# ENGAGING HUMAN NATURE IN SUPPORT OF JUDICIAL ENGAGEMENT

*Douglas W. Kmiec*[*]

Upon hearing that the Institute for Justice was making a case that judicial activism was a false problem and that there was a need for judicial engagement,[1] I was tempted to call upon the old lyric: You say "to-may-toe," I say "toe-mah-toe."[2] However, the Institute's purpose is hardly a modest change in terminology; "judicial activism" is today perceived as a pejorative, but when the phrase was first employed, it was considered a statement of some praise for constructive thinking.[3]

The general thesis of the Institute is that the now-longstanding conservative complaint that judicial activism is not empirically verifiable,[4] and that the judiciary has been less effective than the Madisonian "bulwark" of liberty it was intended to be.[5] From the Institute's perspective, the judiciary has been particularly weak in the defense of economic liberty.[6] Over its quarter century of existence, the Institute has drawn upon multiple provisions of the Constitution in its efforts to affirm Madison's observation that the intent of the Constitution was the protection of property.[7] Having had

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[*] U.S. Ambassador (ret.); Caruso Family Chair in Constitutional Law and Human Rights, Pepperdine University School of Law. Ambassador Kmiec is grateful to the Pepperdine Law Librarians, especially research specialist Alyssa Thurston, as well as the editors and staff of the GEORGE MASON LAW REVIEW for assistance; any error is likely human nature.

[1] CLARK NEILY & DICK M. CARPENTER II, GOVERNMENT UNCHECKED: THE FALSE PROBLEM OF "JUDICIAL ACTIVISM" AND THE NEED FOR JUDICIAL ENGAGEMENT 7-11 (2011), *available at* http://www.ij.org/images/pdf_folder/other_pubs/grvnmtunchkd.pdf (noting that the Supreme Court strikes down, on average, less than 0.25 percent of state laws and less than 1 percent of federal statutes and has overruled its own precedent in only 2 percent of cases between 1954 and 2010, then concluding that for decades, the Court has been "abdicating its duty to enforce the Constitution" and urging judges to engage constitutional claims).

[2] *See* GEORGE GERSHWIN & IRA GERSHWIN, *Let's Call the Whole Thing Off*, on LADY DAY: THE COMPLETE BILLIE HOLIDAY ON COLUMBIA 1933-1944 (Legacy Recordings 2001) (1937).

[3] Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism*," 92 CALIF. L. REV. 1441, 1451 (2004) ("In its early days, the term 'judicial activist' sometimes had a positive connotation, much more akin to 'civil rights activist' than 'judge misusing authority.'").

[4] NEILY & CARPENTER, *supra* note 1, at 7-8.

[5] *Id.* at 3 & 14 n.9.

[6] *Id.* at 10 (criticizing Louisiana for enacting its florist-license law at the request of interest groups, then urging that a judge considering that law should "not ignore [such facts] and simply rubber stamp whatever half-baked rationalization the government offers instead" (citing Meadows v. Odom, 360 F. Supp. 2d 811 (M.D. La. 2005), *vacated as moot*, 198 F. App'x 348 (5th Cir. 2006) (per curiam))).

[7] Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L. REV. 173, 175-76 (2003) ("For Madison, wealth and property were both the primary causes of faction . . . and one

the privilege of teaching in the Institute's summer programs for many years until a recent interruption for foreign service as a U.S. ambassador, I am intimately familiar with the Institute's ingenuity in drawing upon provisions in the Constitution for this purpose. The Institute has advocated including the Contracts Clause as it is written, made many attempts to formulate or to reformulate the various judicial glosses on the Takings Clause, and has even on occasion made efforts to awaken the more moribund provisions like the Fourteenth Amendment's Privileges or Immunities Clause.

Not every effort of the Institute to have courts vindicate economic liberty has been successful, but it is fair to say that wherever the "merry band" of Institute lawyers has gone, a new appreciation for the interrelationship between human dignity, property, and economic opportunity has followed. For example, without the Castle Coalition, the Institute for Justice's nationwide grassroots property rights activism project, it is unlikely that forty-three state legislatures—to say nothing of the Supreme Court—would have acknowledged the concept of eminent domain abuse.[8] Likewise, without the Institute's efforts in several states, the interrelationship between children's educational success and parents' control of their tax monies would have likely continued to struggle under the weight of various constitutional misinterpretations unneeded to secure religious freedom.[9] And then there are simply the Institute's tenacious efforts to transform a rational basis judicial review standard into something other than the proverbial rubber stamp on regulations that impose ridiculously demanding requirements on Benedictine monks wishing to sell wooden caskets[10] or has permitted some to secure insulation from competition not by providing a better product or service, but by erecting barriers to entry that lack any justification beyond exclusion.

No one should make light of these efforts, and certainly I do not, as the efforts of the Institute have yielded economic opportunity, especially to those who would not otherwise have had the wherewithal to invest in new enterprise, while defending it from regulatory assault at the same time. In-

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of the primary concerns of government. . . . In short, governments control things that a large number of people would like to see controlled for their own benefit . . . . [T]he framers [therefore] included a secondary level of protection for liberty in the form of a Bill of Rights." (citing U.S. CONST. amends. I-X)).

8 *See Legislative Center*, CASTLE COALITION, http://www.castlecoalition.org/legislativecenter (last visited Apr. 5, 2012).

9 *Cases: School Choice*, INST. FOR JUST., http://www.ij.org/index.php?option=com_content&task=view&id=562&Itemid=290 (last visited Apr. 5, 2012).

10 *See* St. Joseph Abbey v. Castille, No. 10-2717, 2011 WL 2973566, at *3-4 (E.D. La. July 21, 2011) (describing Louisiana's regulation of casket sales, which restricted the retail business to licensed funeral directors—who themselves were required to "have a high school diploma or GED, pass 30 credit hours at an accredited college, and complete a one-year, full-time apprenticeship"). In *St. Joseph Abbey*, the court overturned the regulations because they had no rational relationship to consumer protection and violated the monks' due process rights. *Id.* at *10-11.

deed, the Institute has specially targeted those barriers that have no basis in reason but are protectionist at their core.

Part I of this Article describes the cases that the Institute has already brought on behalf of individuals seeking to freely exercise their chosen vocation. Part II responds to the Institute's findings about "judicial abdication" and suggests some new frameworks for judicial review that properly account for individual economic liberties. Part III presents some of the modern philosophical and psychological materials that demonstrate the evolution and changeability of human nature toward a more positive formulation. Part IV discusses how these developments should inform the engaged judge wishing to preserve the Constitution.

