally released by the Federal Election Commission); see also FEDERAL ELECTION COMMISSION, OFFICIAL 2016 PRESIDENTIAL GENERAL ELECTION RESULTS 2, 6 <https://transition.fec.gov/pubrec/fe2016/2016presgeresults.pdf> (detailing the official final vote count of the 2016 presidential election).

16. See Matt Wilson, *Elizabeth Warren Faces President Trump with Rachel Maddow: No Compromise on Bigotry*, THE DAILY BEAST (Nov. 10, 2016),

Trump's divisive rhetoric, America handed Trump the keys to the White House.<sup>17</sup>

But how does all of this relate to advocacy and judicial decision-making?

Numerous scholars have examined what Barry Friedman long has described as a "tacit deal" between the Supreme Court and the American people, whereby the justices will not stray too far from the views held by the majority of the public.<sup>18</sup> Thus, from a progressive perspective, the danger of the Trump presidency is not just the number of Supreme Court appointments that he may make.<sup>19</sup> Rather, the real danger is that if America truly reverses course in terms of bigotry, the Supreme Court may be compelled to look the other way.<sup>20</sup>

However, acceptance of a perceived Trumponian world view by a majority of Americans is *not* what happened – Trump's approval rating has dropped to 36-48% in many nationally accepted polls.<sup>21</sup> The swift post-election response decrying the politics of bigotry suggests Americans are much more American than they may have realized.<sup>22</sup> While the deeply ingrained values of equality for all, individual liberty, and respect for religious freedom may

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<http://www.thedailybeast.com/articles/2016/11/10/elizabeth-warren-faces-president-trump-with-rachel-maddow-no-compromise-on-bigotry.html> (highlighting that Senator Elizabeth Warren urged Clinton supporters to listen to those who voted for Trump despite the "bigotry").

17. See Gabriel Debendetti & Madeline Conway, *Warren Offers Democrats Path Forward in Trump Era*, POLITICO, (Nov. 10, 2016), <http://www.politico.com/story/2016/11/warren-pledges-to-stand-up-to-bigotry-under-trump-but-offers-olive-branch-on-policy-issues-231195> (explicating Senator Elizabeth Warren's statements distinguishing Trump supporters that voted from him hoping to see change rather than reasons driven by bigotry).

18. Barry Friedman, *The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232, 1233 (2010); see generally Amanda Frost, *Defending the Majoritarian Court*, 2010 MICH. ST. L. REV. 757 (2010).

19. See Jeffrey Rosen, *How President Trump Could Reshape the Supreme Court – and the Country*, WASH. POST (Nov. 13, 2016), <http://www.politico.com/magazine/story/2016/11/donald-trump-wins-supreme-court-214449> (discussing the possible ramifications of a "6-3 conservative majority" by the end of the Trump presidency).

20. See discussion, *infra* at Subsections III.B., III.C.

21. See Tim Macin, *How Popular is Trump? Approval Ratings Plunge for President Amid Russia Investigation, Comey Controversy*, NEWSWEEK: U.S. (June 10, 2017), <http://www.newsweek.com/how-popular-trump-approval-ratings-plummet-president-russia-investigation-623856> (noting that Website FiveThirtyEight, which tracks numerous polls, found the weighted approval average was 38% while disapproval was 56%).

22. See discussion, *infra* at Subsection III.A.

have lied dormant, those values collectively awoke like sleeping giants in the face of the post-election wave of hatred aimed at minorities.<sup>23</sup> Without any prodding, Americans were not just fighting for their individualized interests, Americans were fighting for *each other*.<sup>24</sup>

One of the early displays of the enormity of the equality for all movement was at the Women's March, which was held the day after the Trump inauguration.<sup>25</sup> Millions across America – and throughout the world – took to the streets to protest, holding signs that not only supported women, but that supported numerous other interests targeted by the Trump administration, such as Muslims and Latinos.<sup>26</sup> Marchers also walked in solidarity with those advocating other causes, such as Black Lives Matter and the LGBTQ community.<sup>27</sup>

No one could have predicted that so many different groups and their allies would come together in enormous numbers to demand equality for all. Or *could* such a prediction have been made? Far from turning over in their graves, metaphorical tears may have filled the eyes of our founding fathers. Fighting for each other's liberty is *exactly* what America is all about.<sup>28</sup> So long as the majority of Americans stay true to this guiding star, that sentiment will *not* be lost on our judiciary.

This Article posits that efforts to heal the current division in our nation must be advanced on multiple fronts, specifically the use of responsible

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23. See Colby Itkowitz, 'It's Unprecedented in Our History': Trump's Election Inspired Millions in Nonprofit Donations, WASH. POST: INSPIRED LIFE (Nov. 30, 2016) [https://www.washingtonpost.com/news/inspired-life/wp/2016/11/30/its-unprecedented-in-our-history-after-trumps-election-millions-of-dollars-poured-into-nonprofits/?utm\\_term=.969018d41527](https://www.washingtonpost.com/news/inspired-life/wp/2016/11/30/its-unprecedented-in-our-history-after-trumps-election-millions-of-dollars-poured-into-nonprofits/?utm_term=.969018d41527) (highlighting the unprecedented amount of donations nonprofits received in the aftermath of the election).

24. See Karen Turner, Kainaz Amaria & Nesima Aberra, *The Vast Diversity of the Women's March on Washington, in Words and Photos*, VOX (Jan. 21, 2017), <http://www.vox.com/first-person/2017/1/21/14346568/womens-march-washington-photos-diversity> (discussing the widespread support by individuals from a myriad of backgrounds, cultures, experiences, and perspectives); see also, e.g., discussion, *infra* at Subsection III.A.

25. See WOMEN'S MARCH, <https://www.womensmarch.com/sisters> (last visited Sept. 29, 2017) (emphasizing that one million marched in Washington D.C. and five million protestors marched world-wide).

26. See Turner, *supra* note 24.

27. See *id.* (commenting on the wide range of causes supported at the Women's March which occurred world-wide after Trump's inauguration).

28. See, e.g., *Three Things to Know About the ACLU*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/guardians-freedom> (last visited Sept. 29, 2017) (describing how the mission of the ACLU aligns with the fundamental principles of American values by protecting the civil liberties of "every man, woman and child in [America]").

rhetoric in both judicial advocacy and judicial decision-making.<sup>29</sup> Responsible rhetoric recognizes the power of the pen. Just as a presidential tweet can have reverberations around the world, well-crafted judicial opinions have the power to guide America back to the fundamental principles of our founding fathers.<sup>30</sup>

To combat division, this Article suggests that advocates and courts strive to frame legal issues in a manner that is *not* perceived as favoring one political viewpoint over the other.<sup>31</sup> Cases involving the intersection of free exercise of religion and individual liberties often have powerful narratives on *both* sides.<sup>32</sup> Those perspectives should be respected and listened to with dignity. There is no shame if this is done with tact. Resolution cannot turn on who has the better viewpoint, but instead on the fundamental American value that “my rights end where your rights begin.”<sup>33</sup>

Part II of this Article addresses the science behind the concept of trickle-down bullying, specifically including how a president’s conduct and character has a profound effect on the culture of America – and even the world – for generations to come.<sup>34</sup> This flows from the inevitable effect on our children. The perceived presidential support of bullying – including oppression of minorities – is poised to become a deeply-ingrained American value that will be difficult to shake. This threatens to roll back decades of legal and social advancements in terms of civil rights and condemnation of bigotry. This part also explores how Trump *could* be a powerful catalyst the other way. If Trump changed his ways, he could serve as a role model that would allow his supporters to do the same.

Part III examines the enormous grass roots effort against intolerance, including how that movement may play a role in upcoming judicial decision-

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29. See discussion *infra* at Part III (suggesting a tacit agreement between the American people and the judiciary influencing rulings to reflect the social values of the public).

30. See Shellie Karabell, *Donald Trump in Russian and European Media: ‘Dumb Tweets . . . and Getting Worse’*, FORBES: LEADERSHIP (May 17, 2017), <https://www.forbes.com/sites/shelliekarabell/2017/05/17/donald-trump-in-russian-european-media-dumb-tweets-and-getting-worse/#2a5d69914bcc> (suggesting that President Trump’s tweets have as caused “the world [to] tremble[.]”); *infra* text accompanying notes 199-200.

31. See discussion, *infra* at Section IV.

32. See discussion, *infra* at Section IV.

33. See, e.g., *Douglas v. City of Jeannette*, 319 U.S. 157, 178 (1943) (stating that “[t]he real question is where their rights end and the rights of others begin”); cf. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2791 (2014) (quoting the widely used maxim “[y]our right to swing your arms ends just where the other man’s nose begins”).

34. See discussion, *infra* at Subsection II.A.

making.<sup>35</sup> As noted above, the “tacit deal” between the Supreme Court and the American public has always existed, whereby the justices never stray too far from popular opinion.<sup>36</sup> If America continues to demonstrate popular support for protection of individual liberties, then that message will be heard by our judicial decision-makers. Part II also discusses the flip of the coin, namely that many Americans disagree with judicial activism, which is how cases supporting individual liberties – such as abortion rights and same-sex marriage – have been perceived by those opposed to recognition of these rights.<sup>37</sup> Together, these competing views establish the backdrop against which our judiciary will decide upcoming high-profile cases.

Part IV discusses responsible rhetoric within a particular subset of high-profile cases, namely cases involving the intersection of free-exercise of religion and two specific individual liberties: LGBTQ rights and a woman’s right to choose.<sup>38</sup> In recent Supreme Court cases, the prevailing brief – and the subsequent court opinion – relied heavily on powerful personal narratives that spoke to the American people in a manner that legalese could not. Such narratives are quickly becoming the gold standard, especially given the confirmation of Neil Gorsuch – an avid story teller – to the Supreme Court.<sup>39</sup> For that reason, cases working their way through the lower courts create the possibility of a classic show-down between narratives reflecting religious freedom and competing narratives respecting other individual liberties. Who wins – and *how* – can have a profound effect on the current divisiveness.

Part IV ends with a proposed list of Ten Commandments for Responsible Rhetoric.<sup>40</sup>

This Article urges advocates and decision-makers to think twice before going for the jugular. In terms of cases involving religious freedom, this entails more than simply anchoring legal analysis to a “compelling interest” and a “least restrictive means” test.<sup>41</sup> Instead, advocates and judges should use their words to make clear such cases that should be resolved based upon the fundamental notion of “my rights end where your rights begin.” This

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35. See discussion, *infra* at Section II.

36. See Friedman, *supra* note 18, at 1233.

37. See discussion, *infra* at Subsection III.C.

38. See discussion, *infra* at Subsection III.B.

39. See, e.g., Ross Guberman, *Judge Gorsuch is a Gifted Writer. He’s a Great Writer. But is He a “Great Writer”?* Part One: Four Gifts, ROSS GUBERMAN BLOG (Feb. 7, 2017), <http://legalwritingpro.com/blog/judge-gorsuch-gifts/> (noting that Supreme Court Justice Gorsuch’s judicial creativity, particularly, his storytelling garnered a great deal of public attention).

40. *Infra* p. 506.

41. See discussion, *infra* at Subsection III.C.



would allow judicial opinions to compassionately present all points of views and rest a decision on the fine constitutional line that protects *both* views, so long as one does not interfere with the other. Put differently, the thumb of the judiciary on the scales of justice should reflect the fundamental notion that varying individual rights – including the right to freely exercise religion – must co-exist.

## II. THE IMPACT OF AN AMERICAN PRESIDENT

November 4, 2008. America elects its first African-American President, Barack Obama. Voter turnout reached historical levels and the anticipated down-ticket impact solidly kicked in.<sup>42</sup> Not only did Obama log more votes than any other American presidential nominee in our history, but the Democrats comprised a majority in both the House of Representatives and the Senate.<sup>43</sup> The spirit of Obama's campaign could be summed up in a single word: Hope.<sup>44</sup>

Fast-forward: July 2016. Hillary Clinton, the nominee for the Democratic Party, campaigns on a message of inclusion that is a natural extension of the Obama world view.<sup>45</sup> Her opponent? Donald J. Trump, an entrepreneur and reality TV star who made disparaging remarks against minorities and leveled vicious personal attacks on almost anyone who dared to disagree with him.<sup>46</sup> In an iconic moment in American politics, a TMZ videotape would even

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42. See Associated Press, *2008 Election Turnout Hit 40-Year High*, CBS NEWS (Dec. 15, 2008, 4:33 PM), <http://www.cbsnews.com/news/2008-election-turnout-hit-40-year-high/> (detailing the historical statistics leading to President Obama's victory).

43. See N.Y. TIMES, *Election Results 2008* (Dec. 9, 2008), <http://www.nytimes.com/elections/2008/results/house/votes.html> (summarizing that Democrats gained twenty-one seats in the November election earning the party a House majority); see also N.Y. TIMES, *Election Results 2008* (Dec. 9, 2008), <http://www.nytimes.com/elections/2008/results/senate/votes.html> (tallying the election results to reveal that the Republicans lost seven seats thereby giving Democrats a majority in the Senate with fifty-eight seats).

44. See John Hilliar, *Obama 'Hope' Artist Returns with 'We the People' Posters*, GLOBE CORRESPONDENT (Jan. 20, 2017), <https://www.bostonglobe.com/arts/2017/01/20/obama-hope-artist-returns-with-people-posters/4f3Fp8gRgDXCd5Xtreq2QN/story.html> (highlighting that artist Shepard Fairey is credited for the iconic "Hope" poster used in Obama's 2008 campaign, and following the Trump election, Fairy etched posters utilizing the catch-phrase, "We the People").

45. See Yvonne Latty, *Hillary Clinton Closes DNC with Message of Inclusion*, THE HILL (July 29, 2016), <http://thehill.com/blogs/pundits-blog/campaign/289810-hillary-clinton-closes-dnc-with-message-of-inclusion> (noting the impact Clinton's speech had on various attendees, drawing supporters with an inspirational tone).

46. See Lee, *supra* note 1 (recounting the growing number of entities garnering negative attention from the then-Republican Party nominee).

expose him in a manner characterized by many as being a sexual predator.<sup>47</sup>

A lot had changed in the American culture in the eight years of the Obama presidency.<sup>48</sup> Same-sex marriage was the law of the land.<sup>49</sup> Many Americans became sensitive to the needs of transgender individuals.<sup>50</sup> America soundly embraced anti-bullying, specifically by condemning and even criminalizing cyber-bullying.<sup>51</sup> Given how America evolved even more toward inclusion, Hillary Clinton was poised to easily break the “glass ceiling” and become the first woman president.<sup>52</sup>

Yet rumblings of a “silent” majority supporting Trump began to surface.<sup>53</sup> Trump himself made repeated claims of a “rigged” election.<sup>54</sup> Adding to this

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47. See Brian Stelter, *How the Shocking Hot Mic Tape of Donald Trump Was Exposed*, CNN MEDIA (Oct. 7, 2016), <http://money.cnn.com/2016/10/07/media/access-hollywood-donald-trump-tape/> (stressing that in the tape, Trump is heard using graphic language about grabbing women in the genital area, and the shock that followed not only saw plummeting poll numbers but it caused even Republicans to call for Trump to resign from the presidential race).

48. See Rich Lowry, *The Next JFK*, NAT'L REVIEW (Jan. 30, 2017), <http://www.nationalreview.com/article/444036/barack-obama-legacy-next-jfk> (discussing the “cultural” change that will be Obama’s legacy).

49. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2591 (2015) (holding that marriage is a “fundamental right” that could not be denied to same sex couples).

50. Barbra Casbar Siperstein, *Transgender Progress and the “Chilling” Challenges of 2017 and Beyond*, HUFFINGTON POST (Jan. 4, 2017, 12:08 AM), [http://www.huffingtonpost.com/entry/transgender-progress-and-the-chilling-challenges\\_us\\_586c7d31e4b068764965c553](http://www.huffingtonpost.com/entry/transgender-progress-and-the-chilling-challenges_us_586c7d31e4b068764965c553) (discussing a report surveying transgender people in the United States that coined the “growing visibility and acceptance” in America as historical between 2008 and 2015).

51. See U.S. DEP'T OF HEALTH AND HUMAN SERV., *Policies & Laws*, STOPBULLYING.GOV, <https://www.stopbullying.gov/laws/#listing> (last visited Sept. 29, 2017) (providing a state by state analysis of anti-bullying laws with all fifty states having laws and/or policy to prevent bullying).

52. See Matt Flegenheimer, *Clinton to Ring in Election Under a Real ‘Glass Ceiling’: Manhattan’s Javits Center*, N.Y. TIMES (Oct. 26, 2016), [https://www.nytimes.com/2016/10/27/us/politics/hillary-clinton-election-night.html?\\_r=0](https://www.nytimes.com/2016/10/27/us/politics/hillary-clinton-election-night.html?_r=0) (noting that the election night plan was to celebrate the win under a “glass ceiling” at the Jacob K. Javits Convention Center).

53. See Sam Sanders, *Trump Champions the ‘Silent Majority,’ But What Does That Mean in 2016?*, N.P.R. POLITICS (Jan. 22, 2016), <http://www.npr.org/2016/01/22/463884201/trump-champions-the-silent-majority-but-what-does-that-mean-in-2016> (explaining that the Trump campaign not only spoke of this, but also handed out “silent majority” signs to supporters at Trump’s rallies).

54. See Andre Tartar and Ben Brody, *On Eve of Election, Odds Point to Clinton Win With Democratic Senate and GOP House*, BLOOMBERG POLITICS (Nov. 4, 2016, 5:00 AM), <https://www.bloomberg.com/politics/articles/2016-11-04/what-will-government-look-like-after-tuesday-predictions-and-polls-have-a-few-answers> (predicting a sixty-

mix was the fear of Russian interference on election day.<sup>55</sup>

November 8, 2016. Upwards of 130,000,000 voters would make their ways to the polls.<sup>56</sup> Political forecasters and pundits all but guaranteed a Clinton win.<sup>57</sup> The stakes could not be higher. America was either going to elect the first American woman president, or it was going to elect a bully and a perceived misogynist. Sometime during election night, momentum shifted. While it had been predicted only a perfect storm could forge a path for a Trump victory, the weather was decidedly turning Trump's way. Well before dawn, candidate Trump would become the president-elect.<sup>58</sup>

Undisputedly, the Obama presidency had a substantial impact on American culture and advanced civil rights and inclusion in profound ways.<sup>59</sup> The open question is whether and to what extent the Trump presidency could reverse that. As explained below, per both science and history, presidential bullying coupled with tacit approval of animus toward minorities, can easily trickle-down into our core values and beliefs, thus allowing prejudice to once again become deeply ingrained in both our children and in our society at large.

*A. Trickle-Down Bullying: What's Good for the Goose is Good for the*

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one percent chance of a Clinton victory); *see also* Gabrielle Levy, *Poll: Voters Think Election Could be 'Stolen'*, U.S. NEWS (Oct. 17, 2016, 11:38 AM), <https://www.usnews.com/news/politics/articles/2016-10-17/poll-shows-trumps-claims-of-a-rigged-election-are-working-with-voters?int=a14709>.