## I. THE INSTITUTE'S EFFORTS TO PROTECT AGAINST ECONOMIC IRRATIONALITY

Having identified the Institute's central aim as rectifying the unbalanced or second-class way it believes the courts have treated economic liberty, we should pause briefly here to examine the Institute's success in a world before judicial engagement. While I have already noted the success the Institute has achieved in promoting interpretation of a variety of constitutional provisions, the central player has been the Due Process Clause of the Fourteenth Amendment.[11] The conservative complaint about efforts like the Institute's has been that they read a substantive guarantee of liberty into a promise of procedural protection. Justice Scalia often criticizes substantive due process,[12] and of course, Justice Holmes's dissent in *Lochner*[13] is frequently praised for keeping pro-marketplace judicial ideology from being read into the Constitution. Depending on the moment and how facts are described,[14] one might favor Justice Peckham's laissez-faire approach, or one might applaud the supposed door kept open to democratically chosen

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11 "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

12 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) ("Our opinions applying the doctrine known as 'substantive due process' hold that . . . *only* fundamental rights qualify for this so-called 'heightened scrutiny' protection. . . . All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest."); Cnty. of Sacramento v. Lewis, 523 U.S. 833, 861 (1998) (Scalia, J., concurring in the judgment) (criticizing "highly subjective substantive-due-process methodologies"); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting) (arguing that due process limits on punitive damages are "insusceptible of principled application . . . constrained by no principle other than the Justices' subjective assessment of the 'reasonableness' of the award").

13 Lochner v. New York, 198 U.S. 45, 74-75 (1905) (Holmes, J., dissenting).

14 For example, was Lochner a victim, or was he a beneficiary of the state's intervention to adjust his working conditions?

limits on Lochner's freedom to choose what the Court thought he was mistaken for wanting.

One of the unhappy consequences of the standard *Lochner* critique is that it ends up being an inquiry into the judicial role, rather than an inquiry into what the Due Process Clause was meant to secure. Starting from a blank page, for example, it seems rather odd to think the emphasis of the Clause to be wholly procedural. Yes, building on its Magna Carta origin, it is a limit on governmental power to confiscate or to deprive, but its essential purpose was not to serve solely as a checked box that the government would provide notice before holding a hearing, but whether or not the people leave with their liberty intact. In the late nineteenth and early twentieth centuries, the Court believed that the individual citizen must be left free to adopt such calling, profession, or trade as may seem most conducive to his or her end.[15] Without this right, citizens cannot be free. The right to choose one's calling is an essential part of that liberty which government is bound to protect; and a calling, when chosen, is a person's property and right.[16]

In challenging barriers to entry for men and women seeking to enter the taxi business, the hair-styling business, or any number of common occupations, the Institute for Justice does not seek to make the Court a censor of all health and safety regulations. Instead, it wishes to ensure that these regulations serve their proclaimed public health and safety purpose and do not merely exclude those seeking opportunity.

By contrast, the usual recital of the rational basis standard favors the collectivized redefinition of our human personality, which is more tyrannically radical than benignly democratic. As a consequence, one's choice of vocation is reduced to a commercial status, which has less value. Consider the following from Chief Justice Stone:

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting *ordinary commercial transactions* is not to be pronounced unconstitutional unless in the *light* of the facts made known or generally assumed it is of such a charac-

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15 *See* Twining v. New Jersey, 211 U.S. 78, 94 (1908); Slaughterhouse Cases, 83 U.S. 36, 116 (1873) (Bradley, J., dissenting).

16 Indeed, since the Institute is inspiring scholars to rethink terminology, I would recommend getting beyond the language of rights in order to understand that "calling" is embedded in human nature. This concept is easily grasped when considering occupational surnames like Miller, Cooper, and Smith, which give an answer well before one can ask the question, "So tell me about you?" Even my own surname (which translates from the Polish as "farmer or small landowner") signals an element of freedom based upon property ownership, which was not common throughout the name's distinctive history. Now, of course, few stay in their ancestors' calling, though we are all shaped by our family histories. The point is that "calling" is inextricable from human personality, and a legal system that subordinates that personality is likely not firing on all cylinders.

> ter as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[17]

Stone's comments betray the low esteem in which the judiciary holds the choice of vocation. This key personal freedom, however, actually deserves our utmost respect.

### A. *The Institute's Attack on Rational Basis Review*

By pressing for the language of judicial engagement, the Institute seeks to recalibrate the inquiry so that the government must actually demonstrate the rational basis for a challenged law rather than expecting the judiciary to presume the law has one. This task has not been easy, since legislatures can mask the difference between genuine health and safety regulation and protectionism with carefully crafted justifications.

Consider the words of Judge Boggs for the Sixth Circuit as he presided over a case brought by the Institute and considered a prohibition on selling caskets without a funeral director's license. A 1972 amendment to Tennessee's Funeral Directors and Embalmers Act ("FDEA") required prospective licensees to complete (among other things) two years of training to learn how to embalm bodies.[18] Representing the plaintiff, the Institute successfully challenged this legislation, urging that it lacked rational basis.[19] The state countered that the FDEA's requirements prevented the spread of communicable diseases by ensuring that only qualified morticians handled dead bodies.[20] Agreeing with the Institute, Judge Boggs wrote:

> Finding no rational relationship to any of the articulated purposes of the state, we are left with the more obvious illegitimate purpose to which licensure provision is very well tailored. The licensure requirement imposes a significant barrier to competition in the casket market. By protecting licensed funeral directors from competition on caskets, the FDEA harms consumers in their pocketbooks. If consumer protection were the aim of the 1972 amendment, the General Assembly had several direct means of achieving that end. None of the justifications offered by the state satisfies the slight review required by rational basis review under the Due Process and Equal Protection clauses of the Fourteenth Amendment. As this court has said, "rational basis review, while deferential, is not 'toothless.'"[21]

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17 United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (emphases added).

18 Craigmiles v. Giles, 312 F.3d 220, 222 (6th Cir. 2002) (describing the extensive curriculum a candidate must complete to become a licensed funeral director in Tennessee, and noting in particular that the state had only one accredited mortuary-science school).

19 *Id.* at 221, 224 (stating that interest-group protection, in this case funeral home operators, does not constitute a rational basis for legislation).

20 *Id.* at 225.

21 *Id.* at 228-29 (quoting Peoples Rights Org., Inc. v City of Columbus, 152 F.3d 522, 532 (6th Cir. 1998)).

One might argue that judicial engagement would permit judges to intervene in Congress's will without acknowledging the capacities and capabilities of the executive and legislative branches. That is not, however, the way jurists who invalidate laws under rational basis review presently see the decision table.[22] Instead, courts are concerned about substituting their views of economic theory for that of the legislature and straining to justify this seemingly heroic act. When the Institute succeeded before the Sixth Circuit, for example, we find this misdirected discussion:

> No sophisticated economic analysis is required to see the pretextual nature of the state's proffered explanations for the 1972 amendment. We are not imposing our view of a well-functioning market on the people of Tennessee. Instead, we invalidate only the General Assembly's naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers. This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.[23]

In a similar vein, when the Institute asked the court to consider whether the FDEA violated the Privileges or Immunities Clause of the Fourteenth Amendment, the court declined, though nominally leaving the issue for another day:

> Because the plaintiffs' Equal Protection and Due Process arguments are sufficient to support the district court's injunction, we do not reach this argument. The Privileges and Immunities Clause has been largely dormant since the *Slaughter-House Cases*, restricted its coverage to "very limited rights of national citizenship" and held that clause did not protect an individual's right to pursue an economic livelihood against his own state. There has been some recent speculation that the Privileges and Immunities Clause should have a broader meaning. Nevertheless, we need not break new ground today to hold that the application of the FDEA to funeral merchandise retailers is unconstitutional under the Fourteenth Amendment.[24]

If the court is to more consistently engage, it is reasonable to suppose that it needs not merely a new label (that is, "engagement" substituting for "activism"), but also a theory of decision, ratio descendi, that ties its heightened analysis to due process, since that will not supply the needed infrastructure for the protection against irrational governmental assertions of power.

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22 *See id.* at 229 ("Our decision today is not a return to *Lochner*, by which this court would elevate its economic theory over that of legislative bodies.").

23 *Id.*

24 *Craigmiles*, 312 F.3d at 229 (citations omitted).

### B. *Using the Dormant Commerce Clause to Preserve Economic Opportunities*

Article I, Section 8, of the Constitution contains an affirmative grant of power "[t]o regulate commerce with foreign nations and among the several States,"[25] giving Congress express authority to pass laws affecting interstate commerce. The states may regulate where the federal government has not done so, but they are subject to a judicially grafted limit that such state and local laws not "unduly burden interstate commerce."[26] This notion is called the "dormant commerce" power.[27] As Justice Felix Frankfurter once wrote, "the doctrine [is] that the commerce clause, by its own force and without national legislation, puts it into the power of the Court to place limits upon state authority."[28]

The Court has held that the first step in analyzing any law subject to judicial scrutiny under the dormant commerce clause is to determine whether it regulates evenhandedly, with only "incidental" effects on interstate commerce, or "discriminates . . . against interstate commerce."[29] "'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[30] "If a restriction on commerce is discriminatory, it is virtually *per se* invalid."[31] By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[32]

The Supreme Court has struck down taxation and treatment that prefer local wine industries,[33] but a number of states maintained such practices in spite of the Court's opinion.[34] The Institute could have challenged these inconsistent, and generally trade-dampening, regulations as violating substantive due process; in virtually every case, the discrimination against out-

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25 U.S. CONST. art. I, § 8, cl. 3.

26 *See, e.g.*, Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997).

27 *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824) (Marshall, C.J.) (writing that the power to regulate interstate commerce "can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant").

28 FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY & WAITE 18 (1937).

29 United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338, 346 (2007).

30 *Id.* at 338 (quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994)).

31 *See Oregon Waste Sys.*, 511 U.S. at 99.

32 Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

33 *See* Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 273 (1984).

34 *See* Steve Simpson, *Vino Victory at the U.S. Supreme Court!*, 14 LIBERTY & L., June 2005, at 1, 1, 11, *available at* http://www.ij.org/images/pdf_folder/liberty/14_3_05.pdf.

of-state commerce was weakly bootstrapped onto regulations putatively for health and safety.[35] Knowing the Court's substantive due process analytic would likely leave the grapes on the vine, however, the Institute instead successfully relied in *Granholm v. Heald*[36] on the structural protection of the dormant commerce clause. As a consequence of the Institute's victory in *Granholm*, American wine consumers will now be able to save money on out-of-state wines by buying directly. They can also buy rare vintages that wholesalers and retailers have no incentive to carry.

But a close look at the 5-4 outcome in *Granholm* indicates that a victory for vino was anything but sure. As noted above, Congress's commerce power authority carries with it an implied limit on states' authority.[37] States may not enact laws that *discriminate* against interstate commerce.[38] But *Granholm* presented issues under both the affirmative and dormant commerce powers, which was a problem for the Institute because the Court long held that Congress may authorize state laws—including state discrimination against out-of-state products and services—that would, absent Congressional authorization, violate the dormant commerce clause.[39] No surprise that in *Granholm*, Michigan and New York argued that the Webb-Kenyon Act authorizes interstate discrimination against out-of-state winemakers.[40] The Webb-Kenyon Act prohibits all manner of interstate "shipment or transportation" of alcoholic beverages "in violation of any law of [any] State, Territory, or District of the United States."[41] Michigan and New York interpreted this language as Congress putting its imprimatur on state laws barring direct interstate wine sales.[42] Thus, they argued, there was no occasion to apply the dormant commerce clause doctrines.[43]

The Institute for Justice represented the winemakers. The Institute's careful lawyering and historical research revealed how the early twentieth-century dormant commerce clause cases sometimes erroneously conferred an affirmative immunity from state regulation on interstate commerce.[44]

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35 *See, e.g.*, James Alexander Tanford, *E-Commerce in Wine*, 3 J.L. ECON. & POL'Y 275, 311 (2007) (describing Michigan's public health and safety justification for its ban on direct shipping from out-of-state wineries in *Granholm v. Heald*, 544 U.S. 560 (2005)).

36 544 U.S. 460 (2005).

37 *See supra* text accompanying notes 25-32.

38 *E.g.*, City of Phila. v. New Jersey, 437 U.S. 617, 623-24 (1978); Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 145 (1970).

39 *See* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87-88 (1984); *In re* Rahrer, 140 U.S. 545, 561-62 (1891).

40 Brief for State of New York Respondents at 13, *Granholm*, 544 U.S. 460 (No. 03-1274).

41 Webb-Kenyon Act, 27 U.S.C. § 122 (2006). Congress enacted the Webb-Kenyon Act in 1913 and reenacted it with identical wording in 1935. *Id.* It remains on the books to this day. *Id.*

42 *See, e.g.*, Brief for State of New York Respondents, *supra* note 40, at 19-21.

43 *Id.* at 29. This ultimately would be the view of the four dissenters: Thomas, Rehnquist, Stevens, and O'Connor. *Granholm*, 544 U.S. at 497 (Thomas, J., dissenting).