55. *See* Jeremy Diamond, *Russian Hacking and the 2016 Election: What You Need to Know*, CNN (Dec. 16, 2016), [www.cnn.com/2016/12/12/politics/russian-hack-donald-trump-2016-election/index.html](http://www.cnn.com/2016/12/12/politics/russian-hack-donald-trump-2016-election/index.html) (emphasizing that while public discussion of Russian involvement would later dominate the post-election news coverage, it was announced – at least preliminarily – in October).

56. CNN, *2016 Presidential Election Results*, <http://www.cnn.com/election/results/president> (last visited Sept. 29, 2017).

57. *See* Tartar, *supra* note 54.

58. *Id.*; *see also* *President Trump: Networks Call Race as Trump Takes Swing State of Pennsylvania; Hillary Concedes*, TWITCHY (Nov. 9, 2016), <http://twitchy.com/brett-3136/2016/11/09/president-trump-networks-call-race-as-trump-takes-swing-state-of-pennsylvania/>; Josh Katz, *Who Will Be President?*, N.Y. TIMES (Nov. 8, 2017), [https://www.nytimes.com/interactive/2016/upshot/presidential-polls-forecast.html?\\_r=0](https://www.nytimes.com/interactive/2016/upshot/presidential-polls-forecast.html?_r=0) (stating on election day that Hillary Clinton had an “85% chance” of beating Donald Trump).

59. *See* Joseph P. Williams, *Protecting Progress*, U.S. NEWS (Nov. 12, 2016, 2:09 PM), <https://www.usnews.com/news/the-report/articles/2016-11-17/civil-rights-groups-try-to-protect-obamas-legacy> (reflecting on the advances in civil rights during Obama's presidency).

*Goslings*

Just prior to the Trump Inauguration, actor Meryl Streep took the stage at the Golden Globes to receive the prestigious Cecil B. deMille Award for lifetime achievement.<sup>60</sup> It was no surprise that she devoted a portion of her speech to fight for equality for all.<sup>61</sup> In one of the most poignant moments of the speech, Streep shared her own visceral reaction to the widely-publicized video of Trump mocking a disabled reporter while entertaining a crowd at a campaign rally.<sup>62</sup>

Not only did Ms. Streep find Trump's conduct personally reprehensible, but she recognized the effect on the American public. More particularly, Ms. Streep saw how Trump's cheap grab for a laugh invited others to do the same. Bullying was being legitimized by a potential world leader and that sickened her. After acknowledging the many truly great theatrical performances turned in by her peers, Ms. Streep drew a sharp contrast to the "performance" turned in by Trump:

An actor's only job is to enter the lives of people who are different from us and let you feel what that feels like. And there were many, many, many powerful performances this year that did exactly that, breathtaking, compassionate work.

But there was one performance this year that stunned me. It sank its hooks in my heart, not because it was good, it was – there's nothing good about it. But it was effective and it did its job. It made its intended audience laugh and show their teeth.

*It was that moment when the person asking to sit in the most respected seat in our country imitated a disabled reporter, someone he outranked in privilege and power and the capacity to fight back. It kind of broke my heart when I saw it and I still can't get it out of my head because it wasn't in a movie. It was real life. **And this instinct to humiliate when it's modeled by someone in the public platform, by someone powerful, it filters down into everybody's life because it kind of gives permission for other people to do the same thing.***

Disrespect invites disrespect. When the powerful use their position to

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60. See *Watch (and Read) All of Meryl Streep's Provocative Golden Globes Acceptance Speech*, L.A. TIMES (Jan. 8, 2017), <http://www.latimes.com/entertainment/la-et-golden-globes-2017-live-watch-all-of-meryl-streep-s-1483932724-htmlstory.html>.

61. *Id.*

62. See *id.*; *Trump Mocks Reporter with Disability*, CNN (Nov. 26, 2015) <http://www.cnn.com/videos/tv/2015/11/26/donald-trump-mocks-reporter-with-disability-berman-sot-ac.cnn> (describing the backlash received by the Trump campaign following his disparaging comments during a rally).

bully others, we all lose.<sup>63</sup>

Ms. Streep enjoyed a thunderous standing ovation from her peers. She also received support from countless others through social media.<sup>64</sup> But others begged to differ. The incoming president himself tweeted not only his disapproval for her message, but he insulted her on a personal level.<sup>65</sup> It had happened again. Classic Bullying 101. Sidestep the real issue by shutting down dissenters through ridicule and derogatory remarks. Thousands followed Trump's lead by berating Ms. Streep with personal attacks.<sup>66</sup>

Ms. Streep was right.

Trickle-down bullying recognizes that our leaders – specifically including an American president – are a role-model for the entire nation, even the world.<sup>67</sup> No doubt the American president has a substantial impact on core values, morality, and discharge of civic and ethical obligations.<sup>68</sup> And the impact does not stop there. An American president – as well as the First Lady and First Children – all have a pronounced impact on American culture.<sup>69</sup> A president's demeanor – and the way our president treats others

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63. L.A. TIMES, *supra* note 60 (emphasis added).

64. See Gibson Johns, *George Clooney and Robert De Niro Voice Support for Meryl Streep After Contentious Golden Globes Speech*, AOL.COM (Jan. 10, 2017), <https://www.aol.com/article/entertainment/2017/01/10/george-clooney-robert-de-niro-define-meryl-streep/21651811/> (discussing that both George Clooney and Robert De Niro made lengthy public statements about Streep's speech and De Niro even penned an "Open Letter").

65. See D'Angelo Gore, *Fact Check: Trump Errs in Reply to Meryl Streep*, USA TODAY (Jan. 9, 2017), <http://www.usatoday.com/story/news/politics/elections/2017/01/09/fact-check-trump-serge-kovalski-meryl-streep/96364654/> (pointing out that Trump disparaged Ms. Streep's acting career, called her a "Hillary flunky who lost big," and denied mocking the reporter despite video evidence to the contrary).

66. See Aja Romano, *The Uproar Over Meryl Streep's Golden Globes Speech, Explained*, VOX (Jan. 9, 2017), <http://www.vox.com/2017/1/9/14208608/meryl-streep-golden-globes-trump-backlash> (surveying the breadth of responses that mirrored, then President-elect, Trump's reaction to Streep's speech).

67. See John W. Lee, *Class Warfare 1988-2005 Over Top Individual Income Tax Rates: Teeter-Totter from Soak-the-Rich to Robin-Hood-in-Reverse*, 2 HASTINGS BUS. L.J. 47, 75 (2006) (analogizing trickle-down bullying to the term "trickle-down economics," which was used to refer to the economic policy "during the twelve Reagan-Bush years").

68. See *supra* notes 11–12 and accompanying text.

69. See Radhika Sanghani, *Why Jackie Kennedy Still Matters Today*, THE TELEGRAPH: FILM (Jan. 10, 2017, 10:30 AM), <http://www.telegraph.co.uk/films/jackie>

– unmistakably establishes an acceptable code of conduct for others to follow.<sup>70</sup>

Sadly, the impact of trickle-down bullying already has begun. In just the first month following the election, the Southern Poverty Law Center documented 1,094 hate crimes, with an alarming number committed in the days immediately following the election.<sup>71</sup> These hate crimes heavily targeted Jewish-Americans, especially after a perceived slight by the Trump Administration.<sup>72</sup> More specifically, on Holocaust Remembrance Day, the Trump Administration issued a statement that inexplicably failed to make any reference to the Jewish community or anti-Semitism.<sup>73</sup> In the days that followed, instances of bomb threats to Jewish Community Centers escalated as well as desecration of Jewish gravesites.<sup>74</sup> Notably, in the first two months of 2017 alone, there were over ninety bomb threats against Jews.<sup>75</sup>

The shooting of two Indian men caused an international stir one month after the Inauguration when a Kansas man open-fired at both men in a bar prefaced by a now familiar rant: “Get out of my country.”<sup>76</sup> Twenty-nine

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*/why-jackie-kennedy-still-matters/* (discussing the lasting impact of Jackie Kennedy’s legacy); *Ciro Scotti, Ivanka Trump Could be the Most Powerful First Daughter Ever*, THE FISCAL TIMES (June 22, 2016), <http://www.thefiscaltimes.com/2016/06/22/Ivanka-Trump-Could-Be-Most-Powerful-First-Daughter-Ever> (examining the impact first ladies and daughters have had on previous administrations and society at large, while theorizing about the potential impact Ivanka Trump would have as first daughter).

70. See Jen McGuire, *Kids Are Mimicking Trump & Bullying Others, According to Educators*, ROMPER (June 7, 2017), <https://www.romper.com/p/kids-are-mimicking-trump-bullying-others-according-to-educators-62723> (suggesting children are mimicking Trump’s “brutish behavior” and educators are struggling to manage the new level of “acceptable hate speech” since he was elected).

71. See Hatewatch Staff, *Update: 1.094 Bias-Related Incidents in the Month Following the Election*, SOUTHERN POVERTY LAW CENTER (Dec. 16, 2016), <https://www.splcenter.org/hatewatch/2016/12/16/update-1094-bias-related-incidents-month-following-election> (pointing out that the report covered the period for November 9, 2016 to December 12, 2016).

72. *Id.*

73. See Ben Jacobs, *No Mention of Jews in White House’s Holocaust Remembrance Day*, THE GUARDIAN (Jan. 27, 2017), <https://www.theguardian.com/us-news/2017/jan/27/white-house-holocaust-remembrance-day-no-jews> (stressing that Jonathon Greenblatt, the head of the Anti-Defamation League, responded that more than “six million Jews” perished, finding the omission both “puzzling and troubling”).

74. John Bacon, *Latest Wave of Threats, Vandalism Rocks Jewish Communities*, USA TODAY (Feb. 27, 2017), <http://ux-origin.usatoday.com/story/news/nation/2017/02/27/latest-wave-threats-vandalism-rocks-jewish-community/98477568/>.

75. *Id.*

76. See Mark Berman and Samantha Schmidt, *Morning Mix: He Yelled ‘Get Out of My Country,’ Witnesses Say, and then Shot 2 Men from India, Killing One*, WASH. POST

year old, Srinivas Kuchibhotla, an aviation engineer, died from the gun-shot injury.<sup>77</sup> Demands quickly came from the Indian government imploring that President Trump respond and take the “strongest action” to condemn the attack.<sup>78</sup> Officials easily saw that the attack was racially motivated and could “dent the image” of the United States.<sup>79</sup> The widow of the slain man acknowledged that the couple had been wary of the rise in hate crimes but they decided to stay in the United States despite the threat.<sup>80</sup> Within five days, GoFundMe had raised over one million dollars to pay for funeral expenses to assist the families of the victims.<sup>81</sup> The administration’s response amidst all of this: Crickets.<sup>82</sup>

Put simply, hate crimes are up, way up.<sup>83</sup> This should be no surprise.

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(Feb. 24, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/02/24/get-out-of-my-country-kansan-reportedly-yelled-before-shooting-2-men-from-india-killing-one/?utm\\_term=.d1c98c33d9d5](https://www.washingtonpost.com/news/morning-mix/wp/2017/02/24/get-out-of-my-country-kansan-reportedly-yelled-before-shooting-2-men-from-india-killing-one/?utm_term=.d1c98c33d9d5) (noting that the event occurred on Feb 22, 2017).

77. See *id.* (noting that Kuchibhotla’s colleague, also 32, was injured but survived the attack); see also *Latest: Donations Top 1 Million for Kansas Bar Attack Victims*, ASSOCIATED PRESS (Feb. 25, 2017), <https://www.yahoo.com/news/latest-victim-says-alleged-shooter-asked-visas-130918382.html> (including heartfelt video from Kuchibhotla’s widow demanding answers for the violence).

78. See AFP, *India Demands ‘Strongest Action’ From US After Kansas Killing*, YAHOO! NEWS (Feb. 26, 2017), <https://www.yahoo.com/news/india-demands-strongest-action-us-kansas-killing-002855706.html> (highlighting that this statement was made by Information and Broadcasting Minister Venkaiah Naidu).

79. *Id.*

80. John Eligon, Alan Blinder, and Nida Najar, *Hate Crime Is Feared as 2 Indian Engineers Are Shot in Kansas*, N.Y. Times (Feb. 24, 2017), [https://www.nytimes.com/2017/02/24/world/asia/kansas-attack-possible-hate-crime-srinivas-kuchibhotla.html?\\_r=0](https://www.nytimes.com/2017/02/24/world/asia/kansas-attack-possible-hate-crime-srinivas-kuchibhotla.html?_r=0).

81. See ASSOCIATED PRESS, *supra* note 77.

82. See Arron Rugar, *Trump’s Response to Racist Shooting in Kansas: Silence*, THINKPROGRESS (Feb. 24, 2017), <https://thinkprogress.org/the-gun-violence-trump-wont-talk-about-fb5779da1e46#b5dpr1u4a> (stating that Trump made a reference to this in his first State of the Union speech, indicating that it might be a hate crime); *The Latest: Trump Condemns Kansas Bar Shooting in Speech*, ASSOCIATED PRESS (Feb. 28, 2017), <https://www.yahoo.com/news/latest-fbi-probes-kansas-bar-shooting-hate-crime-204448184.html> (finding that one of the killer’s neighbors did not believe the shooting was done from “hatred” but rather from the killer’s, loss of his father eighteen months prior to the shooting, thus causing the killer’s life to spiral into deep alcoholism); Jim Suhr and John Hanna, *Neighbor: Bar Attack Suspect a ‘Drunken Mess’; Not Political*, ASSOCIATED PRESS (Feb. 25, 2017), <https://www.yahoo.com/news/kansas-community-tries-heal-shooting-bar-reopen-071356744.html> (discussing that this does not negate the sentiment that it is acceptable to denounce those who are foreign born nor does it negate society’s role in validating that sentiment because as long as animus against minorities is acceptable, hate crimes are inevitable).

83. See Jack Jenkins, *ThinkProgress Has Been Tracking Hate Since Trump’s*

Bullying begets bigotry and bigotry begets bullying. As set forth below, the particular danger is that deeply-ingrained values and beliefs – such as prejudice – can take generations to purge.

*B. “System One” Thinking: How and Why Deeply Ingrained Values and Beliefs Are so Difficult to Shake*

A child is born into this world with a mind that is a blank slate.<sup>84</sup> The child’s understanding of how the world operates derives first from actual physical interactions.<sup>85</sup> Food is tasty and it’s no fun to have a wet diaper.<sup>86</sup> As a child grows, his or her mind is molded by other external stimuli, including not just what a child personally perceives, but what a child is taught by his or her direct caregivers and society at large.<sup>87</sup> For this reason, despite the greatest of intentions, a child with loving parents may still grow up feeling inferior based upon the child’s race, ethnicity, or gender.<sup>88</sup> In other words, even if a child is *told* prejudice is wrong by his or her parents, a child still absorbs the deeply ingrained societal beliefs that a child perceives first-hand from others or from media sources.<sup>89</sup>

Case in point. This author is privileged to have a friend who works as an auditor for elementary schools in a large urban area. More specifically, my friend often works in schools dominated by minority children from low-income families. Part of my friend’s job is to assess the children’s world view. Starting back many years ago, my friend would ask African-American boys if they thought there ever would be an African-American president. “Are you crazy, lady?” They uniformly answered “no,” despite that many of their parents likely told them that it was certainly possible, if not probable,

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*Election. Here’s What We Found.*, THINKPROGRESS (Feb. 10, 2017), <https://thinkprogress.org/thinkprogress-has-been-tracking-hate-since-trumps-election-here-s-what-we-found-e0288ed69869> (noting that data collected regarding hate-based crime around the nation showed a dramatic “spike” in the months following President Trump’s election).

84. See Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV., 663, 664-70 (2017) (explaining the impact of external stimulus, including rhetoric, on the brain, specifically including that of an infant).

85. See *id.*

86. See *id.* at 664.

87. See *id.* at 664-70.

88. See *id.* at 664 (averring that “harmful rhetoric used to describe racial minorities and other subordinated groups produces toxic thought patterns that can become entrenched in the public mind.”).

89. See *id.* at 672-73 (discussing “somatic markers” and how mass culture “carve[s]” these in our brain as early as childhood”).



that this would happen in their lifetimes. Bottom line: these little boys knew what they knew. All American presidents were white males. That thinking changed drastically once Barack Obama was elected. And the effect on African-American school boys was extraordinary. From my friend's direct observation, the boys' overall confidence rose. They too – just like their white counterparts – could *of course* be president one day.

This slice of American pie illustrates how deeply rooted beliefs and absolute truths are a product of both what a child is told by his or her parents, and by what a child perceives to be true in his or her observation of the world. The latter can be challenged and changed in the face of contrary evidence.<sup>90</sup> Again, we know what we see. Our logical brains can adapt to changed circumstances.<sup>91</sup> Still, deeply ingrained bias and beliefs are difficult to shake – and even if tamped down – they easily can reemerge.<sup>92</sup>

Part of this can be explained by what many refer to as “system one” thinking.<sup>93</sup> Such thinking refers to the reactions that occur before our logical brains even get a chance to intervene.<sup>94</sup> If someone has a deeply-ingrained bias against a minority that goes back to his or her childhood, then that triggers an immediate snap-judgment.<sup>95</sup> While that can be overridden by logic, it is never quite eliminated.<sup>96</sup>

For over a half-century, America has sent a societal message aimed at eradicating prejudice. For example, the Civil Rights Act of 1964 made

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90. See *id.* at 682 (recognizing that in a legal setting, a lawyer must “reframe and reiterate facts in a way that will trigger alternative path-ways”).

91. See *id.* at 671 (noting that “[o]nce a thought becomes cemented in the brain that thought appears with great rapidity and arises unconsciously”).

92. See GEORGE LAKOFF, *WHOSE FREEDOM? THE BATTLE OVER AMERICA'S MOST IMPORTANT IDEA* 12-16 (2006) (discussing deeply ingrained beliefs).

93. See Negowetti, *supra* note 13, at 705 (defining “System 1” cognitive systems as “rapid, intuitive, and error-prone”).

94. *Id.* (noting that “System 1 mental processes . . . operate without conscious awareness or conscious control”).

95. *Id.* (explaining that under the “dual process”, “System 1 is rapid, intuitive, and error-prone; System 2 is more deliberate calculative, slower, and often more likely to be error-free. Many implicit mental processes function outside of one's conscious focus and are rooted in System 1, including implicit memories, implicit perceptions, implicit attitude, and implicit stereotypes. System 1 mental processes affect social judgments, but operate without conscious awareness or conscious control.”)

96. See Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ASSN. LEG. WRITING DIRECTORS 1, 15 (2010) (discussing “deep frames” that are held at a subconscious level and are so powerful that they “often trump facts”).

discrimination against women and certain protected minorities illegal.<sup>97</sup> That was followed by numerous other state and federal statutes and judicial decisions that moved this country toward a goal of equality for all, albeit at a snail's pace.<sup>98</sup> And while the LGBTQ community faced criminal prosecution for many of these formative years, the constitutional right for gays and lesbians to marry would be celebrated in the Rose Garden by the first African-American president.<sup>99</sup>

Still, while a government can mandate equal treatment under the law, a government cannot purge bigotry from its citizen's hearts. Eradicating personal bigotry is a gradual process. Yet, America certainly has made its strides, especially during Barack Obama's presidency.<sup>100</sup>

With this wave of inclusion, slurs against the LGBTQ community – *or any minority* – not only became unacceptable but they even resulted in a societal backlash, such as financial boycotts.<sup>101</sup> In large part – at least in many urban and other progressive areas – bigots had been marginalized and shamed into silence.