44 Reply Brief for the Petitioners at 19, *Granholm*, 544 U.S. 460 (No. 03-1116).

The Institute interpreted the Webb-Kenyon Act as a re-extension by Congress to the states "broad authority to regulate alcohol, but it did not expunge the nondiscrimination principle."[45]

Justice Kennedy agreed with the Institute; Justices Scalia, Souter, Ginsburg, and Breyer joined his majority opinion.[46] Citing the history of the Webb-Kenyon Act, the majority held that the Act's purpose was simply to make clear that state laws that do *not* discriminate against interstate alcohol shipments *were* valid.[47] The statute's "any" state law phrasing, therefore, referred only to those laws that applied equally to both in-state and out-of-state alcohol.[48]

The Institute won the day, but it bears note that its argument was complicated by its need to carefully navigate the meaning of the Twenty-First Amendment, which repealed the Eighteenth Amendment and ended Prohibition.[49] The Twenty-First Amendment does not merely state that the Eighteenth Amendment is void; it also prohibits "transportation or importation" of "intoxicating liquors" into any State "in violation of the laws thereof."[50] The dissent read the Webb-Kenyon Act literally—"any" law means *any* law, including laws that discriminate.[51] Moreover, the text of an explicit constitutional provision, said the dissent, must prevail over an implied one.[52]

Nope, said the majority; the Twenty-First Amendment merely constitutionalized the authority the Webb-Kenyon Act gave the states to pass evenhanded statutes.[53] So with one of the oddest voting alignments in the history of the Rehnquist Court,[54] *Granholm* vindicated the authority of the

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45 Petitioners' Brief on the Merits at 31-32, *Granholm*, 544 U.S. 460 (No. 03-1274).

46 *Granholm*, 544 U.S. at 463.

47 *Id*. at 483-84.

48 *Id*. at 481-82.

49 *See* Petitioners' Brief on the Merits, *supra* note 45, at 30-31.

50 U.S. CONST. amend. XXI.

51 *Granholm*, 544 U.S. at 500 (Thomas, J., dissenting).

52 *Id*. at 497.

53 *Id*. at 484 (majority opinion).

54 Justices Scalia, Souter, Ginsburg, and Breyer joined Justice Kennedy's majority; the dissent contained the Chief Justice as well as Justices Stevens, O'Connor, and Thomas. *Id*. at 463; *see also* Michael C. Dorf, *In Vino Veritas? The Supreme Court's Decision on Interstate Wine Shipment Creates Some Odd Bedfellows Among the Justices*, FINDLAW (May 20, 2005), http://writ.lp.findlaw.com/dorf/20050523.html (exploring unusual voting alliances in *Granholm*). Some have speculated that the dissenters reflect the perspective of senior citizens who remember Prohibition and the bitter battles the states fought for authority. *E.g*., Dorf, *supra*. But Rehnquist, Stevens, and O'Connor would have been children when the Twenty-First Amendment was ratified, and Thomas had not yet been born. *Id*. The real curiosity is the division of Scalia, who joined the majority, and Thomas, who dissented. Scholars sometimes label both Justices as textualists, *see id*., but they are originalists. *See*, *e.g*., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) ("Having described what I consider the principal difficulties with the originalist and nonoriginalist approaches, I suppose I owe it to the listener to say which of the two evils I prefer. It is originalism."); Clarence Thomas, *Judging*, 45 U.

states to regulate a product that moves in interstate commerce, so long as the regulation was evenhanded. The Institute won this case because it demonstrated that statute and constitutional text conferred unique authority upon the states to regulate a commodity in interstate commerce, but that authority also reflected a specific and general history that subjugates states' powers to the overarching purpose of our Constitution: to create a single economic union.[55]

## II. A NEW PARADIGM FOR JUDICIAL REVIEW

For the Institute's new terminology of judicial engagement to be persuasive, it must be more than old wine in a new flask. The new regime must draw upon what I call the "pre-originalism" of human nature. The Founders intended every aspect of the Constitution to positively advance our human nature in society. We did not construct just any democracy, but a democracy premised upon "self-evident" "truths" describing a created human person as having an unalienable right to "Life, Liberty and the pursuit of Happiness."[56] The Constitution did not simply endorse some majority; it safeguarded the Declaration by requiring that the only majorities entitled to deference would be those exercising power consistent with the human person.

In an effort to engage the judiciary on these higher, pre-originalist terms, the Declaration of the Institute for Justice's Center for Judicial Engagement provides:

> Government actions are not entitled to "deference" simply because they result from a political process involving elected representatives. To the contrary, the Framers were acutely aware of and deeply concerned about the dangers of interest-group politics and overweening government, and the structure of the Constitution rejects reflexive deference to the other branches. It is the courts' job to check forbidden political impulses, not ratify them under the banner of majoritarian democracy.[57]

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KAN. L. REV. 1, 6 (1996) ("I have said in my opinions that when interpreting the Constitution, judges should seek the original understanding of the provision's text, if that text's meaning is not readily apparent."). Original meaning requires ascertaining not simply the plain meaning of text, but the meaning it had when ratified or approved in light of the usages of the people at the time. *See, e.g.*, Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714 n.1 (2011) ("What [originalist] theories generally have in common is that they treat 'the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.'" (quoting Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004))).

55 A feat not easily achieved, as modern Europe might attest.

56 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

57 *Declaration of the Institute for Justice's Center for Judicial Engagement*, INST. FOR JUST., http://www.ij.org/component/content/article/42-liberty/3673-ij-launches-center-for-judicial-engagement (last visited Apr. 5, 2012) [hereinafter *CJE Declaration*].

One might ask, then, how properly engaged judges should view government action. This Part begins by asking first whether the Institute has properly shown that judicial engagement is necessary or even desirable. The Part then points out two possible sets of guidelines for engaged judges that at least some Justices have already considered, first discussing Justice Breyer's dissents from two copyright cases and then addressing the Court's Footnote Four in *United States v. Carolene Products*[58] about the distinction between civil and economic liberties.

### A. *Do We Really Need More Judicial Engagement?*

In its never-ending quest to protect people's work efforts from governmental regulations that have no purpose other than to burden competition, the Institute has hit upon the idea of demonstrating how infrequently the judiciary actually invalidates or sets aside the work of the legislature. Thus, the Institute uses the occasion of judicial activism's rebirth as "judicial engagement" to illustrate how little judicial monitoring goes on, no matter what you call it.[59] But the Institute's count of judicial interventions does not tell me enough. The numbers confirm what most of us know from our case studies: the number of invalidations of legislative or regulatory handiwork is quite small in comparison to the numbers of enactments or regulatory exercises. But what exactly does this mean? It does support the proposition that democracy is remarkably unchecked by judicial invalidation. The Institute contends that the numbers reveal that judicial activism is a nonissue and that judicial abdication is the real problem, one that goes overlooked.[60] It is not clear to me that the numbers prove either. The invalidations and preemptions, however small or infrequent, would fulfill the judiciary's role if they properly protected human nature.