That message began to unravel in direct relation to the rise in Trump's popularity. Even if unintended, somehow the message got out to the Alt-Right that if your vision of America accepted bigotry; Trump was your guy.<sup>102</sup> Rally after rally saw Trump supporters openly spewing racial slurs

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97. See Civil Rights Act of 1964, Pub. L. No. 88-352, 71 Stat. 241 (1964) (referring to the numerous protections from sex and race discrimination regarding schooling, voting, and employment in the Act's titles I–XI).

98. See *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (preventing states from denying free public education to children who had not been legally admitted to the United States); The Ralph Civil Rights Act of 1976, CAL. CIV. CODE § 51, 51.7, 52 (Deering 2017) (prohibiting hate violence against California residents on the basis of an array of characteristics, including but not limited to, disability, medical condition, genetic information, and sexual orientation).

99. Gregory Korte, *Obama: Gay Marriage Ruling is 'A Victory for America'*, USA TODAY (June 26, 2015, 10:43 AM), <https://www.usatoday.com/story/news/politics/2015/06/26/obama-gay-marriage-ruling/29328755/>.

100. See Lowry, *supra* note 48 and accompanying text (discussing how Obama's legacy will be marked by the cultural change that occurred throughout his presidency).

101. See John Schuppe, *Corporate Boycotts Become Key Weapon in Gay Rights Fight*, NBC NEWS (Mar. 26, 2016), <http://www.nbcnews.com/news/us-news/corporate-boycotts-become-key-weapon-gay-rights-fight-n545721> (stating that Commentators have noted that boycotts have become a key tool in fighting prejudice because, put simply, what the government cannot – or won't – do, the public can).

102. See Clark Mindock, *What is the KKK? Racist 'Alt-Right' Trump Supporters to Rally in North Carolina*, INT'L BUSINESS TIMES (Dec. 2, 2012), <http://www.ibtimes.com/what-kkk-racist-alt-right-trump-supporters-rally-north-carolina-2453815> (noting that just after the election, the Alt-Right organized a Trump

and even physically beating minorities.<sup>103</sup> All to the chant of “Make America Great Again.”<sup>104</sup> While not all Trump supporters were racists, those who were racists certainly felt welcome at Trump rallies.

Trump pledged that he would undo everything Obama did, a metaphoric “white-wash” of the Obama presidency. The tenor was so strong it arguably signaled Trump’s willingness to sign an executive order erasing the Obama years from the history books, if he could somehow do so.<sup>105</sup> Going back to that group of African-American school boys. What message does this send to these boys?

Similarly, what message does building a wall send to Latino children? Or the other messages – such as the call for a Muslim ban – send to other children? And what about young girls? Not only did they *not* see the election of the first woman president – despite her winning the popular vote by almost three million votes – they saw America elect a candidate that America knew was a misogynist.

As noted above, even if parents absolutely tell children that bigotry and bullying is wrong, children know what they see. Deeply-ingrained beliefs are the product of *both* what is conveyed by the immediate circle surrounding a child *and* by society.<sup>106</sup> Just like the image of Trump mocking a disabled reporter has been indelibly imprinted in our minds, so too are societal signals

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rally at an undisclosed location in North Carolina, and after Trump’s victories, numerous Alt-Right speakers have made clear they believe a Trump presidency supports their agenda).

103. See Avi Selk, *The Violent Rally Trump Can’t Move Past*, WASH. POST (Apr. 3, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2017/04/03/the-violent-rally-trump-cant-move-past/?utm\\_term=.1b39f280719a](https://www.washingtonpost.com/news/the-fix/wp/2017/04/03/the-violent-rally-trump-cant-move-past/?utm_term=.1b39f280719a) (discussing routine nature of violence directed toward minorities during Trump’s campaign rallies); see also Elliott C. McLaughlin, *It’s Plausible Trump Incited Violence, Federal Judge Rules in OK’ing Lawsuit*, CNN: POLITICS (Apr. 3, 2017), <http://www.cnn.com/2017/04/02/politics/donald-trump-lawsuit-incite-violence-kentucky-rally/index.html> (discussing U.S. District Court Judge David Hale’s decision to deny President Trump’s motions to dismiss plaintiffs’ negligence, gross negligence and recklessness, and incitement to riot claims).

104. Shaun King, *King: Not Long Before Someone Gets Killed at Trump Rally*, N.Y. DAILY NEWS (Mar. 2, 2016), <http://www.nydailynews.com/news/national/king-not-long-killed-trump-rally-article-1.2549868> (pointing out that African-Americans were particularly targeted, specifically thirty African-American college students were, “forcefully ejected – simply for being black”).

105. See Timothy Noah & Cogan Schneier, *Trump Poised to Erase Obama Policies*, POLITICO (Nov. 10, 2016), <http://www.politico.com/story/2016/11/trump-erase-obama-policies-231156>.

106. See, e.g., Jewel, *supra* note 84, at 663-65 (discussing how “toxic racial stereotypes and categories become embedded in the human brain and what can be done about it”).

condoning prejudice. They simply cannot be “unseen.”<sup>107</sup> Per science, the only remedy to challenge a deeply-seeded belief or bias is with a contrary and equally-powerful message that – no pun intended – *trumps* the other.<sup>108</sup> Interestingly, that message *could theoretically* come from an evolved Donald Trump.

*C. A Unique Opportunity: Could President Trump Set an Example that Would Guide His Supporters to Reject Their Own Implicit or Explicit Bias?*

Imagine, if you will, the White House on a future date. It is a cold winter’s night. Trump has just finished binge-watching a half-dozen Saturday Night Live skits.<sup>109</sup> Charles D., his personal butler, walks in.<sup>110</sup> In his decades-long service to the White House, Charles has seen the human side of many presidents, and this moment will prove to be no exception.<sup>111</sup> Denouncing SNL, Trump asks “Why? Why do they do this to me?”

The wise butler responds, “If you really want to know, listen.”

“To who?” retorts Trump. “Not those haters on MSNBC.” Trump begins madly scavenging through the cushions of a gold-embossed sofa. “Did they take your phone again?” asks Charles. “I need my people, all right.” Charles heads for the door as Trump continues his tirade: “If you’re not going to answer my question, you’re of no use to me.” Charles stops in his tracks. “Who do I listen to?” barks Trump.

With a wry smile, Charles responds: “Yourself.”

Later that night, Trump cuddles up with his favorite cocker spaniel – no, make that something else – and finally falls asleep.<sup>112</sup> Visions of sugar plums

107. See *id.* at 667 (discussing how the words “unwed mother” cause our minds to “quickly latch[] onto the majoritarian culture values” associated with this term).

108. See *id.* at 690-691 (recognizing the need for “[a]lternative narratives” which ultimately can operate to “erase existing neural pathways and form new pathways”).

109. See Jill Disis, *Trump Renews Attacks on ‘SNL,’ Right on Cue*, CNN MEDIA (Jan. 16, 2017), <http://money.cnn.com/2017/01/15/media/trump-alec-baldwin-saturday-night-live/index.html> (reporting that Trump regularly watches Saturday Night Live and tweets about how Alec Baldwin portrays him).

110. The name “Charles D.” was chosen as a shout-out to Charles Dickens.

111. *Lee Daniels’ The Butler*, IMDB, <http://www.imdb.com/title/tt1327773/> (last visited Sept. 29, 2017) (discussing the eight decades of service of Cecil Gaines, an African-American butler, and how the film made clear that the White House housekeeping staff takes great pride in their positions and routinely stay in such positions for decades).

112. See Karin Brulliard, *Meet Patton the Goldendoodle. Will He Become Trump’s First Dog?*, WASH. POST (Dec. 6, 2016), [https://www.washingtonpost.com/news/animalia/wp/2016/12/06/meet-patton-the-goldendoodle-will-he-become-trumps-first-dog/?utm\\_term=.5c94c09bbf87](https://www.washingtonpost.com/news/animalia/wp/2016/12/06/meet-patton-the-goldendoodle-will-he-become-trumps-first-dog/?utm_term=.5c94c09bbf87) (noting Trump’s apparent aversion to pets, in particular

dance in his head.<sup>113</sup> But he can't shake that quizzical look from Charles D. As Trump drifts into deep REM mode – or as he calls it, “bigly” sleep – he is visited by three ghosts: The Ghost of Elections Past, the Ghost of Elections Present, and the Ghost of Elections Yet to Come.<sup>114</sup>

The Ghost of Elections Past takes Trump on a tour not just of his glorious campaign but of his entire life to show him how he became the man who would one day become president. The final images include his victory speeches on election night and at the Republican National Convention, where he pledged to unite America.

Trump turns in his sleep, a happy man.

The Ghost of Elections Present enters next and takes Trump on another tour, this time focusing on the upcoming 2018 mid-term elections. Trump finds himself looking at a Town Hall meeting in middle America where a Republican Congressman is firing up a supportive crowd chanting “Obamacare Has Got to Go” and “Repeal It Now.”

Trump is again pleased.

But a young man steps up to the microphone. He implores the Congressman to hold off repealing Obamacare until a replacement is in place, explaining that his cancer-stricken daughter will not get the medical attention she needs.

A flash of compassion crosses Trump's face. “This man,” asks Trump, “did he vote for me?” “Does it matter?” responds the Ghost.

Later, Trump is transported to the man's home, where he realizes the child – Tiny Tina – is the niece of one of his favorite White House maids, Beatrice Cratchit, who recently quit for “family reasons.” “Can't anything be done?”

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dogs, and that shortly after the election it was reported that Trump was at least considering overcoming this aversion, in part, because of his son, Baron); Aaron Short, *Trump's Friend 'Fell in Love' with Dog She Offered for White House*, N.Y. POST (Jan. 15, 2017), <http://nypost.com/2017/01/15/trumps-friend-fell-in-love-with-dog-she-offered-for-white-house/> (positioning Trump as the first president in 150 years not to have a pet); Nick Wing, *Donald Trump Clearly Doesn't Understand How Dogs Work*, THE HUFFINGTON POST (Feb. 9, 2017), [http://www.huffingtonpost.com/entry/donald-trump-dogs\\_us\\_56b99a5ee4b04f9b57dafa54](http://www.huffingtonpost.com/entry/donald-trump-dogs_us_56b99a5ee4b04f9b57dafa54).

113. See Clark Moore, *'Twas the Night Before Christmas* (1983), <https://www.poetryfoundation.org/poems-and-poets/poems/detail/43171> (noting that this is a homage to the famous poem, ‘Twas the Night Before Christmas’ by Clement Clark Moore).

114. See John Broich, *The Real Reason Charles Dickens Wrote A Christmas Carol*, TIME (Dec. 13, 2016), <http://time.com/4597964/history-charles-dickens-christmas-carol/> (noting that this is based upon the famous novel, *A Christmas Carol*, by Charles Dickens, which may have been politically motivated).

Trump asks. “No.” responds the Ghost. “This child *will* die unless the course of future events be altered.” A knot begins to turn in Trump’s stomach, yet he convinces himself the child’s death is an unfortunate but necessary consequence.

Next up is the Ghost of Elections Yet to Come. At first, Trump is fearful. But the Ghost assures him he is still the president and takes him to the National Mall for the 2020 Inauguration. Trump relaxes as he sees the massive crowd packed into the sacred square. “See,” says Trump. “This is way more people than Obama had at his inauguration.”

The Ghost directs Trump’s attention to various people in the crowd. An elderly white man banters jovially with a group of young African-American and Latino college students. A woman donning a hijab offers a smile and a bottle of water to a rabbi. Next up, Trump sees a farming family from the Midwest aligned with members of the LBGTQ community. They jointly hold up an American Flag and a Gay Pride Flag as they sing “America the Beautiful.” “I did this,” Trump proudly declares. “I really united them.” With a wry smile that reminds Trump of that quizzical look from Charles D., the Ghost answers: “In a way.”

The Ghost collapses time to the end of the Inauguration ceremony and transports Trump to the back of the main stage, where he sees an older version of himself – slightly weathered but still handsome – staring out into the crowd. A pleased Trump watches his future-self wave to the onlookers. Just then another figure approaches and shakes Trump’s hand. The figure acknowledges the crowd, evoking an immediate thunderous response. The figure breaks the handshake with Trump with a comforting pat on his shoulder. Trump watches as his future self turns and heads back toward the tunnel between the National Mall and the White House. The crowd breaks into the send-off stadium chant: “Na-Na-Na-Na, Na-Na-Na-Na, Hey, Hey, Hey, Goodbye” that marked George W. Bush’s farewell at Obama’s 2009 Inauguration.<sup>115</sup> As Trump’s future self disappears in what will be his last walk to the White House, Trump remembers he had hoped to hear that chant just four years earlier, but did not.

Trump wakes up in a cold sweat. He immediately calls together his staff and declares himself a changed man. He grabs a pad, scribbling: “Executive Order: Equality for All. Now.” Trump scratches plans for a border wall,

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115. See Dave Ubanski, *Flashback: Bush Booed, Mocked by ‘Na Na Hey Hey Kiss Him Goodbye’ Song at ‘09 Obama Inaugural*, THE BLAZE (Jan. 20, 2017), <http://www.theblaze.com/news/2017/01/20/flashback-bush-booed-mocked-by-na-na-hey-hey-kiss-him-goodbye-song-at-09-obama-inaugural/> (stating that this is the chant that famously was heard at the 2009 Inauguration of Barack Obama as President George W. Bush headed back into the tunnel toward the White House).

rescinds immigration orders, and shows all presidential appointees and staffers harboring any degree of prejudice the door. Within a week, Trump has congressional leaders sitting down working out what is best for America, as opposed to what is best for an individual political party or group. Magically, the only division in America is over who to pick for the final four in March madness.<sup>116</sup>

And the World will be a Better Place. And the World will be a Better Place . . . .<sup>117</sup>

Setting tongue-in-cheek aside, Trump actually is uniquely situated to play a major role in the eradication of prejudice.<sup>118</sup> It is well accepted that the evolution of a leader can set an example for others to follow.<sup>119</sup> For example, before taking office, Barack Obama did not support gay marriage.<sup>120</sup> Yet as his view evolved, so too did the view of most Americans. Americans could more easily put themselves in the shoes of someone with an *evolving* view than someone with an *opposing* view.<sup>121</sup>

This phenomenon can be explained in terms of validating the original view, as opposed to shaming. For example, if coastal-elites just yell at those in the rust-belt and label them intolerant, they justifiably feel shamed and an impasse occurs. A perfect example of this is anyone who felt they could be

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116. See Max Greenwood, *ESPN: Trump to Pass on 'March Madness' Bracket*, THE HILL (Feb. 15, 2017), <http://thehill.com/blogs/blog-briefing-room/news/319733-trump-to-pass-on-ncaa-march-madness-bracket-report> (explaining that “March Madness” refers to the annual NCAA basketball tournament that begins with sixty-eight teams and ends in a final match toward the end of March, where many fans participate by filling out “brackets,” through office pools or online, but in another break from tradition, Trump declined to fill out an ESPN bracket).

117. This is a reference to the song “Put a Little Love in Your Heart,” originally recorded by Jackie DeShawn in 1969. It has since been recorded by numerous other artists, such as a version by Al Green and Annie Lennox that was used in the 1988 movie “Scrooged.” Ms. DeShawn’s other signature song is “What the World Needs Now.”

118. Compare Elizabeth Landers, *Trump Holds 'Little Breakfast' To Kick Off Black History Month*, CNN: POLITICS (Feb. 2, 2017), <http://www.cnn.com/2017/02/01/politics/african-american-meeting-donald-trump-frederick-douglass/index.html> (discussing President Trump’s efforts to negate the perception he supports racism), with Jewel, *supra* note 84, at 690-91 (explaining “alternative narratives” should change neural short-cuts to racism).

119. See Jewel, *supra* note 84, at 674–75

120. Becky Bowers, *President Barack Obama’s Shifting Stance on Gay Marriage*, POLITIFACT (May 11, 2012, 4:19 PM), <http://www.politifact.com/truth-o-meter/statements/2012/may/11/barack-obama/president-barack-obamas-shift-gay-marriage/>.

121. See Bradford J. Kelley, *The Rainbow Sea Change: The Impact of Popular Culture on Homosexual Rights*, 16 SCHOLAR: ST. MARY’S L. REV. & SOC. JUST. 283, 284–85 (2014).

characterized as falling into that “basket of deplorables,” which was a label used by Hillary Clinton to characterize certain groups of Trump’s supporters during the campaign.<sup>122</sup> Clinton could never change any of their minds about prejudice. Yet, Donald Trump could.

It *could* happen . . . . Or *not*.<sup>123</sup>

As discussed below, while Trump is in a position to end the divisiveness by serving as a role model for his supporters to confront their explicit and implicit bias, it is clear that the American people are not holding their breath.

### III. THE “TWELFTH MAN” – THE IMPACT OF THE AMERICAN PUBLIC ON JUDICIAL DECISION-MAKING

The American system long has been explained as having checks and balances to ensure our government stays true to our democratic principles. Typically, most view these checks and balances in terms of three independent branches of government: the legislative branch, the executive branch, and the judicial branch.<sup>124</sup> Yet there is a fourth check: the American people. Like the “twelfth man” in football – epitomizing the strategic roar of the home-town stadium fans – the roar of the American people also can wield its power on how these checks and balances play out.

One insight into the tsunami of grass roots political activism rising after Trump’s election might be related to historian Tim Weiner’s view that our country is at a crossroads in our search to define ourselves as a nation.<sup>125</sup>

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122. See Amy Chozick, *Hillary Clinton Calls Many Trump Backers ‘Depolorables’ and G.O.P Pounces*, N.Y. TIMES (Sept. 10, 2016), <https://www.nytimes.com/2016/09/11/us/politics/hillary-clinton-basket-of-deplorables.html> (describing what Clinton used to call Trump supporters at a fundraiser in Manhattan).

123. See Christopher Wilson, *Trump Touts Jewish Friends, Family Members After Israeli Reporter Asks About Anti-Semitic Crime*, YAHOO NEWS (Feb. 15, 2017), <https://www.yahoo.com/news/trump-touts-jewish-friends-family-members-after-israeli-reporter-asks-about-anti-semitic-crime-181437544.html> (discussing that there are at least some signs that Trump *could* rise to the occasion and truly denounce racism, specifically when Trump held a news conference with Israeli Prime Minister Benjamin Netanyahu, in which Trump pledged to “do everything in [his] power to stop long-simmering racism,” and also plainly acknowledged he thought one of the reasons he had won was because the nation was “very, very divided”).

124. See U.S. CONST. art. I, § 1 (vesting all legislative power with the Congress of the United States); U.S. CONST. art. II, § 1 (vesting executive power with the President of the United States of America); U.S. CONST. art. III, § 1 (vesting judicial power with the Supreme Court and inferior courts).

125. See TIM WEINER, *LEGACY OF ASHES: THE HISTORY OF THE CIA* (Anchor, Reprint ed. 2008); Laura Sydell, *On Both the Left and Right, Trump is Driving New Political Engagement*, NATIONAL PUBLIC RADIO: U.S. (Mar. 3, 2017) <http://www.npr.org/2017/03/03/518261347/on-both-left-and-right-trump-is-driving->



Weiner argues that *no* free republic other than the Roman Empire has ever lasted longer 300 years.<sup>126</sup> Our young country entered its 249<sup>th</sup> year when Trump was elected.<sup>127</sup> And many political commentators have pointed out that the system has effectively become clogged.<sup>128</sup> Through gerrymandering and other trickery, the normal checks and balances are not working, and we could be headed toward rule by oligarchy.<sup>129</sup> Following Weiner's view, this gives rise to a last stand to hold onto democracy.<sup>130</sup> When, as perhaps here, a country has essentially been divided into two very distinct factions, each side fights desperately to wrestle control from the other. Put simply, Americans sense we're either going to take a very hard right or a very hard left.

Against this backdrop, our Supreme Court will decide hotly contested cases, many of which will go to the core of what divides us as a nation. And the Supreme Court will have to walk a tight rope if it is to honor that "tacit deal" with the American public to never stray too far from public opinion.

Is this a great Shakespearian drama or just another modern-day civics lesson? It certainly is looking like a little bit of both. This section introduces the main players: the left; the right; and our Supreme Court, which is stuck

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new-political-engagement (describing the "unprecedented" increase in political engagement on both sides of the political spectrum since President Trump's election); see also *The Rachel Maddow Show, Transcript 2/14/2017*, (MSNBC Feb. 14, 2017, 9:00 PM), <http://www.msnbc.com/transcripts/rachel-maddow-show/2017-02-14> (interviewing Tim Weiner about the FBI and the CIA).

126. See WEINER, *supra* note 125, p. xvii ("[n]o republic in history has lasted longer than 300 years").

127. *Id.*

128. See, e.g., Mickey Edwards, *We No Longer Have Three Branches of Government*, POLITICO (Feb. 27, 2017), <http://www.politico.com/magazine/story/2017/02/three-branches-government-separation-powers-executive-legislative-judicial-214812>.

129. See Jane Mayer, *Donald Trump, American Oligarch*, NEW YORKER: NEWS DESK (Oct. 3, 2016), <http://www.newyorker.com/news/news-desk/donald-trump-american-oligarch> (discussing how Trump epitomized the traits of a Russian oligarch).

130. See Rachel Maddow Show, *supra* note 125 (stressing that Weiner noted in his interview that "Jim Comey [Director of the FBI] and Senator John McCain were standing between President Trump and the survival of American democracy," and that John McCain was the "last cold warrior" in the senate that would stop Trump); Amy B. Wang, *'That's How Dictators Get Started': McCain Criticizes Trump for Calling the Media 'the Enemy'*, WASH. POST (Feb. 18, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/02/18/thats-how-dictators-get-started-mccain-criticizes-trump-for-calling-media-the-enemy/?utm\\_term=.10f34c7d5c58](https://www.washingtonpost.com/news/the-fix/wp/2017/02/18/thats-how-dictators-get-started-mccain-criticizes-trump-for-calling-media-the-enemy/?utm_term=.10f34c7d5c58) (noting that less than one week later, McCain would state on camera that Trump's efforts to delegitimize the press was the type of "first step" that dictators take, and that McCain did not say that he was trying to suggest that Trump wanted to be a dictator, just that we should be aware of the tactic).

smack dab in the middle.

A. *The Spontaneous Collective Grassroots Response to the Trump Presidency*

In the immediate aftermath of the Trump election, progressives across the nation began to organize. On November 9, 2016—one day after Trump was elected—Teresa Shook—a grandmother in Hawaii—posted on Facebook her idea to march on Washington D.C.<sup>131</sup> Within a few weeks, it was decided that the protest would be tagged the “Million Women March,” and it would take place at the National Mall on the day after Trump’s inauguration.<sup>132</sup> But that was just the beginning. That single Facebook post would morph into a world-wide event. The name would be changed to “Women’s March on Washington” and *over 500 sister-marches* would be organized in America (407 other marches) and in 81 other countries (168 marches). And on January 21, 2017, an estimated *five million people* world-wide would gather to peacefully protest.<sup>133</sup>

As expected, celebrity speakers packed the stage not only in Washington D.C., but they also headlined events from Los Angeles to New York to London and back again. Subways were jammed and so were the events, but it did not matter. Women—and all genders—found a way to add themselves to the count even if it meant standing blocks away from the main stage.<sup>134</sup> This desire for visibility was manifested in the many other sister-marches, specifically including those in small towns and traditional red-states.

Notably, the Women’s March embraced far more than just women’s rights. “Build Bridges, Not Walls” was a common rally cry. Consistent with the Women’s March policy platform, announced on January 12, 2017, numerous interests were promoted, including, *inter alia*, Muslims, the LGBTQ community, climate change, environmental issues, and the

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131. See, e.g., Meredith Woerner, *Who Started the March? One Woman*, L.A. TIMES (Jan. 21, 2017), <http://www.latimes.com/nation/la-na-pol-womens-march-live-who-started-the-march-one-1485033621-htmstory.html>; Laila Kearney, *Hawaii Grandma’s Plea Launches Women’s March in Washington*, REUTERS (Dec. 5, 2016), <http://www.reuters.com/article/us-usa-trump-women-idUSKBN13U0GW>.

132. Kearney, *supra* note 131.

133. See WOMEN’S MARCH, *supra* note 25.

134. See Jose A. DelReal, *It Wasn’t Just Liberal Enclaves. Women’s Marches Drew Surprising Numbers in Red States and Small Towns, Too*, WASH. POST (Jan. 22, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/01/22/it-wasnt-just-liberal-enclaves-womens-marches-drew-surprising-numbers-in-red-states-and-small-towns-too/?utm\\_term=.d8c93799ae2a](https://www.washingtonpost.com/news/post-nation/wp/2017/01/22/it-wasnt-just-liberal-enclaves-womens-marches-drew-surprising-numbers-in-red-states-and-small-towns-too/?utm_term=.d8c93799ae2a) (describing the “record-breaking participation” that occurred at the women’s marches across the country).

preservation of a national health plan.<sup>135</sup> Arguably, that might have been one of the reasons the Women's March exceeded the expected attendance. Women felt the need not only to march to protect their own rights, but the need to march to protect *everyone* whose rights were placed in jeopardy by a Trump presidency.

The need to take to the streets was also seen in the weeks just following the Women's March. Crowds gathered at airports to protest Trump's executive order targeting Muslims from seven nations from entering the United States.<sup>136</sup> There were also protests against Trump's aggressive deportation policies, such as the arrest of Guadalupe Garcia de Rayos in Arizona, a mother whose only crime was a twenty-year old conviction for using a false social security number to secure a job.<sup>137</sup> President's Day would be dubbed "Not my President's Day" as protestors marched in numerous locations throughout America.<sup>138</sup>

Other grassroots efforts that received national attention include the "Indivisible Movement," which began with a small group of congressional staffers who drafted a twenty-six-page guide about how activists could best petition politicians on a local level.<sup>139</sup> Here too, while the idea started

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135. See Karen Turner, Kainaz Amaria, and Nesima Aberra, *The Vast Diversity of the Women's March on Washington*, in *Words and Photos*, VOX (Jan. 21, 2017), <http://www.vox.com/first-person/2017/1/21/14346568/womens-march-washington-photos-diversity> (describing that the "wall" reference pertains to Trump's campaign promise to build a wall along the border between the United States and Mexico, which would prompt a "Day Without Immigrants" on February 16, 2017); Kate Taylor, *McDonald's Restaurants Across the US are Shutting Down for a 'Day Without Immigrants' Protest*, BUSINESS INSIDER (Feb. 16, 2016), <http://www.businessinsider.com/day-without-immigrants-mcdonalds-shut-down-2017-2> (showcasing the economic effect of the immigrant workforce in the U.S.).

136. See James Doubek, *Photos: Thousands Protest at Airports Nationwide Against Trump's Immigration Order*, NATIONAL PUBLIC RADIO (Jan. 29, 2017), <http://www.npr.org/sections/thetwo-way/2017/01/29/512250469/photos-thousands-protest-at-airports-nationwide-against-trumps-immigration-order> (noting that the Executive Order was signed in the first week following the Trump Inauguration, causing chaos and inciting spontaneous nationwide protests).

137. Fernanda Santos, *She Showed Up Yearly to Meet Immigration Agents. Now They've Deported Her*, N.Y. TIMES (Feb. 8, 2017), [https://www.nytimes.com/2017/02/08/us/phoenix-guadalupe-garcia-de-rayos.html?\\_r=0](https://www.nytimes.com/2017/02/08/us/phoenix-guadalupe-garcia-de-rayos.html?_r=0).

138. See Kate Abbey-Lambertz, Hayley Miller, and Kim Bellware, *Thousands Rally at Anti-Trump 'Not My Presidents Day' Events*, HUFFINGTON POST (Feb. 20, 2017), [http://www.huffingtonpost.com/entry/not-my-presidents-day-protests\\_us\\_58ab1f9ce4b07602ad56cece](http://www.huffingtonpost.com/entry/not-my-presidents-day-protests_us_58ab1f9ce4b07602ad56cece) (stating that organized protests took place in at least eight different cities, including Washington D.C.).

139. See Elana Schor and Rachael Bade, *Inside the Protest Movement that Has Republicans Reeling*, POLITICO (Feb. 10, 2017), <http://www.politico.com/story/2017/02/>

small—and was a way for the staffers to funnel their angst—became big. It was reported that less than *two weeks* after the Indivisible website was launched, nearly a *quarter of a million participants* had registered. Just a few weeks into the Trump administration, Indivisible had 6,200 local affiliate groups.<sup>140</sup>

One tactic urged by Indivisible was for local citizens to phone their Congressional Members.<sup>141</sup> An early “nationwide call” day scheduled for January 22, 2017 (two days after the inauguration) generated an estimated 60,000 phone calls. Similarly, an estimated 35,000 calls were logged on a designated day following Trump’s executive order on immigration.<sup>142</sup> Other strategies included flooding town-hall meetings.<sup>143</sup> Here too, the sheer number of activists was staggering. While the protests were not violent, they were vocal and many Congressional Members had to be escorted out of back doors by police to escape the crowds.<sup>144</sup>

Numerous other grassroots groups spontaneously erupted across America.<sup>145</sup> It was as if the Trump presidency was a lightning rod, electrifying many stay-at-home progressives to get off the couch and follow the call to “resist.”<sup>146</sup> This simple term quickly became the anthem for the collective anti-Trump movement. Of course, the need to “resist” presupposes a powerful contrary view. Put simply, there are two sides to every story.

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protest-movement-republicans-234863 (commenting that the “Indivisible Guide,” as the document was deemed, borrows from the tactics of the Tea Party’s “best practices for making Congress listen”).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. See Nelson Garcia, *Congressman Coffman Leaves Frustrated Crowd*, 9NEWS (Jan. 16, 2017), <http://www.9news.com/news/congressman-coffman-leaves-frustrated-crowd/386167135> (highlighting a town hall meeting hosted by House Representative Mike Coffman in Aurora, Colorado).

145. See, e.g., #EQ4ALL@LLS (<https://eq4all.lls.edu/>), a website launched by Loyola Law School, Los Angeles on April 4, 2017 that includes profiles and pictures reflecting why those profiled are fighting for equality for all, not just one’s own group. The site was designed in a manner to allow other schools to follow the template by using: #EQ4ALL@[YourCampus].

146. See Joshua Holland, *Your Guide to the Sprawling New Anti-Trump Resistance Movement*, THE NATION (Feb. 6, 2017), <https://www.thenation.com/article/your-guide-to-the-sprawling-new-anti-trump-resistance-movement/> (noting that the movement has been called an “explosion of new activism”).

*B. The Flip of the Coin: Trumpism, Evangelist Values and the Distrust of the Judiciary*

The sense of urgency to *support* Trump wasn't anywhere near as dire as the sense of urgency felt by those who oppose the Trump presidency. Besides the massive Women's March, the other major march held at the National Mall around the time of the inauguration was the annual Pro-Life March.<sup>147</sup> In 2017, attendance was minimal, at least in comparison to the throngs seen at the Women's March.<sup>148</sup> Celebrities were not pushing to get on the bill and it's fair to say there was relatively little "bling" provided by corporate sponsors.<sup>149</sup> Still, there could be a very simple explanation for the comparable low attendance: Trump won.

There also may be another reason that Trump supporters are not joining together in the wave of unity of those forming the "Resistance." As a practical matter, many Trump supporters – specifically including the Alt-Right – simply do not share the same world view.<sup>150</sup>

For example, it would appear undisputed that the Trump campaign—whether intentionally or not—stoked the fire of racial and gender animus.<sup>151</sup>

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147. See *Thousands Attend the March for Life Rally*, USA TODAY (Feb. 27, 2017), <http://www.usatoday.com/picture-gallery/news/2017/01/27/thousands-attend-the-march-for-life-rally/97133170/> (sharing pictures from the Pro-Life March held in Washington D.C.).

148. See Stephanie Dube Dwilson, *How Many Attended the March for Life vs. Women's March on Washington? [PHOTOS]*, HEAVY (Jan. 28, 2017), <http://heavy.com/news/2017/01/how-many-attended-march-for-life-vs-womens-march-photos-crowd-size-trump-inauguration-pictures-number-people/> (admitting that attendance at pro-life march was expected to be, and was, less than the Women's March).

149. See David Beasley, *Countering Anti-Trump Protests, President's Fans Stage Protests, President's Fans Stage Rallies*, REUTERS (Feb. 27, 2017), <http://www.reuters.com/article/us-usa-trump-supporters-idUSKBN1661CM> (discussing that the post-Inauguration "Trump Rallies" held on February 25, 2017 and February 27, 2017, to counter the many anti-Trump protests, including the Women's March, had minimal attendance); Matt Pearce, *Crowd Sizes Become the Latest Disputed Measuring Stick in a Divided (and Confused) America*, L.A. TIMES (Jan. 27, 2017), <http://www.latimes.com/nation/la-na-crowd-sizes-20170127-story.html> (citing Pro-Life supporters' concerns regarding the absence of media attention surrounding their annual march).

150. See Joseph Goldstein, *Alt-Right Gathering Exults in Trump Election with Nazi-Era Salute*, N.Y. TIMES, <https://www.nytimes.com/2016/11/21/us/alt-right-salutes-donald-trump.html> (discussing Richard Spencer and the Alt-Right's views on "white identity").

151. See Tim Alberto, *I'm a Dead Man Walking*, POLITICO MAGAZINE: THE FRIDAY COVER (Feb. 17, 2017), <http://www.politico.com/magazine/story/2017/02/mark-sanford-profile-214791> (noting that in an interview with Politico, Republican Mark

As noted above, in addition to a tough stance on immigration, Trump also advocated for a “Muslim Ban,” meaning a ban based upon a person’s religion. While such views may have been welcomed by the Alt-Right, these views cannot be reconciled with many sincerely held religious beliefs. More particularly, main stream religions in America certainly *do not* support animus or violence toward minorities or religions.<sup>152</sup> And religious organizations certainly have reason to object to permitting a government to discriminate based upon religious belief.

This is the exact quandary Utah voters found themselves in prior to the election.<sup>153</sup> On one hand, Utahans wanted to vote for a candidate who would champion their views regarding, *inter alia*, abortion.<sup>154</sup> On the other hand, many could not stomach Trump’s perceived values, including his bullying and treatment of women. For that reason, many Utahans rallied around independent Evan McMullin.<sup>155</sup>

While the Alt-Right may have been downright giddy upon realizing a Trump presidency, they are not the type of individuals many other Trump supporters want to stand shoulder to shoulder with at a protest.<sup>156</sup> Far from fitting the stereotypes ascribed to Trump supporters, a significant portion previously voted for Obama, thereby negating any suggestion such voters endorse white supremacy.<sup>157</sup> Still, this fact appears lost on many

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Sanford candidly stated that Trump had “fanned the flame of intolerance”).

152. See Donald J. Trump (@DonaldTrump), FACEBOOK (Feb. 18, 2016), <https://www.facebook.com/DonaldTrump/posts/10156658168535725> (illustrating that Trump drew perceived criticism from the Pope, prompting Trump to counter that criticism in an official response).

153. See Melanie Mason, *Evan McMullin Made Utah a Presidential Battleground. Next, He’ll Try to Transform Conservative Politics*, L.A. TIMES (Oct. 27, 2016), <http://www.latimes.com/politics/la-na-pol-evan-mcmullin-utah-20161027-story.html> (mentioning how Utah voters never fully backed Clinton or Trump, the major-party candidates).

154. See *id.* (noting voters were unable to vote for their principles).

155. See *id.* (highlighting the apathy connected with many Utahns’ decisions to vote for McMullin).

156. See Brakkton Booker, *Alt-Right Infighting Simmers Around Inaugural ‘DeploraBall’*, NATIONAL PUBLIC RADIO (Jan. 1, 2017), <http://www.npr.org/2017/01/01/507395282/alt-right-infighting-simmers-around-inaugural-deploraball> (highlighting that even the “moderate” Alt-Right appear to have issues with their “extremist” Alt-Right counterparts, and that the “moderate” Alt-Rights rescinded the invitation of Tim Treadstone, a prominent social media personality to their inaugural ball).

157. See Van Jones, Opinion, *The Messy Truth About the Gulf Between Trump and Hillary Voters*, CNN (Dec. 6, 2016), <http://www.cnn.com/2016/11/12/opinions/van-jones-messy-truth/index.html> (referring to numerous journalists that embarked on journeys to interview Trump supporters in local towns to find out exactly what motivated

Progressives.

While the Alt-Right may not be the *largest* group in the Trump alliance, they may be the most salient. And therein lies the great divide. Progressives will *not* return to an America that embraces bigotry. And the Alt-Right has firmly hitched their wagon to the Republican platform and appear—at least to Progressives—to be driving decisions at the presidential level.<sup>158</sup> The irony is that, similar to Progressives, many decent Conservatives—specifically including Evangelist Christians—reject both prejudice and bullying and that rejection is based in part on their religious belief.<sup>159</sup>

It can be expected that our Supreme Court would give short shift to any argument supporting an Alt-Right viewpoint. As a practical matter, the Alt-Right is a fringe group that does not reflect true populist opinion.<sup>160</sup> Thus, their views do not embody the “will of the people” espoused by Friedman.<sup>161</sup> Even more fundamental, supremacist views are directly at odds with present day interpretation of our Constitution.<sup>162</sup>

The same cannot be said for Evangelists and others who—based upon religious grounds—oppose LGBTQ rights and a woman’s right to choose.<sup>163</sup> While such views may be in the minority, the numbers are still close.<sup>164</sup> Moreover, unlike views espoused by the Alt-Right, free exercise of religion

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their vote).