Neily and Carpenter argue that judicial activism is not a problem because it occurs with considerable infrequency.[61] For them, it is enough that the Supreme Court set aside just 0.67 percent of all the laws enacted between 1954 and 2003 and showed even greater deference to state laws.[62] They claim that James Madison, who called the judiciary the "bulwark" of liberty, would have anticipated a higher level of activity.[63] It's not clear whether this can be confirmed in the historical record, but the size and scope of modern government is clearly well beyond the imagination of anything the Founders could have conceived.

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58 304 U.S. 144, 152 n.4 (1938).

59 *See* NEILY & CARPENTER, *supra* note 1, at 1.

60 *Id.* at 9-10.

61 *Id.* at 7-8.

62 *Id.* at 7.

63 *See id.* at 3 & 14 n.9.

The numerical count is insufficient in another way. While the percentages of invalidation or preemption or return of regulation to administrative agencies for a fuller record is relatively small, this small percentage would be more significant if it occurred in highly important areas of law. Consider, for example, California's Proposition 8, the highly controversial referendum overturning the state Supreme Court's acknowledgment of same-sex marriage. Conservatives would likely assail the California Supreme Court's initial decision that articulated a right to same-sex marriage as judicially active. But Proposition 8 is a legislative act passed directly by the people. The Ninth Circuit Court of Appeals recently affirmed the prior ruling invalidating Proposition 8.[64] Will this second judicial intervention find its way into the statistics? Perhaps, but however the Institute counts the ups and downs of such a complicated case, statistics alone cannot reflect the importance of the case's subject matter.

Even if the numbers are not a complete measure of judicial activism, they certainly reveal that judicial oversight occurs rarely. Neily and Carpenter suggests that "at a minimum . . . judges should evaluate all laws that come before them in light of their actual purposes," just as they do with respect to the favored constitutional values, and also that the burden of proof should rest with the government to demonstrate that there is rational basis for the means listed in the statute.[65] Judicial engagement is a new and engaging name, but this prescription is an old one: in the early 1980s, the much-beloved Bernard Siegan persuaded a presidential commission seeking affordable housing to make just this recommendation. Despite the measure's receiving considerable attention, it was adopted virtually nowhere, and housing remained unaffordable to many until the onset of manipulative lending practices.

The Institute's revival of this vintage solution deserves at least experimental adoption. Requiring a closer matching of regulatory means and ends is little more than common sense; one doesn't keep buying a household cleaning product if it never cleans, but the judiciary continues the same regulatory nonperformance by deferring to what it conceives as the legislature's intent. No consumer would accept a product that conceivably cleans, and such deferential hocus-pocus ought not be allowed to trump unalienable rights.

Assuming that things must change, the question immediately arises as to which framework is best to follow. The best approach, in my view, would account for the critical individual right to economic liberty.

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64 *See* Perry v. Brown, Nos. 10-16696, 11-16577, 2012 WL 372713, at *29 (9th Cir. Feb. 7, 2012).

65 NEILY & CARPENTER, *supra* note 1, at 11.

### B. *A Possible Framework from an Unlikely Source*

Justice Breyer's dissent in *Eldred v. Ashcroft*[66] might provide courts with one possible theoretical framework for intervention that they might pursue to give life to the concept of judicial engagement. This is a case outside substantive due process analysis, but judges might find it useful to borrow from. Seven Justices in *Eldred* gave rational basis deference to Congress on whether a twenty-year extension of copyright for new and existing works fell within the legislative power.[67] Justice Breyer, however, reasoned that the monopoly privilege of the Copyright Clause (not unlike the monopoly privileges of regulation that exclude new competitors) cannot be unlimited in scope or primarily designed to provide special private benefit.[68] Breyer had little difficulty applying heightened scrutiny to the statute at issue in *Eldred* because he sees an interrelation between the expressive interests of human nature and what can—and what should be—justified under the Copyright Clause.[69] Looking through the prism of copyright policy, Justice Breyer wrote that when line-drawing among constitutional interests is at stake,

> I would find that the statute lacks the constitutionally necessary rational support (1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values inherently advanced by the Copyright Clause; and (3) if it cannot find justification in any [other] significant Clause-related objective.[70]

Thus, for Justice Breyer, the primary purpose of the Copyright Clause is not to reward the author, but rather to secure the benefits for the public from the author's labors. Any statute (economic regulation?) must serve public, not private, ends. Breyer acknowledges that there are costs in every copyright statute—royalties, the transaction costs associated with seeking permission—but here, the benefits arising from these costs are primarily directed at the copyright holders, not the public.[71] These costs are also perverse since the term-extension statute would impose them for existing works that have already lost much of their value.[72]

Justice Breyer had a second bite at a somewhat similar apple in *Golan v. Holder*.[73] In *Golan*, the Court considered the Berne Convention-imposed

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66 537 U.S. 186 (2003).

67 *See id.* at 212-13.

68 *Id.* at 243 (Breyer, J., dissenting) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)).

69 *Id.* at 244.

70 *Id.* at 245.

71 *Id.* at 248.

72 *Eldred*, 537 U.S. at 251.

73 132 S. Ct. 873 (2012).

transition from minimalist to maximalist coverage, which had the effect of withdrawing from the public domain various musical compositions and other artistic works protected in Europe but that had enjoyed no protection in the United States before the nation entered the Berne Convention.[74] What rationality could there be in giving added monopoly protection to artistic work already produced, released and being in the public domain? Good question. The Court majority doesn't really say, since all it had do under the *Eldred* majority's rule, and indeed as it must in every rational basis case, is provide some conceivable rationale. In *Golan*, then, the generation of uniform, seamless copyright protection ended up being rational enough to convince the majority.[75] Again, although, Breyer dissented—this time joined by Alito—both Justices would have applied something like the closer-look doctrine Breyer outlined in his *Eldred* dissent.[76]

So what is the relevance of Justice Breyer's *Eldred* analysis to judicial engagement, especially since he wrote in dissent and even said that the protection of copyright was premised more on ensuring public benefit rather than private gain? Despite all the differences between the cases, Breyer's *Golan* dissent is intriguing because it is the first time any fraction of the Court has argued for heightened scrutiny of the protection of an economic interest since the Court turned its back on *Lochner*. In addition, its elements ask more subtle questions about the need for regulation to have public benefit and to further expressive interests. If judicial engagement protecting individual liberty and corollary investment is to take hold, its proponents must suggest more than a label change. The analytic inquiry an engaged judge might employ might seek to require the government to demonstrate how a proposed copyright regulation both results in a net public benefit and respects the equivalent of the expressive aspects of copyright analysis—namely, the expressive or defining aspects of human nature.

### C. *Originalism and Economic Liberties*

The Institute's Declaration calls on engaged judges to "check forbidden political impulses."[77] But how will that effort be received? After all, the notion of reconnection with our human nature may be simply an articulation of that which is merely a grunt or roar heard at Tea Party meetings or uttered by the conclaves of people presently occupying town squares across the country. We seldom think of Tea Parties and Occupiers as occupying (pun intended) the same parts of the ideological spectrum. There is some political party division in these expressions, but more often than not, the

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74 *Id.* at 879-82.