158. See Jessica Roy, *What is the Alt-Right? A Refresher Course on Steve Bannon’s Fringe Brand of Conservatism*, L.A. TIMES (Nov. 14, 2016), <http://www.latimes.com/nation/politics/trailguide/la-na-trailguide-updates-what-is-the-alt-right-a-refresher-1479169663-htmstory.html> (discussing the role of Steve Bannon, Trump’s former chief strategist, and the “Alt-Right,” described as a “brand of far-right conservatism that generally embraces and promotes white nationalism, racism, anti-Semitism, homophobia, transphobia, and misogyny.”)

159. See Mason, *supra* note 153 (discussing how Trump failed to win the support of the sixty percent of voters who identify as Mormon in the past election).

160. See Roy, *supra* note 158.

161. See Friedman, *supra* note 18, at 1236 (arguing the constitutional change occurs when public understanding and judicial interpretation come together).

162. See Roy, *supra* note 158.

163. See Karen Swallow Prior, *Gay Marriage, Abortion, and the Bigger Picture*, CHRISTIANITY TODAY (June 29, 2015), <http://www.christianitytoday.com/women/2015/june/gay-marriage-abortion-and-bigger-picture.html> (noting that one minister characterized *Obergefell v. Hodges* as the “*Roe v. Wade*” of LGBTQ matters).

164. See David Masci & Michael Lipka, *Where Christian Churches, Other Religions Stand on Gay Marriage*, PEW RESEARCH CENTER (Dec. 21, 2015), <http://www.pewresearch.org/fact-tank/2015/12/21/where-christian-churches-stand-on-gay-marriage/> (noting that even in 2015 there was growing support for same-sex marriage amongst certain protestant religions).

is a staunch American value embedded in our Constitution.<sup>165</sup> The bottom line is that those Americans with sincerely held religious beliefs—as opposed to those who barter in hate—certainly are entitled to respect.

Added to this mix is that conservatives are quick to label Supreme Court opinions that expand individual liberties as examples of impermissible judicial activism.<sup>166</sup> This is the exact concern that conservatives have had with respect to judicial decisions such as *Roe v. Wade* and *Obergefell v. Hodges*.<sup>167</sup> Decisions that expand individual liberties are viewed by conservatives as partisan.<sup>168</sup> Of course, this ignores that our Supreme Court has decided cases in favor of conservative views, specifically including the recent decision in *Hobby Lobby*, which came down on the side of religious freedom when pitted against abortion rights.<sup>169</sup> In any event, the distrust of the judiciary and disdain for court made law—when it favors progressives—has irritated conservatives and fueled some of the legal challenges discussed below.

This is the zeitgeist against which our Supreme Court will decide the next round of hotly contested cases. Will popular opinion matter? If Friedman is correct, you bet it will.<sup>170</sup>

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165. U.S. CONST. amend. I (noting that Congress shall make no law “prohibiting the free exercise” of religion).

166. See S.M., *Those “Activist” Judges*, THE ECONOMIST (July 18, 2015), <https://www.economist.com/blogs/democracyinamerica/2015/07/judicial-politics-0>.

167. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

168. See Mason, *supra* note 153; see also John Lewis & Stuart Gaffney, *LGBT Rights and Abortion Rights Are Inseparable*, HUFFPOST: THE BLOG (Mar. 24, 2017), [http://www.huffingtonpost.com/john-lewis/lgbt-rights-and-abortion-rights-inseparable\\_b\\_9526388.html](http://www.huffingtonpost.com/john-lewis/lgbt-rights-and-abortion-rights-inseparable_b_9526388.html) (discussing the inseparability of LGBT rights and abortion rights and how conservative Christian groups view recent Supreme Court decisions protecting these rights).

169. See discussion, *infra* Subsection IV.A.

170. See Friedman, *supra* note 18, at 1249.



C. *Rock, Paper, Scissors and That “Tacit” Deal Between the American Public and the Judiciary*

*Brown v. Board of Education*.<sup>171</sup> *Roe v. Wade*.<sup>172</sup> *Obergefell v. Hodges*.<sup>173</sup> In these landmark cases, the Supreme Court was one step ahead of public acceptance of the civil right in question.<sup>174</sup> Even in the “one step back” cases, such as *Planned Parenthood v. Casey*, the Supreme Court arguably forecasted public opinion.<sup>175</sup> Why is that?

Rock, paper, scissors. Each branch of the government has extraordinary power subject to the powers vested in the other branches. The judiciary has always had the power to step in when elected officials go too far or do too little. Yet our Supreme Court has stayed true to the prevailing principle upon which our nation was born, namely, that the “will of the people” shall prevail.<sup>176</sup>

This premise was explored by Supreme Court historian Barry Friedman in his book: “The Will of the People.”<sup>177</sup> Friedman makes the case that the Supreme Court knows that the perception of the American people stands as a check on the Supreme Court’s legitimacy.<sup>178</sup>

Friedman thesis’ rests on a constitutional crisis that played out in the late 1930s.<sup>179</sup> More particularly, decision after decision by the Supreme Court threatened to derail President Roosevelt’s widely popular New Deal legislation.<sup>180</sup> Roosevelt envisioned an end run. He would appoint an

171. See 347 U.S. 483 (1954) (holding that segregated educational facilities are inherently unequal).

172. See 410 U.S. at 113 (finding that whether or not to terminate a pregnancy falls within the scope of the right of privacy under the Fourteenth Amendment).

173. See 135 S. Ct. 2584 (2015) (holding that the Fourteenth Amendment ensures same-sex couples the right to marry).

174. See *id.* at 2612 (Roberts, J. dissenting) (suggesting that the implications of the majority opinion will be difficult for society to accept); Friedman, *supra* note 18, at 1238-39 (explaining the influence that public opinion may yield over judges and judicial outcomes).

175. See generally 505 U.S. 833 (1992).

176. See Friedman, *supra* note 18.

177. See *id.*

178. See, e.g., *id.*

179. See, e.g., *id.*

180. See, e.g., *id.*; see also Maureen Johnson, *You Had Me at Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recently Hotly Contested U.S. Supreme Court Decisions*, 49 IND. L. REV. 397, 412 (2016) (describing Barry Friedman’s discussion of the Supreme Court’s efforts to “chip away” at President Roosevelt’s New Deal legislation).

additional justice for every sitting justice over the age of seventy.<sup>181</sup> This would permit Roosevelt to effectively control Supreme Court decisions by packing the court with friendly justices.<sup>182</sup> While this proposal was being debated, the Supreme Court retreated. Instead of *striking* New Deal legislation, the Supreme Court began to uphold the constitutionality of such measures.<sup>183</sup> This change of course quelled public outrage and resulted in Congressional rejection of the court packing proposal.<sup>184</sup> Friedman concludes that a “tacit deal” emerged whereby “the American people would grant the justices their power, so long as the Supreme Court’s interpretation of the Constitution did not stray too far from what a majority of the people believed it should be.”<sup>185</sup>

Friedman also argues that a corollary to this “tacit deal” is that the Supreme Court essentially tests the waters through a process he calls “judicial decision – popular response – judicial re-decision.”<sup>186</sup> Put differently, when the Supreme Court hands down a controversial decision, the Supreme Court pays close attention to the public reaction. If public reaction is negative, the Supreme Court retreats, as arguably was the case in the wake of *Roe v. Wade*.<sup>187</sup> When public reaction is positive, the Supreme Court forges forward, sensing the metaphorical loose leash that enables the justices to follow through with broader principles floated in the prior opinion.<sup>188</sup> When viewed in this manner, Supreme Court decision-making is informed not only by the briefs, but also by how a decision might be perceived by the American public.<sup>189</sup>

Even assuming that Friedman somehow is wrong – and the justices pay *no* attention to how Supreme Court decisions are received by the American public – the fact remains that the justices are positioned to help heal the current division by writing opinions in a manner that soundly bring us back to core unifying principles. Similarly, as discussed below, legal advocates for *both* sides should pave this path through use of responsible rhetoric.

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181. See Friedman, *supra* note 18. (explaining President Roosevelt’s solution to the Supreme Court’s efforts to frustrate his legislation).

182. See *id.* at 1242.

183. See *id.*

184. *Id.* at 1236.

185. *Id.* at 1241 (emphasizing that “[f]or the most part, this deal has struck”).

186. *Id.* at 1248.

187. *Id.* at 1253 (citing *Roe v. Wade* as an example).

188. *Id.*

189. *Id.*

#### IV. THE IMPACT OF THE JUDICIARY: HOW RESPONSIBLE RHETORIC CAN HEAL A DIVIDED NATION

A popular neighborhood pub in Boston, Massachusetts. Hand-crafted beer flows as a group of men play snooker in a back room. Others toss dingy darts at a tattered board.

Despite the revelry, politics is talk of the day. How dare a government impose rules that its citizens reject? Voices as well as beer steins rise in support of personal liberties, including freedom of religion and freedom of speech. “Equality for all,” shouts one, “not just for those in power.”

The year is 1776.

No, the bar isn’t named “Cheers.” And the pub regulars are not named Sam Malone, Norm Peterson, and Cliff Clavin.<sup>190</sup> But the sense of unity strikes a familiar chord. Our forefathers were rallying against a common tyrant—Mother England—for obstructing our ability to self-govern. Chants of “no taxation without representation” united thirteen colonies in what would become our great nation. That coalition embodied a desire to stand together as one.

In drafting a constitution that all the colonies could live with, our forefathers needed to find a way to ensure that individual states would not be bullied by others whilst adhering to a uniform set of governing principles that would apply equally to *all* the states.<sup>191</sup> Thus, our forefathers were driven by finding that fine line that embodies the simple principle of “my rights end where your rights begin.”

It is perhaps ironic that the “red states”—consisting of many less populated states—have had their way in recent elections, despite losing the popular vote. Conservatives should recognize both how frustrating this is to those in blue states and how eerily similar this is to the reasons that our forefathers declared independence from England. The red states can be seen as using the procedural benefits of majority rule to bully the blue states. The lack of any apology for doing so raises legitimate fear and anger that continuation of this pattern will result in the exact type of signature inequities that can be traced to England’s exploitation of the colonies.<sup>192</sup>

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190. See Michael J. Albano, *Nothing to “Cheer” About: A Call for Reform of the Right of Publicity in Audiovisual Characters*, 90 GEO. L.J. 253, 253 (2001) (discussing an interesting account of litigation concerning the “Cheers” brand).

191. See, e.g., Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2531 (2001) (explaining that the electoral college system was implemented to balance the interests of large and small states).

192. See Octavio Blanco, *Sanctuary Cities Risk Billions in Defiance of Trump*, CNN: MONEY (Nov. 19, 2016), <http://money.cnn.com/2016/11/19/news/economy/sanctuary->

To be fair, many conservatives also have felt disenfranchised. In particular—and as noted above—many conservatives holding sincerely held religious beliefs have felt spurned by Supreme Court decisions viewed as championing rights that cannot be reconciled with their own religious convictions. Conservative pundits are quick to point out that both a woman’s right to choose and the right to same-sex marriage were products of the judiciary—at least in terms of federal rules—and not by popular vote.<sup>193</sup> The fear of an overly liberal Supreme Court was ratcheted up by the untimely death of Justice Antonin Scalia.<sup>194</sup> At least some of those voting for Trump may have been following the simple to understand ideology of preempting further culture change by the fiat of Supreme Court rule.

The tug-of-war over Supreme Court nominees underscores the *presumption* that a Supreme Court justice would purposefully wield his or her vote in favor of the party affiliation of the nominating president. Yet that is not what a Supreme Court justice is charged to do. Nor would doing so remain true to that “tacit deal” that our Supreme Court may have with the American people.<sup>195</sup> The judiciary is tasked with the duty of protecting our core constitutional principles, which includes safe-guarding the interest of oppressed minorities.<sup>196</sup> In executing that task, it is widely accepted that justices should – borrowing the words of Chief Justice John Roberts—be viewed as fairly calling “balls and strikes” as opposed to making favorable calls for one political side over the other.<sup>197</sup>

And that brings us square to how the judiciary can help heal a divided nation.<sup>198</sup> In cases intersecting competing individual liberties—*e.g.*, cases

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cities-trump-funding/index.html (stating that Trump has threatened to cut off billions of federal funding to sanctuary cities and states, which overwhelmingly voted for Clinton, and yet these states and municipalities would still have to pay taxes to the government. It is easy to see how this inequity would rankle such entities in the same way that England’s taxation of the colonies led to the Boston Tea Party).

193. See Charles Lane, *How Gay Marriage Escaped the Backlash that Plagues Roe v. Wade*, WASH. POST (Oct. 8, 2014), [https://www.washingtonpost.com/opinions/charles-lane-gay-marriages-quiet-triumph/2014/10/08/5beba156-4f04-11e4-babe-e91da079cb8a\\_story.html?utm\\_term=.61c16483e0f5](https://www.washingtonpost.com/opinions/charles-lane-gay-marriages-quiet-triumph/2014/10/08/5beba156-4f04-11e4-babe-e91da079cb8a_story.html?utm_term=.61c16483e0f5) (distinguishing conservative reactions and criticisms of judiciary’s decisions in cases upholding reproductive rights and same-sex marriage).

194. See Mason, *supra* note 153.

195. See Friedman, *supra* note 18, at 1233.

196. See U.S. CONST. art. III, § 2; U.S. CONST. amend. XIV.

197. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 109-158 (2005) (statement of John G. Roberts, Jr., nominee for Chief Justice of the United States).

198. See Joan Biskupic, *Trump’s Supreme Court Pick Marks End of One Battle, Starts*

involving religious freedom and LGBTQ rights or a women's right to choose—our judiciary can guide us back to the fundamental principle of “my rights end where your rights begin.”<sup>199</sup> One technique the judiciary—and legal advocates—can use is to continue the modern trend of powerful personal narratives.<sup>200</sup> Put simply, the men and women donning robes in courtrooms across this nation can show us how and why we can and *must* find a way to co-exist. It's more than just a lofty goal, it's what our Constitution and the continuation of our democracy demands.

*A. The Modern Trend: Use of Personal Narratives in Cases Dealing with Individual Liberties, Including Free Exercise of Religion*

Just as J.K. Rowling can tantalize us with descriptions of wizards flying through the air on Nimbus 2000 broomsticks chasing an elusive golden snitch in a game of Quidditch, so too can the justices of our Supreme Court dazzle us with vivid words and images.<sup>201</sup> But it's more than just an artist peppering an otherwise dense judicial opinion. The emphasis is on storytelling. Take the “Spiderman” yarn brilliantly spun by Justice Kagan in her artfully drafted majority opinion in *Kimble v. Marvel Entertainment*.<sup>202</sup> Or Justice Scalia starting his concurrence in *Glossip v. Gross* with a reference to “Ground Hog Day.”<sup>203</sup> Boring is out; storytelling is in. And that certainly is likely to continue following the confirmation of Gorsuch to the Supreme Court. He already has made a name for himself telling stories to illustrate judicial principles and enable readers to *feel* the plight of the

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*New One*, CNN: POLITICS (Jan. 31, 2017), <http://www.cnn.com/2017/01/31/politics/supreme-court-nominee-preview-donald-trump/index.html> (assessing the pivotal role Justice Neil Gorsuch and the Supreme Court as a whole by addressing divisive constitutional matters).

199. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2790-91 (2014) (Ginsburg, J., dissenting) (reiterating the oppressive force of Hobby Lobby's decision not to grant its employees coverage contraceptive coverage); *Masterpiece Cakeshop v. Co. Civil Rights Comm'n*, 370 P. 2d 272 (Co. S. Ct. 2015), *cert. granted*, 85 U.S.L.W. 3593 (U.S. June 27, 2017) (No. 16-111) (examining the intersection and tension between individual religious liberties and LGBTQ rights); cf. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919).

200. See discussion *infra* Section III.A.

201. See generally J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE 189 (1999) (illustrating a fictional game played by characters in the novel that ride broomsticks and score goals).

202. See *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2405 (2015) (weaving the facts of the case into a story).

203. See *Glossip v. Gross*, 135 S. Ct. 2726, 2746 (2015) (Scalia, J., concurring) (underscoring the repetitive nature of death penalty Supreme Court cases).

litigants before the Court.<sup>204</sup> This does more than make a good story. It morally justifies a ruling in common sense terms that members of the public can easily understand.

And therein lies the opportunity.

As this author has discussed in prior works, the emotional appeal of a brief can pack a powerful punch, especially if that appeal is presented in an advocate's "Hello," meaning the first spot where an advocate truly makes the substantive case as to why their side should win.<sup>205</sup> While some advocates default to first explaining the legal basis for a win—say the intricacies of a statutory scheme—others begin their "Hellos" by addressing what this author calls the emotional "WRGO" of a case: What's Really Going On.

Winning the reader over emotionally *and* intellectually has an array of benefits. Not only might a powerful emotional appeal sway a judge in a close case, but as a practical matter, it arms the judiciary with the requisite tools to explain its reasoning in a manner that is both legally *and* morally justified.<sup>206</sup>

For example, in *Adoptive Couple v. Baby Girl*, the legal issue involved the rights of a non-custodial parent—an unwed father—under the Indian Child Welfare Act ("ICWA").<sup>207</sup> The birth mother—who was not a Native-American—had given up Baby Girl at birth to the Adoptive Couple, who also were not Native-Americans.<sup>208</sup> The Adoptive Couple's "Hello" opened with this jaw dropper:

After unceremoniously renouncing his parental rights to his unborn daughter—Baby Girl—in a text message and making no effort to see ***Baby Girl for months after she was born***, Father stepped in at the eleventh hour to block an adoption that was lawful and in the "best interests" of Baby Girl.<sup>209</sup>

This emotional "Hello" made it into the Supreme Court opinion.<sup>210</sup>

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204. See Guberman, *supra* note 39 (identifying Gorsuch's storytelling "gifts" when it comes to writing).

205. Johnson, *supra* note 180, at 413.

206. *Id.* at 411-12.

207. See Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 (2017).

208. See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2252, 2556-58 (2013).

209. Brief for Petitioners at 6, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399) (pointing out that unless otherwise stated, any emphasis added to the excerpts of the briefs or court opinions referenced in this article is added by the author of this article).

210. See *Adoptive Couple*, 133 S. Ct. at 2258.

Suffice it to say the Birth Father was *not* the prevailing party.<sup>211</sup> The Adoptive Couple had painted the Birth Father as a deadbeat dad and that theme morally justified the Supreme Court's ruling.<sup>212</sup>

Similar examples of powerful “Hellos” and emotional themes can be found in the marriage equality cases, dating back to *Hollingsworth v. Perry* and *U.S. v. Windsor*, both decided in 2013 and continuing through to *Obergefell v. Hodges*, which was decided in 2015.<sup>213</sup> These brief-writers presented poignant stories of individuals directly stigmatized by the refusal of some states to recognize same-sex marriages.<sup>214</sup> A particular focus was on the stigmatization of the *children* of same-sex couples, who had done nothing wrong.<sup>215</sup> To the extent this stigmatization was emphasized, it lessened the controversial nature of the ruling. How can we not protect innocent children? The briefs also spoke powerfully of love and human connection, which are universal and relatable themes that made it into the Supreme Court opinions. This supplied the *moral* justification for the Court's landmark rulings.

Conservatives took a page from this playbook in two recent cases involving birth control and religious freedom rights protected under the Religious Freedom Restoration Act (“RFRA”). For example, at issue in *Hobby Lobby* was whether a for-profit, closely held corporation was entitled to an exemption from the requirement under the Affordable Care Act (“ACA”) to provide certain health coverage for employees, namely, coverage for “abortifacients,” meaning birth control that could affect an already-fertilized egg.<sup>216</sup>

While Hobby Lobby employed close to 14,000 employees—putting it on the scale of Fortune 500 companies such as Goldman Sachs and General Mills—the brief-writers painted personal pictures of the *individuals* who

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211. *See id.* at 2257.

212. Johnson, *supra* note 172, at 434-41 (noting that a careful reading of the Birth Father's brief demonstrated that he was far from a deadbeat dad. When he sent the text message, the Birth Father was stationed at an army base serving the U.S. He had asked the Birth Mother to marry him, but she refused his phone calls or to even see him when he made the four-hour drive from Fort Sill to visit her).

213. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015); *U.S. v. Windsor*, 133 S. Ct. 2675 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013).

214. *See, e.g.*, Brief for Respondents, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 648742, at \*1-4.

215. Johnson, *supra* note 172, at 422 (characterizing the *Hollingsworth* “Hello” as “implicitly pos[ing] the simple question: how can we not right the wrong committed when innocent children are stigmatized because of governmental discrimination directed at their parents?”).

216. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759-60 (2014).

owned the company.<sup>217</sup> The argument was that requiring such individuals to provide the mandated health coverage made these individuals “complicit” in sin.<sup>218</sup> The narratives conjured up images of a simple family sitting around at Sunday dinner. Although the sincerity of their religious beliefs had not been questioned, these lengthy personal narratives ultimately were included almost verbatim in the Supreme Court opinion.<sup>219</sup> Here too, by focusing on the plight of the *individuals* burdened by the rule, empathy for these individuals justified the exemption on a moral basis.

While emphasis of powerful personal narratives can easily result in a win when only invoked by one side, what happens when *both* sides do that? That showdown is drawing near as the Supreme Court prepares to deal with cases involving the intersection of individual liberties. Such cases are perfect for the frame of “my rights end where your rights begin.”

*B. The Showdown: Wedding Cakes, Bathrooms, and the Freedom to Choose*

Two gunslingers face off at the town square. “There’s only room in this town for one of us,” shouts one. “Damn straight,” responds the other. Close in on the grizzled mugs of the two cowboys. A lone tumbleweed rumbles down the road as onlookers intuitively step aside. Cue the theme from “The Good, The Bad, and The Ugly.” Each gunslinger dangles his hand just above his holster. On the silent count of three, both grab for their guns. Pistols flare as one gunslinger stumbles backward, clutching at a wound that might just take his life. The other sighs in relief as he returns his gun to his holster. Dominance has prevailed.

This familiar scene has played out in thousands of westerns. But does it have to end like this? Couldn’t the two gunslingers find a way to get along? Maybe open a real estate brokerage on the outskirts of town?

In the legal context, there are a number of such dualisms, some of which already are or ultimately will make their way to our Supreme Court. Is the legal scribe with the better story going to win? If so, top legal scribes best hone their skills. Some of the cases easily present compelling stories on *both* sides. Beware the cocky gunslinger who thinks they cannot lose. Or the greedy past victor who asks for too much. There might just be a scrappy underdog poised to take advantage of any such oversights.

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217. Brief for Respondent at 7, *Hobby Lobby*, 134 S. Ct. 2751 (2015) (No. 13-354), 2014 WL 546899, at \*7-10.

218. *See id.* at 9.

219. *See Hobby Lobby*, 134 S. Ct. at 2765-66 (mentioning the personal lives and beliefs of the Respondents).



As explained below, the better course for both sides might be to start respecting each other and forging a compromise. And that compromise should be based upon that simple fundamental precept that we all can agree on: “my rights end where your rights begin.”

Toward this end, this Section addresses three sets of cases that give rise to such dualisms that will be heard by our Supreme Court in one iteration or another. As the title of this Section suggests, these cases involved wedding cakes, bathrooms, and a woman’s right to choose.

### 1. *The Wedding Cake Cases*

The Wedding Cake Cases—as they are affectionately referred to by this author—concern a wave of litigation that followed the marriage equality case, *Obergefell v. Hodges*, that gave same-sex couples the right to marry nationwide.<sup>220</sup> While the majority of Americans appeared to support the *Obergefell* ruling, those who disagreed with it were very vocal and advocated for civil disobedience.<sup>221</sup> Following this sentiment, many wedding “artists” such as bakers, photographers, and florists, refused their goods and services to same-sex couples.<sup>222</sup>

On February 16, 2017, the Washington Supreme Court weighed in on one such case involving a florist who refused to sell flowers for a same-sex wedding.<sup>223</sup> In *State v. Arlene’s Flowers Inc.*, the Washington Supreme Court unanimously ruled against the florist, refusing to hold that the florist

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220. See, e.g., *Masterpiece Cakeshop v. Co. Civil Rights Comm’n*, 370 P.3d 272, 294 (Colo. 2015), *cert. granted*, 137 S. Ct. 2290 (U.S. June 26, 2017) (No. 16-111) (prohibiting discrimination against same-sex couples “by places of public accommodation”); see generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (requiring states to issue marriage licenses to same-sex couples).

221. See Todd Starnes, ‘We Will Not Obey’: Christian Leaders Threaten Civil Disobedience if Supreme Court Legalizes Gay Marriage, FOX NEWS OPINION: TODD’S AM. DISPATCH (Apr. 28, 2015), <http://www.foxnews.com/opinion/2015/04/28/will-not-obey-christian-leaders-threaten-civil-disobedience-if-supreme-court.html> (discussing pledge of solidarity and calls for civil disobedience ahead of the Supreme Court decision in *Obergefell v. Hodges*).

222. See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59–60 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) (discussing one of the first cases involving the refusal to render goods or services for same-sex weddings, where the New Mexico Supreme Court ruled *unanimously* against the petitioning photographer); see also *Masterpiece Cakeshop*, 370 P.3d 272 (explaining that Appellant baker refused service to a same-sex couple on the basis of his religious beliefs, but offered baked goods that did not celebrate their forthcoming nuptials).

223. See *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 552–53 (Wash. 2017), *petition for cert. filed*, 86 U.S.L.W. 3047 (U.S. July 14, 2017) (No. 17-108) (finding a flower shop owner had unlawfully discriminated on the basis of sexual orientation).

was entitled to a religious exemption from complying with the Washington Law Against Discrimination (“WLAD”).<sup>224</sup> The core holding was that religious beliefs cannot be used as an excuse to discriminate.<sup>225</sup> Despite the unanimity of the decision—and that the Washington State Supreme Court conducted a strict scrutiny analysis—the florist immediately vowed to seek review from the U.S. Supreme Court.<sup>226</sup>

The ruling in *Arlene’s Flowers* was based upon sound legal precedent that rejected right-to-discriminate arguments on religious grounds.<sup>227</sup> These included arguments that were rejected decades ago in cases involving interracial marriages.<sup>228</sup> Giving the unanimity of the Washington ruling, and the national acceptance of same-sex marriage, the momentum appears to be on the side of marriage equality.<sup>229</sup> Still, a closer examination of the briefing reveals that Barronelle Stutzman—the seventy-two year old sole proprietor—had a compelling story and a compelling “Hello” that introduced the florist not as a bigot, but as a human being with sincerely held religious beliefs.<sup>230</sup> As stated in pertinent part in the florist’s “Hello”:

Barronelle Stutzman operates a small florist shop, Arlene’s Flowers, in Richland, Washington. She has enjoyed celebrating events in her customers’ lives for nearly 40 years, and *approaches her work as an art form, with creativity and emotional investment in each piece she designs.*

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*Although this case involves a sexual orientation discrimination claim in the context of a same-sex wedding, it is not primarily about the right to be free from sexual orientation discrimination or the right to same-sex marriage. Mrs. Stutzman does not question either right here.*

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224. *See id.* at 556.

225. *See id.* at 555–56

226. *See* Sarah Toce, *Unanimous Ruling in Washington State Supreme Court Against Arlene’s Flowers Owner*, HUFFINGTON POST (Feb. 16, 2017), [http://www.huffingtonpost.com/entry/unanimous-ruling-in-washington-state-supreme-court\\_us\\_58a5ecb3e4b0fa149f9ac2e3](http://www.huffingtonpost.com/entry/unanimous-ruling-in-washington-state-supreme-court_us_58a5ecb3e4b0fa149f9ac2e3) (discussing the sharp division in reaction to the Washington Supreme Court ruling in *Arlene’s Flowers* immediately after the decision was announced).

227. *See generally Arlene’s Flowers, Inc.*, 389 P.3d at 543.

228. *See id.*

229. Brief of Petitioner at 32, *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543 (Wash. 2017) (No. 91615-2), 2017 WL 629181, at \*16.

230. Brief for Appellants at 7, *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543 (Wash. 2017) (No. 91615-2), 2015 WL 11110491, \*7–11.

*This case is about whether the statutory and constitutional rights of religious persons – **including the right to be free from compelled artistic expression** – are entitled to be weighed in the balance, if and when they come into conflict with the WLAD’s prohibition against discrimination based on sexual orientation. To the extent of any conflict, the Court must strike the proper balance under the unique circumstances presented.*<sup>231</sup>

The florist then went on to a “Statement of the Case” that utilized headings to walk the reader through an even more personalized and detailed narrative that would be echoed throughout the brief.<sup>232</sup> Mrs. Stutzman had been working in floral design for thirty-seven years, having taken over the shop from her mother.<sup>233</sup> The shop’s purpose was described as “primarily of creating floral arrangements for special occasions,” including weddings. The next heading emphasized that Mrs. Stutzman’s considered her floral designs as a form of “artistic expression” that required extensive involvement in the wedding itself. As explained:

Wedding floral arrangements require floral design artists to become even more *personally involved in the creative process and final design*. A floral design artist often forms a **personal bond** with clients. This typically occurs through several personal meetings which results in a **floral designer’s feeling emotionally invested not only in the final floral creation, but the ceremony**. To serve the clients well, the artist must learn about the couple’s individual and shared history, their desires, and the particular wedding dreams and details. The florist attempts to create a mood or feeling consistent with the personalities of the couple and to create arrangements that express the unity of the couple. While the designer may use books or pictures as a conversation starter with the couple, she uses their preferences only as a guide. Ultimately, ***the arrangements not only reflect the mood and look desired by the couple, but also the personal style and creativity of the artist***. The florist’s personal style and creativity is recognizable from the designs and arrangements that she creates, and it is common for those who view the arrangements, especially wedding arrangements, to ask who created them.<sup>234</sup>

The third heading focused on Mrs. Stutzman’s religious beliefs,

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231. *Id.* (emphasis added)

232. *Id.*

233. *Id.*

234. *Id.* at 6 (emphasis added).

specifically her belief to “. . . Treat All Persons With Respect And To Use Her Artistic Skills In A Manner Consistent with Her Religious Beliefs.”<sup>235</sup> The Washington Supreme Court did not doubt the sincerity of Mrs. Stutzman’s belief, which included a duty described as an “obligation *not* to participate or provide material cooperation with a sinful act of another.”<sup>236</sup> Thus, from Mrs. Stutzman’s perspective, a “person who creates floral arrangements for a same-sex marriage ceremony is providing material cooperation with a sinful act.”<sup>237</sup>

The next section told the story of how Mrs. Stutzman had “employed and served those who identify as gay, lesbian and bisexual, and their sexual orientation did not affect how she viewed them as employees, customers, and friends.”<sup>238</sup> One former gay employee not only vouched for the sincerity of her religious beliefs, but also described her as “one of the nicest persons [he’d] ever met.”<sup>239</sup> In terms of the same-sex couple who she refused to service, she referred to them by first name and described with affection the long history of their florist-client relationship, expressly stating that she “loved working with Rob,” and that they would “frequently talk about his relationship with his partner.”<sup>240</sup>

The next heading made clear not only that other florists were available but that Mrs. Stutzman herself “Referred [her] Long-Time Customer” to such florists.<sup>241</sup> The brief made clear that Mrs. Stutzman struggled with how to decline service because she did not want to hurt her friend’s feelings.<sup>242</sup> Ultimately, she “took his hand and explained ‘she could not do the flowers because of her relationship with Jesus Christ,’ [adding that] ‘You know I love you dearly. I think you’re a wonderful person . . . . But my religion doesn’t allow me to do this.’”<sup>243</sup> After giving him the name of three other florists, the pair “hugged each other.”<sup>244</sup>

The final heading packed a powerful punch. Despite treating her client and friend with affection and dignity, generally servicing the gay and lesbian

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235. *Id.* at 7 (noting that this heading—similar to all of the other headings referenced herein—was bolded in the original).

236. *Id.* at 9 (emphasis in original).

237. *Id.* (noting that this viewpoint follows the “complicit in sin” theme advanced in the “Hellos” in the *Hobby Lobby* cases); see also *supra* note 205 and accompanying text.

238. *Id.*

239. *Id.* at 10.

240. *Id.* at 11.

241. *Id.*

242. *Id.* at 12.

243. *Id.* at 13.

244. *Id.*

community for years, and expressly referring her friend to alternate florists willing to provide their services for the wedding, “The Attorney General, Mr. Ingersoll, and Mr. Freed Filed Suit.”<sup>245</sup> As a result of a permanent injunction entered by the lower court, this seventy-two year old proprietor who had taken over the shop from her mother was now prohibited from providing floral arrangements for weddings unless she provided such services to same-sex couples.<sup>246</sup> She also was required to pay attorneys’ fees and damages as well as a \$1000 fine to the State of Washington.<sup>247</sup>

This must give even progressives some pause. It certainly appears to have an emotional appeal for Justice Kennedy, who demonstrated his empathy in *Obergefell* as well as in *Hobby Lobby*, serving as the critical swing vote in both of these cases.<sup>248</sup>

And then there’s that elephant in the room. Why didn’t the same-sex couple just go to a different baker?

Of course, there was an answer. As noted in the same-sex couple’s brief, and included in the Washington Supreme Court opinion, “[t]his case [was] no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches.”<sup>249</sup> Tracking a theme evidenced in the marriage equality cases, the “Hello” of the same-sex couple referenced how discrimination should not be based upon whom a person loves. As stated in pertinent part:

***For more than 125 years***, Washington has prohibited discrimination in places of public accommodation, recognizing that discrimination “threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.” *Businesses open to the public cannot refuse to serve customers because of the customers’ race, creed, color, national origin, sexual orientation, sex, military status, breastfeeding status, or disability.* Under Washington law, ***nobody can be turned away from a business simply because of who they are or whom they love.***<sup>250</sup>

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245. *Id.*

246. *Id.* at 14.

247. *Id.*

248. See Katrina C. Rose, *Has the Future Already Been Forgotten? A Post-2007 Transgender Legal History Told Through the Eyes of the Late, (Rarely) Great Employment Non-Discrimination Act* (2017) 23 WM. & MARY J. WOMEN & L. 527, 633 (2017) (recognizing Justice Kennedy as the typical “swing” vote).

249. See *State v. Arlene’s Flowers, Inc.* 389 P.3d 543, 566 (Wash. 2017) (citing to Respondent’s Brief at p. 32).

250. Brief for Respondents at 1, *State v. Arlene’s Flowers Inc.*, No. 91615-2 (Wash.

The same-sex couple's brief also illustrates an important principle regarding use of personal narratives in court opinions. The emotional appeal is derived from one particular source: the briefs.<sup>251</sup> Notably, the Washington State Supreme Court Opinion nearly identically tracked—*verbatim*—the narrative set forth in the same-sex couple's brief.<sup>252</sup> To be clear, the Opinion often *expressly* quoted from the prevailing brief.<sup>253</sup> While the same-sex couple's version of the facts was entirely consistent with those in the florist's brief, they painted a very different picture.

Beginning in the very third paragraph, the Washington Supreme Court opinion told the story of a couple who had been together in a committed relationship for over eight years prior to being allowed to legally marry.<sup>254</sup> They planned to officially marry on their ninth anniversary.<sup>255</sup> While the opinion included a reference to that “hug” when Mrs. Stutzman told one of the men—Curt Freed—that she was declining their business, this fact was juxtaposed against another fact, namely, that Freed “walked away from that conversation ‘feeling very hurt and upset emotionally.’”<sup>256</sup> After a “sleepless night,” Freed updated his Facebook profile noting how they had been turned down for service and how horrible that made them feel.<sup>257</sup> He didn't mention the shop by name and the Facebook post was “only intended for [the couple's] friends and family.”<sup>258</sup> But the story got out and the Washington State Attorney General's Office contacted Stutzman seeking her agreement to cease discriminating against same-sex couples.<sup>259</sup> In other words, the litigation was *not* started by same-sex couple. Rather, the couple was drafted into the public controversy by the State of Washington.

The couple's story drew media attention, which, when coupled with Stutzman's refusal to accept their business, created an “emotional toll” by which the couple “lost enthusiasm for a large ceremony as initially planned.”<sup>260</sup> They “feared being denied service by other wedding vendors”

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2017) (emphasis added).

251. See Brief for Petitioner, *supra* note 229, 389 P.3d at 548-49 (recounting the emotional impact the shop owner's refusal of service had on the couple).

252. *Id.*

253. *Id.*

254. *Arlene's Flowers, Inc.*, 2017 WL 629181, at \*1.

255. See *id.*

256. *Id.* at \*1 (noting that the internal quotes referenced herein are from the same-sex couple's brief).

257. *Id.* at \*2.

258. *Id.*

259. *Id.* at \*3.

260. *Id.* at \*2.

and were also “concerned for their own safety as a result of public attention.”<sup>261</sup> They were also worried that a public wedding “might require a security presence or attract protestors, such as the Westboro Baptist group.”<sup>262</sup> Ultimately, the wedding – which was originally planned for “a hundred plus,” was only attended by 11 people.<sup>263</sup> In terms of flowers, the couple purchased a single bouquet from a florist and their boutonnières were made by their friends.<sup>264</sup>

While telling a passionate narrative depicting the demoralizing and stigmatizing effect on gays and lesbians, the Washington Supreme Court also noted that it was not just the same-sex couple who had experienced harassment from the public.<sup>265</sup> The little floral shop also had gained notoriety and with it came exposure to public harassment.<sup>266</sup> That attention including “threats to [Stutzman’s] business and other unkind messages.”<sup>267</sup>

This strong and vehement public reaction trolling both sides reflects the kind of dueling hatred that our nation now faces. That point was reflected in another brief filed by the Lambda Legal Defense and Education Fund that touched upon the “my rights end where your rights begin” fundamental precept that has its roots in our Constitution.<sup>268</sup> As eloquently stated in the “Hello”:

*Given the immense demographic diversity and religious pluralism of our nation, the law must remain crystal clear: **a person’s religious liberty ends where legally prohibited harm to another begins.***<sup>269</sup>

The briefing and decision in *Arlene’s Flowers Inc.* represents the quintessential example of powerful dueling narratives that must be listened to and respected if we are going to find that fine line that allows protection

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261. *Id.*

262. *Id.*; see also *Snyder v. Phelps*, 562 U.S. 443, 448-450 (2011) (emphasizing that the Westboro Baptist Church gained notoriety as a result of the church’s regularly protesting at military funerals and holding signs claiming that soldiers were killed because of U.S. acceptance of gays and lesbians).