75 *See id.* at 884-87, 894.

76 *See id.* at 899-900, 903 (Breyer, J., dissenting).

77 *CJE Declaration*, *supra* note 57.

common denominator is *betrayal*. But what do these groups urge has been betrayed? Not just a political party platform or even a single provision of the Constitution, but rather the basic idea of who we are in our own skins.

For a while, Justice Scalia's originalist interpretative method may have insulated the judiciary from being seen as the impetus of this betrayal. After all, with arguably two notable exceptions—handguns and abortion—originalism allowed the Court to keep faith with human nature. But those two notable or major exceptions have shaken the faith of those who defend originalist judicial effort. The present angst, however, should not obscure how the Institute, by dedicating itself from its inception to applying jurisprudence of real, tangible value to human effort, was already in a leadership position in exploring whether modern judicial review honors or betrays human nature. Justice Scalia's campaign in favor of original understanding has strengthened the rule of law, since the formal obligation to comply with legal terminology as it stood at a time before the behavior under examination occurred lends credibility to the judicial product. But this is no longer enough to acquit the judicial role the Constitution gives the Court.

No one on the present court has explained why economic liberties associated with one's work (and as I will argue more fully below, the very definition of the human personality in a vocational sense) deserve less protection than do free speech or freedom of religion. In fact, this distinction has been rather mindlessly passed forward through an obscure footnote in a case where false testimony before Congress manipulated the facts that gave rise to regulatory restriction of human liberty.

On its own, Footnote Four in *Carolene Products* makes plausible sense in that it protects rights like free speech that are vital to informed participation in the political process and rejects those occasions when hatred has taken hold of the legislative mind to deprive someone of right on an irrelevant basis like skin color or gender. Yet the footnote is limited by its failure to adequately weigh the interrelationship between the nature of the human person and economic enterprise. We surely value the ability to champion in speech or faith our respective ideologies, but we also value that which is expressed by work. We are, as human beings, not only what we say, or how we pray, but what we do.[78]

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[78] A small amount of scholarship has tried to explain the dichotomy between economic and civil liberties, but it has been unsuccessful. At best, we can discern how it came about: as a political expedient to federal executive and legislative redistribution in the first Great Depression of the 1930s and as a function of the narrowness of legal training, which renders the Court more versed in humanities than in science and engineering. In reality, economic matters are more difficult for the court to understand insofar as they involve numbers and mathematical concepts, not two- or three-pronged tests invented by the judiciary to give civil liberty greater protection.

## III. THE CONSTITUTION AND EVOLVING HUMAN NATURE

Shouldn't there be more underneath a phrasing of such engaging character? My earlier discussion of the Institute's victory in the wine cases[79] and of Justice Breyer's economic test in the copyright area[80] are worthy models of heightened scrutiny that the Court has applied or seriously considered, and I hope the Institute will attempt to import these models into their quest to give meaning to substantive due process.

Given the Institute's provocative, fresh thinking, perhaps we should expect even more; perhaps it's not just a question of simply ensuring that the government has identified regulatory means that it has demonstrated to reasonably advance the regulator's end. In this regard, if the Institute is serious about human liberty, as I know it to be, then perhaps it should tell all of us to buckle our analytical seatbelts for a close look at whether we need any regulation at all today to accomplish a legislative end. In other words, should not a truly engaged judiciary want to ensure that the government is advancing an aspect of human liberty as we understand that liberty here and now?

I explore this more far-reaching suggestion for judicial engagement in the remainder of this Article. I believe it to be a wholly novel, but credible, suggestion that judicial engagement be defended by the pre-originalist conception of the human person seeking to ask and answer the question whether intrusive, seemingly irrational, or unneeded regulation is consistent with the human nature of a person as it has evolved.

To start this inquiry upon a proper path, I propose to first examine what it means to proclaim, as *The Federalist Papers* did, that the Constitution was intended to be an accurate reflection of human nature.[81] That examination will remind us that when we seek protection from the government, we must first acknowledge that in a democracy, the danger comes from ourselves—because, after all, we are the government. The examination of human nature I propose here is complicated and involves scientific competencies beyond the average court, so it is more thought experiment than prescription.

In my view, the Founders defined the Constitution to be an accurate reflection of human nature, but the conception of human nature by the Founders was dichotomous; namely, they condemned human limitations but then harnessed those same limitations in as they argued for human freedom. The original constitutional design, with its horizontal and vertical divisions of authority, mitigates our tendency to be corrupted by power. Human nature, however, is not static; it is a dynamic construct that actually

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79 *See supra* notes 32-36 and accompanying text.

80 *See supra* notes 69-71 and accompanying text.

81 *See* THE FEDERALIST NO. 51, at 318-19 (James Madison) (Clinton Rossiter ed., 2003).

improves as time passes. The interpretative method of original understanding is therefore misdirected to the extent that the judiciary evaluates present regulatory exercises against an outdated conception of human nature.

We also know from Madison that if "men were angels,"[82] no (or less) government would be needed; as proponents of judicial engagement, the Institute would most likely be pleased by that notion. However, the evolving nature of the person is "transpersonal," such that the ultimate human experience is to get beyond a good deal of social conditioning that imposes difficulty seeing our common nature.

Social psychologists understand vocational calling as the principal way in which a person engages in intrinsically creative and productive activity. This insight alone might assist the Institute in elevating the significance of work to levels perhaps unattainable in mere expressive activities; at a minimum, it would bolster the Institute's objective of having economic liberty treated on a higher plane than it is presently. What these materials suggest, is that the Institute should not aim too low. If judges can grasp a twenty-first century understanding of work in relation to human nature, they should give it greater acknowledgement under the law, in which case a judicially engaged standard could have considerable benefit to unleashing full human potential. As Abraham Maslow wrote:

> We can certainly now assert that at least a reasonable, theoretical, and empirical case has been made for the presence within the human being of a tendency toward, or need for growing in a direction that can be summarized in general as self-actualization, or psychological health . . . i.e., he has within him a pressure toward unity of personality, toward spontaneous expressiveness, toward full individuality and identity, toward seeing the truth rather than being blind, toward being creative, toward being good, and a lot else. This is, the human being is so constructed that he presses toward fuller and fuller being and this means pressing toward what most people would call good values, toward serenity, kindness, courage, honesty, love, unselfishness, and goodness.[83]

This kind of speculation is a good distance from fewer barriers to entry to either hair braiding or limo driving, but I argue that it is on the same road—and most definitely not the road to serfdom, but the one to freedom. We can be certain the Institute would roundly celebrate such a development.

An engaged judiciary that protects not just liberty as it was conceived at the time of the Founding, but that which is needed by twenty-first century humans, will likely produce results far different than those the Institute or the courts themselves presently contemplate. And if our natures are becoming more altruistic compared to the self-interested beings of the eighteenth century, then according to Madison, we have less need for government. One

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82 *Id*. at 319.

83 ABRAHAM H. MASLOW, TOWARD A PSYCHOLOGY OF BEING 171 (John Wiley & Sons, Inc. 1999) (1968).

might argue in the alternative that greater altruism invites greater use of governmental power to accomplish broader objectives (President Obama's healthcare plan, for example). The Institute certainly did not intend for its Declaration of Judicial Engagement to free government from restraints on its own power. The Institute would rightly point out the individual alone, not the government, holds the unalienable right of liberty. That said, constitutional doctrine can sometimes be turned in unpredictable ways, and one need only note that courts have permitted the government to control private speech in workplace settings to realize that citizens are getting less freedom, not more.

### A. *The Constitution Was Intended to Be a Reflection of Human Nature*

In arguing for the ratification of the Constitution in *The Federalist*, Madison portrayed the plan of government as "the greatest of all reflections of human nature."[84] The founding generation was both explicit and emphatic that the Constitution's success would turn on how well the charter got our personal basics correct.[85] The governmental edifice of the Constitution was not intended for an abstract conception of the human person, fashioned with "artificial, regular symmetry" or "planned in the closet" or the soft imagination of its drafters, but in the hard particulars of reality.[86]

But is the human nature that existed in 1787 the same as that in 2012, as some assume?[87] As an evolutionary matter, such stagnation would seem open to question. At a minimum, it would be difficult to deny that after 225 years, we have a different understanding of that nature.

What would be the consequence of such an evolved nature or different understanding? Professor Claes Ryn suggests that the real meaning of the

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84 THE FEDERALIST NO. 51, *supra* note 81, at 319.

85 *See, e.g.*, Douglas W. Kmiec, *Natural-Law Originalism—Or Why Justice Scalia (Almost) Gets It Right*, 20 HARV. J.L. & PUB. POL'Y 627, 651 (1997) ("The Constitution of the United States is the deliberative result of our Founders' respect for natural law and its call to 'form a union' with others. It is not premised upon a right to be left alone, but upon a duty to preserve ourselves and others and a correlative right to be free in the performance of *that* duty.").

86 *See* Douglas W. Kmiec, *The Human Nature of Freedom and Identity—We Hold More Than Random Thoughts*, 29 HARV. J.L. & PUB. POL'Y 34, 46 (2005); *see also* THE FEDERALIST NO. 37, *supra* note 81, at 226 (James Madison).

87 For example, author Ken Zenka writes:

> As the source of nature eludes us, our own nature demands that we know something, if not that. Our innate and inquisitive state has led us to discover who we are and where we are, but not what we are nor where we came from. Not only do we not know nature's origin, but we do not even know our own exact origin within living nature. What is known however, is that from modern man's primeval beginnings we always had the same base and basic qualities and responsibilities that we have now. Our intelligence has modernized our world but not us. As far as the human race has advanced its political, social and economic systems, we are still the same as we were 30,000 to 40,000 years ago, albeit smarter.

KEN ZENKA, HUMAN NATURE 15 (1997). This assertion is at odds with the science of natural selection.

Constitution is inseparable from "an entire view of human nature and society."[88] For Ryn, every textual provision of the Constitution is premised upon

> a more comprehensive and unwritten constitution, which includes the moral ethos of the Framers. The institutions and procedures prescribed by the written document imply a particular kind of civilization and a particular kind of human being. Without a certain personality type setting the tone in society, the government could not function as intended. The Constitution presupposes character traits in tune with its prescriptions, and those prescriptions are expected to foster that personality.[89]

To be most effective, therefore, a robust concept of judicial engagement would need to be cognizant of the current understandings of our strengths and weaknesses.

### B. *Human Nature and Pre-Originalism Necessarily Precede Any Original Understanding*

Accounting for human nature must have a meaningful impact on how we understand the Constitution and its purpose, including how the judiciary should intercede to protect liberty. Consider, for example, the long-running dispute over the legitimacy and utility of originalism. The central interpretative debate over the last several decades has been between original understanding and the "living Constitution" theory.

The proponents of original understanding claim that this interpretative method is superior because any opposing means of interpretation is comparatively subjective. In cases of disputed meaning, Justice Scalia and his fellow originalists contend, the usage of a word at the time of the enactment of the provision provides an authoritative answer.[90] For originalists, objectivity is not only possible, it is preferable to a subjective expression of a jurist's will.[91]

Living constitutionalists, by contrast, doubt that original meaning is accessible, and even if it were, it cannot be stated without many very subjective judicial choices.[92] In addition, they note, some of originalism's answers to modern problems are embarrassing or unwanted, for example the perpetuation of forms of punishment that to modern sensibilities are cruel

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88 Claes G. Ryn, *Political Philosophy and the Unwritten Constitution*, 34 MOD. AGE 303, 303 (1992).

89 *Id.*

90 *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 10 (2010) ("The core idea of originalism is that when we give meanings to the words of the Constitution, we should use the meanings that the people who adopted those constitutional provisions would have assigned.").

91 *Id.*

92 *See, e.g.*, Sean B. Cunningham, Comment, *Is Originalism "Political"?*, 1 TEX. REV. L. & POL. 149, 165-66 (1997).

and unusual.[93] Living constitutionalists have scored their strongest points against originalism by pointing out the number of times originalists find it necessary to be "fainthearted"—that is, to circumvent a plain original meaning in order to achieve a result the public will accept.[94]

This criticism of fainthearted originalism contains its own weakness, because a bad consequence cannot be assessed without an evaluative standard other than personal judicial predilection wrapped in supporting precedent. In other words, living constitutionalism lacks any independent, objective source, in contrast to the original-understanding school. If the very success or failure of a framework for governance depends on its accurate grasp of human nature, something that can be defined reasonably objectively, might it not be subversive of either interpretive scheme for a judge not to consider that nature?

### C. *Judicial Appreciation of Human Nature and the Irrelevancy of Race*

As an example of the importance of human nature in judicial engagement, take the Court's landmark opinion in *Brown v. Board of Education*.[95] *Brown* is not an opinion premised upon originalism. The Congress of 1866, which drafted the words "equal protection" into the Fourteenth Amendment, accepted segregation, including that in public-school environments.[96] By 1954, when *Brown* came before the Court, the strained arguments propping up "separate but equal" had to give way to a different outcome, even though original understanding supported the opposite. The case's outcome was necessary if the Court wanted any respect from the public.