263. *Arlene’s Flowers, Inc.*, 389 P.3d at 549.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. Brief for Lambda Legal Def. & Educ. Fund, Inc., et. al. as Amici Curiae Supporting Plaintiffs, *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543 (Wash. 2015) (No. 91615-2), 2016 WL 3552843, at \*2.

269. *Id.* (emphasis added).

for religious freedom while at the same time preserving and respecting other competing liberty interests. Moreover, even assuming the law is soundly on the side of same-sex couples, that does not mean that sincerely held religious beliefs should be ignored. Progressives should understand that when there is room for compromise, it should be considered. And conservatives should also do a bit of soul searching. The next line of cases—the bathroom cases—impose an immense burden on transsexuals. And for what? Notably, transgender individuals—like the same-sex couple in *Arlene’s Flowers Inc.*—did not ask to be part of this now very public controversy that already has had its first visit at the Supreme Court.

## 2. *The Bathroom Cases*

HB2. You’re likely familiar with the term. HB2 became as synonymous with the bathroom cases as Proposition 8 was with the marriage equality cases.<sup>270</sup> On March 23, 2016, the Public Facilities Privacy & Security Act—HB2—was signed into law by North Carolina Governor Pat McCrory.<sup>271</sup> The law targeted the LGBTQ community in two ways. First, transgender individuals were required use the bathroom that corresponds to the sex identified on their birth certificate.<sup>272</sup> Second, the law also overturned an LGBTQ anti-discrimination law passed in Charlotte, North Carolina.<sup>273</sup>

HB2 was passed as part of the backlash following the Supreme Court’s recognition of the constitutional right for same-sex couples to marry in *Obergefell*.<sup>274</sup> It was a specific response to certain guidelines promulgated during the Obama Administration directing public schools to permit transgender youths to use the bathroom that corresponds to their gender identification. Under these guidelines, a transgender boy could use the boys’

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270. See Mollie Reilly, *Lawyer Who Helped Take Down Prop 8 Joins Fight Against Anti-LGBT Law*, HUFFPOST: POLITICS (May 18, 2016), [http://www.huffingtonpost.com/entry/ted-olson-hb2\\_us\\_573c9fd9e4b0aee7b8e8a28e](http://www.huffingtonpost.com/entry/ted-olson-hb2_us_573c9fd9e4b0aee7b8e8a28e) (discussing how Ted Olson, one of the prevailing attorneys in *Obergefell v. Hodges*, joined the fight against HB2).

271. See Michael Gordon, Mark S. Price & Katie Peralta, *Understanding HB2: North Carolina’s Newest Law Solidifies State’s Role in Defining Discrimination*, THE CHARLOTTE OBSERVER (Mar. 26, 2016), <http://www.charlotteobserver.com/news/politics-government/article68401147.html> (local newspaper reporting initial enactment of HB2).

272. See *id.*

273. See *Prohibiting Sex Bias in Education*, 1 Policies and Practices § 65:9 (2017).

274. See Maayan Sudai, *LGBT Backlash Legislation and the Politics of Biology*, BILL OF HEALTH (Apr. 18, 2016), <https://blogs.harvard.edu/billofhealth/tag/hb2/> (discussing how HB2 and other “bathroom bills” were responses to the Supreme Court decision in *Obergefell v. Hodges*).



bathroom.<sup>275</sup> Under HB2, that same boy—even if he was going though gender reassignment and was presenting as a male—would have to walk shamefaced into the girls’ bathroom to relieve himself. Adult transgender individuals face a similar predicament. A transgender woman would be forced to use the men’s restroom, even though that posed the very real danger of assault, rape, or even death.

The slap back was quick and unrelenting. The National Basketball Association pulled the All-Star Game scheduled to be held in North Carolina, which would have generated millions in revenue.<sup>276</sup> PayPal canceled a planned expansion, eliminating over 400 jobs, as did numerous other corporations.<sup>277</sup> HB2 also gave rise to internal strife within North Carolina. Many North Carolinians wanted the bill repealed.<sup>278</sup> Amendments were passed but HB2 kept its guts.<sup>279</sup> Despite his constituents’ contrary view, Governor Pat McCrory stood firm—until defeated at the ballot-box by current Governor Roy Cooper.<sup>280</sup> Ultimately, on March 16, 2017, HB2 was repealed.<sup>281</sup>

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275. See Emanuella Grinberg, *Feds Issue Guidance on Transgender Access to School Bathrooms*, CNN: POLITICS (May 14, 2016), <http://www.cnn.com/2016/05/12/politics/transgender-bathrooms-obama-administration/index.html> (Obama administration guidelines regarding transgender youths in public schools announced on May 13, 2016).

276. Jon Schuppe, *NBA Tells North Carolina Changes to LGBT Law HB2 Aren’t Enough*, NBC NEWS (July 1, 2016), <http://www.nbcnews.com/news/us-news/nba-tells-north-carolina-changes-lgbt-law-hb2-aren-t-n602411>.

277. Rick Rothacker, Ely Portillo & Katherine Peralto, *PayPal Withdraws Plans for Charlotte Expansion Over HB2*, THE CHARLOTTE OBSERVER (Apr. 5, 2016), <http://www.charlotteobserver.com/news/business/article70001502.html>.

278. See Laura Leslie & Matthew Burns, *Faith Communities Speak Out Against HB2*, WRAL-TV:@NCCAPITOL (Apr. 27, 2016), <http://www.wral.com/methodist-bishops-call-for-hb2-repeal/15665224/> (discussing how even North Carolina religious groups called for the repeal of HB2).

279. See Anne Blythe, *NC Law Replacing HB2 Is Still a Bathroom Bill that Discriminates, Challengers Claim*, THE NEWS & OBSERVER: STATE POLITICS (July 21, 2017, 9:59 AM), <http://www.newsobserver.com/news/politics-government/state-politics/article162850673.html> (discussing HB2 critics’ observations about the substantive similarities between House Bill 142, the repealed version of HB2, and HB2 in its original form).

280. See Richard Fausset, *Pat McCrory, North Carolina Governor, Concedes After Acrimonious Race*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/us/north-carolina-governor.html> (emphasizing that McCrory refused to concede until almost a month after the election).

281. See Jason Hanna, Madison Park & Elliott C. McLaughlin, *North Carolina Repeals ‘Bathroom Bill’*, CNN (Mar. 30, 2017), <http://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html>. *But see* Sam Levine, *North Carolina Repeals HB2, but It Doesn’t Seem to be Much of a Repeal at All*, HUFFPOST (Mar. 30,

While HB2 was busy grabbing headlines, another matter was capturing the attention of the Supreme Court. *Gloucester Cty. Sch. Bd. v. G.G.* was granted certiorari on October 28, 2016.<sup>282</sup> *Gloucester* involved Title IX and the Obama Administration's guidelines protecting transgender students.<sup>283</sup> At the time, it was widely expected that Hillary Clinton would be elected president and that her administration would carry on these guidelines.<sup>284</sup> For that reason, *Gloucester* was seen as centering around a relatively mundane legal issue: whether a prior ruling in *Auer v. Robbins*, which gave deference to an agency's interpretation of its own regulation, would stand.<sup>285</sup> This interpretation of the issue was because the lower Fourth Circuit opinion had predominantly relied upon the Obama Administration's guidelines in striking down the school board's policy requiring transgender students to use bathrooms corresponding to gender assigned at birth.<sup>286</sup>

That focus changed on a dime when the Trump Administration rescinded the Obama guidelines by issuing an executive order—literally—the day before the student's brief on the merits was due.<sup>287</sup> The Supreme Court asked the litigants to submit letter briefs as to “how the case should proceed” in light of the executive order rescinding the Obama Administration's

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2017), [http://www.huffingtonpost.com/entry/north-carolina-hb2-repeal\\_us\\_58dd005be4b05eae031d72a3](http://www.huffingtonpost.com/entry/north-carolina-hb2-repeal_us_58dd005be4b05eae031d72a3) (discussing how the repeal in effect was “doubling-down” on other discrimination against the LBGTQ community by prohibiting local municipalities from enacting anti-discrimination ordinances).

282. See *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *cert. granted*, 137 S. Ct. 369, (U.S. October 28, 2016) (No. 16-273).

283. See *Gloucester County School Board v. G.G.*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/gloucester-county-school-board-v-g-g/> (general discussion including identifying issues before U.S. Supreme Court).

284. See *LGBT Rights and Equality*, THE OFFICE OF HILLARY RODHAM CLINTON (last visited Oct. 10, 2017), <https://www.hillaryclinton.com/issues/lgbt-equality/> (espousing support for LBGTQ rights, specifically including transgender individuals, also noting that the page is a “reproduction of the Hillary for America policy proposal”).

285. See *Auer v. Robbins*, 519 U.S. 452, 462-63 (1997) (finding an agency's interpretation of its own regulations to resolve ambiguities is worthy of deference); *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 721 (4th Cir. 2016) (discussing whether “the Department [of Education]’s interpretation is entitled to *Auer* deference . . .”).

286. See *G.G.*, 822 F.3d at 723-34 (relying upon the Department of Education's Office of Civil Rights letter, dated January 7, 2015, to interpret how Title IX regulations should apply to transgender individuals).

287. See Amy Howe, *What Now? Court Asks Parties to Weigh in on Next Steps in Transgender Bathroom Case*, SCOTUSBLOG (Feb. 23, 2017), <http://www.scotusblog.com/2017/02/now-court-asks-parties-weigh-next-steps-transgender-bathroom-case/> (noting the deadline for filing of briefs was scheduled for March 1, 2017).

guidelines.<sup>288</sup> Both sides wanted the Supreme Court to rule.<sup>289</sup> Yet given the political chatter against judge created law—including pending high-profile litigation in the lower court over Trump’s “travel ban” —there was good reason to postpone weighing in until another day. And that is exactly what the Supreme Court did. On March 6, 2017, the case was remanded to the 4<sup>th</sup> Circuit.<sup>290</sup> Upon remand, the Fourth Circuit quickly lifted the pending preliminary injunction, thereby allowing Gavin to use the men’s room during the last days prior to his graduation.<sup>291</sup>

Still, notwithstanding the Supreme Court’s understandable hesitation, the bathroom cases could be decided without excessive controversy given they are lopsided in terms of who can tell the better story. Popular opinion is overwhelmingly in support of transgender individuals.<sup>292</sup> In May 2016, sixty percent of Americans were against bills like HB2.<sup>293</sup> Touching back on the opening analogy, it would appear one proverbial gunslinger is armed with a fully loaded AK-47, and the other a water pistol, which is leaky at best.<sup>294</sup>

If the briefing in *Gloucester* is any indication, a government entity demanding transgender individuals use a bathroom corresponding to gender assigned at birth simply cannot muster up a powerful emotional appeal. This is evident in Gloucester County’s opening brief.<sup>295</sup> While the “Hello” alluded to traditional religious based notions of gender conformity, Gloucester County failed to point to any rational reason that gender assignment *at birth* is somehow more relevant than gender identification

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288. *Id.*

289. *Id.* (arguing that the case was not rendered moot because of the larger issues of both constitutional protections and interpreting the guidelines).

290. *Gloucester Cty. Sch. Bd. v. G. G.*, 137 S. Ct. 1239 (2017); *see also* Levine, *supra* note 264.

291. *See* Adam Polaski, *4th Circuit Judge Pens Powerful Tribute to Gavin Grim, Young Hero in Transgender Equality Movement*, FREEDOM FOR ALL AMERICANS (Apr. 7, 2017) (<http://www.freedomforallamericans.org/4th-circuit-judge-pens-powerful-tribute-to-gavin-grimm-young-hero-in-transgender-equality-movement/>) (discussing the touching tribute to Gavin penned by the Fourth Circuit).

292. *See* Andrew Flores, Taylor N.T. Brown & Andrew S. Park, *Public Support for Transgender Rights: A Twenty-three Country Survey*, THE WILLIAMS INST. UCLA SCH. OF L. (2016).

293. Jennifer Agiesta, *Poll: 6-in-10 Oppose Bills Like the North Carolina Transgender Bathroom Law*, CNN (May 9, 2016), <http://www.cnn.com/2016/05/09/politics/poll-transgender-bathroom-law-north-carolina/index.html>.

294. *See* discussion *supra* at Section III.B.

295. Brief of Petitioner, *Gloucester Cty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016) (No. 16-273), 2017 WL 65477, at \*1.

later in life.<sup>296</sup> This lack of rationality can be attributed to the fact that the sole justification given for requiring transgender individuals to use bathrooms based upon gender assigned on a birth certificate is that men and women have “expectations of privacy” based upon gender. As set forth in pertinent part in Gloucester’s “Hello”:

Title IX forbids discrimination in educational programs “on the basis of sex,” a straightforward prohibition intended to erase discrimination against women in classrooms, faculties, and athletics. No one imagined, however, that Title IX would *erase all distinctions between men and women, nor **dismantle expectations of privacy between the sexes***. That is why Title IX permits “separate living facilities for the different sexes, including “separate toilet, locker room, and shower facilities on the basis of sexes[.]” For over forty years, our Nation’s schools have structured facilities around that sensible idea - namely, that *in intimate settings men and women may be separated “to afford members of each sex privacy from the other sex.*<sup>297</sup>

Gloucester’s argument seems to support the *opposite* position. If women have an expectation of privacy based upon gender, women obviously would prefer *not* to share a bathroom with a transgender man. This was evidenced by numerous accounts in the wake of the passage of bathroom bills where onlookers balked at the apparent use of a bathroom by a perceived member of the opposite sex. For example, a woman was attacked for using a women’s restroom because an onlooker mistakenly thought she was a male.<sup>298</sup> On the other end of the spectrum, it has long been recognized that transgender women have been harassed and sexually assaulted when forced to use a men’s restroom.<sup>299</sup> Men obviously prefer that such women *not* be required to use male restrooms.

By contrast, the “Hello” in the student’s initial Supreme Court brief captured a much different narrative that easily demonstrated the incredible intrusion upon individual liberty. The “Hello” also noted that medical

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296. *Id.*

297. *Id.* (emphasis added).

298. Jason Silverstein, *Connecticut Woman Says She Was Harassed in a Walmart Bathroom After Customer Mistook Her as a Transgender*, N.Y. DAILY NEWS (May 16, 2016) <http://www.nydailynews.com/news/national/woman-mistaken-transgender-harassed-walmart-bathroom-article-1.2638748>.

299. C.J. Griffin, *Workplace Restroom Policies in Light of New Jersey’s Gender Identity Protection* 61 RUTGERS L. REV. 409, 416–17 (2009).

advancements now allow early services for transgender students.<sup>300</sup> Thus, the only way to protect *all* students is to permit students to use restrooms matching their gender identity. As set forth in this “Hello”:

*This case involves a 17-year-old boy who is transgender. Although he was designated female at birth, G. has a male gender identity. He has a state ID identifying him as male, and, **as a result of hormone therapy, has facial hair, a deep voice, and other male secondary sex characteristics.** In every aspect of life outside school, **G. is recognized as a boy.** At school, however, G. is singled out from every other student and forced to use separate restrooms because his school board has concluded that G.’s mere presence in a restroom used by other boys is unacceptable.*

Title IX protects everyone—including transgender students—from being “excluded from participation in” or “denied the benefits of” any education program or activity “on the basis of sex.” [] The central question in this case is *whether 34 C.F.R. § 106.33, a regulation allowing schools to “provide separate toilet . . . facilities on the basis of sex,” implicitly authorizes schools to prohibit transgender boys and girls from using restrooms consistent with their gender identity, **effectively excluding them from using the common restrooms used by other students.***

When the regulation was drafted in 1975, few would have conceived that, as result of *advances in treatment and support for transgender youth*, a student like G. would be assigned a female sex at birth and yet have ***facial hair and other male secondary sex characteristics, have a male designation on his government ID card, and be able to live all aspects of life in accordance with his male gender identity.*** Faced with this reality, the Department of Education (the “Department”) concluded that the only way to “provide separate toilet . . . facilities on the basis of sex” in a manner that does not deprive students of equal educational opportunity – and *the only way to make common restrooms truly accessible – is to allow transgender students to use restrooms consistent with their gender identity.*<sup>301</sup>

This “Hello” indisputably had a powerful emotional appeal. Why would a student—who would subsequently be identified as “Gavin Green” —be demeaned in such a manner? Notably, school administrators—those in direct contact with Gavin and the other students—initially *permitted* Gavin to use the boys’ restroom. They were forced to change that policy when the

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300. Brief in Opposition, *G.G.*, 2016 WL 4938270 (No. 16-273), at \*1–2.

301. *Id.* (emphasis added).

Gloucester County School Board overruled the administrator's decision based upon "complaints from some adults in the community."<sup>302</sup> Gavin's brief on the merits squarely addressed the stigma he endured, while also alluding to a much broader application. More particularly, the "Hello" touched upon the notion that using a bathroom is a fundamental right that must be provided to all on equal terms. As compassionately stated:

Under the Board's policy, Gavin is excluded from the common restrooms and *publicly stigmatized as unfit to use the same restrooms as all other students*. That discriminatory treatment has *far-reaching consequences* for Gavin, interfering with his ability to access the educational opportunities of high school more generally. *At school, at work, or in society at large, limiting a person's ability to use the restroom limits that person's ability to participate as a full and equal member of the community.*<sup>303</sup>

The procedural posture of *Gloucester County*—specifically the reliance on the rescinded Obama Administration guidelines regarding Title IX—allowed the Supreme Court to side step the larger constitutional issue by remanding the case back to the Fourth Circuit.<sup>304</sup>

Still, the Supreme Court is going to have to grapple with the constitutionality of bills similar to HB2.<sup>305</sup> And that may even include deciding whether laws targeting the LGBTQ community are entitled to heightened scrutiny. Alternately, the Supreme Court could dispose of laws like HB2 on a rational basis review. This is because the passage of bills like HB2 reflect irrational animus, as opposed to honoring sincerely held religious views.<sup>306</sup>

302. Brief for Respondent, *G.G.*, 2017 WL 766063 (No. 16-273), at \*1.

303. *Id.* at \*1-2.

304. *Gloucester Cty. Sch. Bd. v. G.G.* (Order, March 6, 2017) 2017 WL 855755 (noting that this case was vacated and remanded for "further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017[>").

305. *Jackie Evancho's Transgender Sister Wins Lawsuit Against School Board*, ROLLING STONE, (Feb. 28, 2017), <https://www.yahoo.com/music/jackie-evanchos-transgender-sister-wins-030435161.html> (noting that one such case involves the sister of Jackie Evancho, who sang at Trump's inauguration); see also Jeremy Diamond, *Trump to Reinstate US Military Ban on Transgender People*, CNN: POLITICS (July 26, 2017), <http://www.cnn.com/2017/07/26/politics/trump-military-transgender/index.html> (discussing President Trump's decision to reverse Defense Department policy that permitted transgender individuals to serve in the armed forces).

306. See *Romer v. Evans*, 116 S. Ct. 1620, 1668 (1996) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a

In rendering these decisions, there is room to distinguish views espoused by “haters” from views of those holding sincere religious beliefs. While mainstream religions might not yet understand the complicated issue of gender reassignment, it can be presumed they would never go as far as to deny transgender individuals the simple right to use a bathroom.<sup>307</sup> Nor would they subject such individuals to assault, rape, and even death, for doing so.<sup>308</sup> Looking through the lens of “my rights end where your rights begin” would allow a judicial resolution that avoids shame and does not suggest the liberal left has exacted another victory through judicial activism.

### 3. *A Woman’s Right to Choose and the Right to Free Exercise of Religion*

Perhaps the most classic line of cases that have pitted conservatives against progressives are cases dealing with the free exercise of religion and a woman’s right to choose. Although *Roe v. Wade* was decided near a half century ago, calls for its overturn have been renewed in the wake of the Trump presidency.<sup>309</sup> This reached a fever pitch during the confirmation process for Supreme Court Justice Neil Gorsuch.<sup>310</sup>

The most recent iterations of this battle included both *Hobby Lobby*, discussed above, and *Zubik v. Burwell*. As noted above, the main issue in *Hobby Lobby* was whether a closely held for-profit religious organization was entitled to an exemption from the ACA requirement to provide insurance coverage to employees that covered “abortifacients.”<sup>311</sup> Because the Supreme Court held the corporation was entitled to an exemption under the same conditions applicable to nonprofit religious organizations, all the

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legitimate governmental interest.”).

307. See Antonia Blumberg, *Pope Francis Reported to Have Met with Transgender Man at the Vatican*, HUFFPOST: RELIGION (Jan. 26, 2015), [http://www.huffingtonpost.com/2015/01/26/pope-francis-transgender-man\\_n\\_6549886.html](http://www.huffingtonpost.com/2015/01/26/pope-francis-transgender-man_n_6549886.html) (explaining Pope Francis’ meeting with a transgender man and noting, “This pope, through his many gestures of meeting with those who society and the church treat as outcasts, has made it his mission to lead by example, and to send a strong message of welcome and hospitality to all people, regardless of their state in life.”).

308. *Id.*

309. See Rebecca Harrington, *The Trump-Era Supreme Court Could Erode Abortion Access with a ‘Death by 1,000 Cuts’*, BUSINESS INSIDER: POLITICS (Feb. 1, 2017), <http://www.businessinsider.com/if-roe-v-wade-overturned-supreme-court-abortion-trump-2016-12> (noting an “outpouring” of donations for anti-abortion advocacy groups).

310. See Claire Suddath, *Beyond Roe v. Wade: Here’s What Gorsuch Means for Abortion*, BLOOMBERG BUSINESSWEEK (Mar. 20, 2017), <https://www.bloomberg.com/news/features/2017-03-20/beyond-roe-v-wade-here-s-what-gorsuch-means-for-abortion>.

311. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

corporation had to do was fill out a form.<sup>312</sup>

In terms of powerful personal narratives, as also noted above, the *Hobby Lobby* “Hello” focused on one very central theme, namely, that the free exercise of religion should not require an individual—or even a corporation—to be complicit in sin with another. As set forth in *Hobby Lobby*’s “Hello”:

On the merits, this is one of the most straight-forward violations of the Religious Freedom Restoration Act this Court is likely to see. ***Respondents’ religious beliefs prohibit them from providing health coverage for contraceptive drugs and devices that end human life after conception. Yet, the government mandate at issue here compels them to do just that, or face crippling fines, private lawsuits, and government enforcement.***<sup>313</sup>

The complicit in sin argument would be followed by a lengthy narrative making clear that the petitioners strongly followed their religious beliefs both in their daily lives and in the running of their company. As plainly put:

In the same way, Respondents’ faith affects the insurance offered in Hobby Lobby’s self-funded health plan. *Respondents believe that human beings deserve protection from the moment of conception, and that providing insurance coverage for items that risk killing an embryo makes them complicit in abortion.*<sup>314</sup>

The hook was simple but the slippery slope was steep. Could a closely held company refuse to hire women out of fear they *might* get an abortion? Could a man who enjoys an occasional beer be denied his salary if an employer believes it would be used to purchase alcohol? Could the reasoning in *Hobby Lobby* be expanded to *all* corporations?

It cannot be doubted the justices were moved by the emotional appeal of the complicit in sin argument. That argument likely targeted Justice Kennedy’s passion for individual liberties and it would ultimately be featured front and center in the Supreme Court opinion in *Hobby Lobby*.<sup>315</sup> In *Zubik*, Justice Kennedy again found himself in the middle of the fray.<sup>316</sup>

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312. *Id.*

313. Brief for Respondents, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354) 2014 WL 546899, at \*1.

314. *Id.* at \*9.

315. 134 S. Ct. at 2759.

316. *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016).



*Zubik*, which essentially was *Hobby Lobby II*, furthered the legal question by asking that nonprofit religious organizations should not only be exempt from providing coverage, but they should be excused from even filling out the form for the exemption.<sup>317</sup> The “Hellos” in these briefs followed the template in *Hobby Lobby* by soundly drumming home the complicit in sin argument. As stated in pertinent part in one such Hello:

*Petitioners are nonprofit religious organizations ranging from an order of nuns, to religious colleges and universities, to a theological seminary. Each petitioner offers its employees a generous healthcare plan, but each excludes from its plan coverage for contraceptives to which it holds religious objections, and each wants to continue to do so. Yet the government insists that petitioners must comply with a mandate to include contraceptive coverage in their plans. No one questions the sincerity of petitioners’ beliefs that complying with that mandate via any of the means that the government permits would violate their religion . . .*

*This Court addressed a nearly identical dynamic in upholding religious exercise claims in [*Hobby Lobby*]. Indeed, both the underlying contraceptive mandate and the accompanying penalties for non-compliance are the exact same ones that this Court considered and rejected in *Hobby Lobby*. The only difference is that petitioners have been given an alternative mechanism for complying with that mandate: Instead of writing contraceptive coverage into their plans themselves, petitioners may comply by taking government-prescribed actions that empower their insurers or plan administrators to use their own plan infrastructure to provide the coverage.*

*The existence of that alternative mechanism for compliance might matter if petitioners’ religious objections were confined to directing and paying for the inclusion of contraceptive coverage in their plans. But, as the government does not dispute, **petitioners also sincerely object to being forced to facilitate access to contraceptives and abortifacients through their own plans. . . . That the government has given petitioners multiple options for violating their sincere religious beliefs instead of just one thus does not materially alter the substantial burden analysis - especially when the penalties for non-compliance remain the same.** Just as in *Hobby Lobby*, petitioners must choose between following their religion*

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317. *Id.*; see also discussion *infra* p. 502 (framing the Supreme Court’s per curiam opinion. As explained:

Federal regulations require petitioners to cover certain contraceptives as part of their health plans, unless petitioners submit a form either to their insurer or to the Federal Government, stating that they object on religious grounds to providing contraceptive coverage. Petitioners allege that submitting this notice substantially burdens the exercise of their religion, in violation of the Religious Freedom Restoration Act of 1993.

and following the law. That is a textbook substantial burden on religious exercise.

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At bottom, then, the government’s refusal to grant petitioners a true exemption from the contraceptive mandate can be explained only by its *refusal to credit their sincere religious beliefs that the role the government wants them to play would be a sin. The government is certainly free to disagree with that belief, but it is not free to disregard it.* Yet that is precisely what its regulatory scheme does – and precisely what RFRA forbids.<sup>318</sup>

Interestingly, had Justice Scalia not passed, *Zubik* might well have been another victory for conservatives.<sup>319</sup> Instead, with only eight justices who were likely equally divided, the Supreme Court called for a compromise.<sup>320</sup> On March 29, 2016, the Supreme Court issued an order for supplemental briefing addressing whether and how employees could obtain contraceptive coverage through the Petitioners’ insurance companies “in a way that does not require any involvement of Petitioners beyond their own decision to provide health insurance without contraceptive coverage.”<sup>321</sup> In other words, could the employees receive insurance coverage without any notice requirement imposed upon the nonprofit religious organizations? The parties were also encouraged to consider any other proposals that might address the Petitioners’ concerns.<sup>322</sup>

The Supreme Court would punt again—at least somewhat—when the justices issued a per curiam opinion on May 16, 2016 that vacated the prior orders by the lower courts and remanded the matters back.<sup>323</sup> *But lo and behold, the parties actually had come up with a tentative compromise.* As explained by the Supreme Court:

[T]he Court requested supplemental briefing from the parties addressing “whether contraceptive coverage could be provided to petitioners’

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318. Brief for Petitioners, *East Baptist University v. Burwell* (consolidated with *Zubik v. Burwell*) 2016 WL 93989 at \*1–3 (emphasis added).

319. See Ron Kampeas, *How Justice Scalia’s Death Impacts 6 Cases that Matter to Jews*, JEWISH TELEGRAPHIC AGENCY (Feb. 16, 2016), <http://www.jta.org/2016/02/16/arts-entertainment/how-justice-scalias-death-impacts-6-cases-that-matter-to-jews> (discussing pending cases affected by Justice Scalia’s death and noting that *Zubik* likely would have been a 5-4 “conservative majority” tracking the decision in *Hobby Lobby*).

320. *Zubik*, 136 S. Ct. at 1559.

321. *Id.*

322. *Id.*

323. *Id.* at 1559–1596.

employees, through petitioners' insurance companies, without any such notice from petitioners." ***Both petitioners and the Government now confirm that such an option is feasible.*** *Petitioners have clarified that their religious exercise is not infringed* where they "need to do nothing more than contract for a plan that does not include coverage for some or all forms of contraception," even if their employees receive cost-free contraceptive coverage from the same insurance company. *The Government has confirmed that the challenged procedures "for employers with insured plans could be modified to operate in the manner posited in the Court's order while still ensuring that the affected women receive contraceptive coverage seamlessly,* together with the rest of their health coverage."

In light of the positions asserted by the parties in their supplemental briefs, the Court vacates the judgments below and remands to the respective United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits. Given the gravity of the dispute and the substantial clarification and refinement in the positions of the parties, ***the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans "receive full and equal health coverage, including contraceptive coverage."*** [] We anticipate that the Courts of Appeals will allow the parties sufficient time to resolve any outstanding issues between them.<sup>324</sup>

Can't we all just get along? Apparently, we can. The Supreme Court may have gotten a bad rap for not squarely deciding the issue. Still—while not expressly stating so—the per curiam opinion embraced that fundamental precept of "my rights ends where your rights begin." If an exemption could be made, it should be given. Going back to our opening analogy of the two gunslingers, there does not always have to be a winner and a loser. We can simply co-exist.

*C. Combatting Trickle-Down Bullying in Judicial Advocacy: The Ten [Proposed] Commandments of Responsible Rhetoric for Legal Advocates*

Two lawyers walk into a courtroom. They hunker down on opposite ends of the gallery to prepare for oral argument in a relatively mundane discovery motion. The judge rings the opening bell. Yes, bell. The attorneys take their stands at their respective sides of the counsel table. It starts off nice, with a cordial mutual acknowledgement when they state their appearances for the record. But as they begin presenting their argument, one subtle verbal jab

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324. *Id.* (emphasis added).

leads to another. Each side claims the other's position is the most non-meritorious, frivolous, and downright ludicrous argument in the history of lawyering.

Demands for sanctions and then disbarment liberally fly. The other side really should be banished to a dungeon in Transylvania. The lawyers rip off their fancy suits and pummel each other in the judge's well as if it were a WWE wrestling match. Bloodied and badgered, a victor finally emerges. "I won, I won," the lawyer declares, as the other writhes in pain. The judge agrees. Moving party is to give notice. The only problem? In the blind hunger to annihilate the other, the lawyers have forgotten what they were even arguing about.

Now isn't this a lot more fun than submitting on the tentative?

Trickle down bullying might well be coming to a courtroom near you. If Trump's bullying tactics affect every day Americans, why would it not affect legal advocates? Lawyers always have been aggressive, if not outright combative. Studies show that while these traits are what gives lawyers a bad name, they are the *exact* type of traits a client looks for when hiring an attorney.<sup>325</sup> Add on that Trump himself has repeatedly belittled the judiciary.<sup>326</sup> If ridicule and insults can win you the presidency, can it win you a motion for summary judgment?

Lawyers, like judges, are officers of the court. We need to lead by example and maintain a respectable decorum in how we deal with each other and the public we serve. For many, this will necessitate introspection. Haven't we all sprinkled the word "non-meritorious" or "frivolous" in a brief or two in our career? Sometimes it's deserved. And sometimes it's not.

For every action, there is an equal and opposite reaction.<sup>327</sup> One silver lining to the rise in prejudice marking the Trump campaign and presidency is that America truly has become *proactive* in standing up against such

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325. See *Practice Applications of Ethical Rules-A Word About Zealous Advocacy*, 4A N.Y. PRAC., COM. LITIG. IN N.Y. ST. CTS. § 59:7 (2016); see, e.g., Russell G. Pearce & Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1, 43 (2011) (discussing how lawyers and clients can fuel mutual aggression in terms of civility in litigation).

326. See *In His Own Words: The President's Attacks on the Courts*, Brennan Center for Justice (June 5, 2017), <https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts> (cataloging President Trump's criticisms of various courts and judicial officers by topic and age).

327. See generally *Leavitt v. Bacon*, 89 N.H. 383, 387 (1938) (referring to Newton's laws of motion; "for every action there is a compensating reaction"); see also Steven Lubet, *Judicial Campaign Speech and the Third Law of Motion*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 425, 425 (2008).

conduct. For example, just after the Inauguration, it was widely reported that the interior of a subway train in New York had been covered with anti-Semitic symbols and slurs.<sup>328</sup> While graffiti certainly is no stranger to a New York subway, this was different. It so permeated the environment that passengers couldn't help but react. "Hand-sanitizer gets rid of Sharpie pens," shouted one passenger.<sup>329</sup> Others grabbed tissues from their backpacks and purses.<sup>330</sup> Together, they spontaneously scrubbed away the hateful words and images.<sup>331</sup> For anyone who has ever regularly ridden public rail, it's fair to say *that* has never happened before.<sup>332</sup>

Another example of proactive change occurred two months into Trump's presidency. For decades, Arkansas coupled Martin Luther King Day with a mandated state holiday honoring Confederate leader Robert E. Lee, thereby detracting from honoring Dr. King. State lawmakers voted to repeal that law on March 17, 2017.<sup>333</sup> State Senator Dave Wallace, a Republican representing a district nearly seventy-five percent white, acknowledged that although his "ancestors fought and died with the Confederacy," the joint holiday had "never been right." In his words: "You can see it and hear it in the pain and voices of the black community."<sup>334</sup>

As noted above, responsible rhetoric can come into play when advocates include powerful and compassionate narratives that let us truly understand

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328. See, e.g., Donie O'Sullivan, *New Yorkers Unite to Scrub Hateful Graffiti from Subway*, CNN (Feb. 6, 2017), <http://www.cnn.com/2017/02/05/us/subway-nazi-graffiti-new-york-trnd/index.html> (describing the events that occurred after subway riders saw the anti-Semitic graffiti).

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. See Kurtis Lee, *In Arkansas, A Joint Holiday for Robert E. Lee and Martin Luther King Coming to an End*, CHICAGO TRIBUNE (Mar. 19, 2017), <http://www.chicagotribune.com/la-na-arkansas-king-holiday-20170319-story.html> (recounting Arkansas's decision to end the annual holiday recognizing Robert E. Lee); see also Tafi Mukunyadzi, *Arkansas Lawmakers Vote to Remove Lee from King Holiday*, ASSOCIATED PRESS (Mar. 17, 2017) <https://www.yahoo.com/news/arkansas-lawmakers-vote-remove-lee-king-holiday-204358929.html> (following the repeal, Mississippi and Alabama remain the only states that mandate jointly honoring Lee on Martin Luther King Day).

334. *Zubik v. Burwell*, 136 S. Ct. 1157, 1559 (2016); see also Jelani Cobb, *Martin Luther King Day with Trump*, NEW YORKER (Jan. 16, 2017), <http://www.newyorker.com/magazine/2017/01/16/martin-luther-king-day-with-trump> (illustrating the compelling account of how Martin Luther King Day came to be. The first efforts began the same week as a historical Memphis march that occurred on April 8, 1968; four days after Dr. King was assassinated).

both sides of any issue.<sup>335</sup> It also can be used to frame legal arguments in a manner that does not shame an opponent but that instead finds a common ground to resolve legal conflicts.

Toward these ends, this author humbly proposes the following Ten Commandments for Responsible Rhetoric. The list also includes conduct, for the power of words is lost if they are never truly heard because of the unwillingness of another to listen.

#### THE [PROPOSED] TEN COMMANDMENTS OF RESPONSIBLE RHETORIC FOR LEGAL ADVOCATES

1. Understand and honor your role in the judiciary and in the world.
2. Always treat judges, jurors, litigants, fellow attorneys, and staff with kindness.
3. Strive to understand and respect any legitimate beliefs held by your opponent, specifically including sincerely held religious and social beliefs.
4. Use rhetoric to further just causes and inspire others to do the same.
5. Never use the power of words to manipulate, confuse, or foster false beliefs.
6. Do not stand on false rhetoric or law.
7. Win with grace, not scorn: find a way to frame an issue in a manner that allows for a graceful win and a dignified loss.
8. Do not sidestep a legal argument by shaming or belittling your opponent.
9. Strive to go beyond the legal argument and recognize your opponent's humanity.
10. Consider compromise.

In contrast to the Biblical Ten Commandments, this list is not meant to be set in stone. This list is just meant to start a conversation.

#### V. CONCLUSION

Responsible rhetoric doesn't bully. The gentler approach is to listen to each other and use rhetoric to spark empathy, not condemnation. If progressives and conservatives can get past current differences and find a way to co-exist, they can join together not only to champion the rights protected by our Constitution—including free exercise of religion—but also to denounce views that cannot be tolerated, namely bigotry and prejudice.

Reconciliation of religious rights and individual rights may require both

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335. See discussion *supra* Subsection IV.B.

progressives and conservatives to take a hard look in the mirror. Each side could be accused of not being willing to give an inch and instead blindly pushing an agenda without regard to the facts in controversy, including compelling narratives of everyday people on the opposite sides of a legal battle.

The common thread? My rights end where your rights begin. It's not about Republicans and Democrats nor progressives and conservatives. It's about coming together as a nation. Fight as we might, the fact is that we are hardwired to love our democracy. That means respecting contrary views and compromising.

Somewhere, our forefathers are watching. And hoping. They got the blueprint right. That little document signed in a drafty hall in Philadelphia in 1776 might just be the common touchstone that brings us all together.