So is there a principle of law capable of explaining the result in *Brown*? The various theories of living constitutionalism have little to say other than that *Brown* is self-evidently correct.[97] It is, but the mind searches for more than bare assertion to make it so. Even if the common ground to the various nonoriginalist critiques is that the academic underperformance that arises when public schools are segregated is unacceptable, we still need a legal standard. This Article suggests that the law's evaluative standard should be its faithfulness to the best available understanding of the human person. What was wrong with "separate but equal" was not its inconsistency with nineteenth-century usage, but its irreconcilability with human nature.

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93 STRAUSS, *supra* note 90, at 11.

94 *See* Scalia, *supra* note 54, at 864; *see also* Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 16 n.62 (2011).

95 347 U.S. 483 (1954).

96 STRAUSS, *supra* note 90, at 12-13.

97 *Id.* at 77-80.

Although Ryn supposes that "[t]he disintegration of constitutionalism in America manifests the emergence of a different type of civilization and human being,"[98] we should not be too quick to suppose that either a personal God or an impersonal evolutionary process has decided to introduce a new human product line, but we ought at least contemplate that we now have greater insight into the essence of humanity. It bears further note that *Brown*'s favorable result was the work of Chief Justice Warren's judicially engaged hands.

Unlike conservative textualists, the Institute has been equally willing to import liberal and conservative reasoning into its arguments to meet its libertarian objectives.[99] Just as Chief Justice Warren employed a sophisticated sociological grasp of human nature in striking down "separate but equal,"[100] the Institute should rely on evidence of changed assessments of human nature as it relates to economic or vocational pursuit.

### D. *Neurobiology—New and Greater Knowledge About Human Nature or the Scientific Recycling of Old Ideas?*

Where might a judicially engaged judge look for information about human nature? Biological portrayals of the human person provide greater insight into humanity than rational or emotive ones do. For example, in *Moral Minds*, Professor Marc Hauser describes the moral grammar that binds all humanity.[101] A burgeoning literature joins Hauser in his analysis, with its most significantly novel aspect being the employment of new means of empirical measurement, such as MRIs. After all, David Jayne Hill at the turn of the twentieth century, for example, instructed that "[t]o the unreflecting mind government appears to be a purely human institution, an invention of man's ingenuity, having for its purpose the control of human action. . . . It is only after much reflection that one realizes how deeply the roots of government run."[102]

Hill's century-old observations are consistent with pre-originalism, and they supply an answer to those conservative friends who might express the complaint that we are departing from true originalism. Hill explained

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98 Ryn, *supra* note 88, at 303.

99 *See, e.g.*, William H. Mellor & Clint Bolick, *The Quest for Justice: Natural Rights and the Future of Public Interest Law*, INST. FOR JUST. (Sept. 10, 1991), http://www.ij.org/index.php?option=com_content&task=view&id=1413&Itemid=192 ("While abhorring many results of liberal judicial activism, we believed that emphasis on judicial restraint as an end in itself gave insufficient hope for protecting crucial rights."); *Legislation*, INST. FOR JUST., http://www.ij.org/legislation (last visited Mar. 25, 2012) (stating that the Institute advocates on behalf of over-regulation by government).

100 *See* discussion *supra* p. 1008.

101 MARC D. HAUSER, MORAL MINDS: HOW NATURE DESIGNED OUR UNIVERSAL SENSE OF RIGHT AND WRONG 43-44 (2006).

102 DAVID JAYNE HILL, HUMAN NATURE IN THE CONSTITUTION 14 (1926).

that the idea of government predates even Aristotle's conception of man as a political animal in the polis.[103] After all, the Latin *gubernata* referred to the steering of a vessel, just as the concept of government is the direction of the body politic.[104] Unlike Hauser, Hill was unconcerned with understanding in either empirical or biological terms what gives rise to our moral sense, but Hauser would agree with Hill that

> [w]hatever the actual beginning of human life may have been, it is certain that man became man under the dominion of natural laws. As a condition of consciousness, there were in the human body certain possibilities of co-ordinated movement, which can be explained only as an inheritance of an ancestral experience registered in the organism,—a government by inherited habit if you choose to call it so.[105]

Again, my proffer to the Institute is this: a full-bodied concept of judicial engagement does not rest upon a somewhat puny matching of means and ends, but is instead a genuine appreciation of our nature, and thus the regulatory end itself, as it can be grasped in 2012.

Holmes, of course, mocked the natural law,[106] and today, many view those discussing it as a quaint relic of a bygone era.[107] Originalists declare natural law either unknowable or incapable of impartial demonstration,[108] and nonoriginalists are suspicious that natural law claims mask religious fundamentalism.[109] Hill's observations, however, still have force today: "The simple animal has few illusions. Its pleasures are strictly organic and temporary, very little projected upon the future. Man, on the contrary, lives in his [f]antasies; and has been characterized as 'the only animal that eats when he is not hungry and drinks when he is not thirsty.'"[110] The wisdom of that remark is difficult to deny by a nation that before it was broke, had noticed it was fat.

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103 *Id*. at 15.

104 *Id*.

105 *Id*. at 16.

106 Robert P. George, *Natural Law*, 52 AM. J. JURIS. 55, 55 (2007) ("Oliver Wendell Holmes . . . established in the minds of many people a certain image of what natural law theories are theories of, and a certain set of reasons for supposing that such theories are misguided and even ridiculous.").

107 *See, e.g.*, J. C. Oleson, *The Antigone Dilemma: When the Paths of Law and Morality Diverge*, 29 CARDOZO L. REV. 669, 671-72 (2007).

108 *See, e.g.*, Cunningham, *supra* note 92, at 164-65.

109 *See* DAVID A. J. RICHARDS, FUNDAMENTALISM IN AMERICAN RELIGION AND LAW: OBAMA'S CHALLENGE TO PATRIARCHY'S THREAT TO DEMOCRACY 8 (2010).

110 HILL, *supra* note 102, at 22.

### E. *Judicial Engagement and Conceptions of Liberty and Community: A Balance Calibrated by Human Nature*

In addition to how well we grasp human nature as it pertains to the pursuit of individual liberty, we can also gain insight from examining how men and women live in society. A constitution must accommodate the competing interests of the individual and the individual's community. Writes Hill:

> It is evident, therefore, that, in any complex organization, like human society, something must be freely granted to the individual. This is what we mean politically by "liberty." On the other hand, something must be insisted upon for the benefit of the group. This is what we mean by "law," in its social sense. Social progress depends upon the just balance between the two. Without liberty, there is no initiative, and hence no progress. Without law, there is no survival of the group.[111]

An evolved human nature, however, may well reveal little danger to a community's survival; if that is so, when a constitution allocates power to the government, judicial engagement in the direction of greater freedom can balance the scales.

It is not surprising that pre-constitutional societies reflect these competing specifications, but at a far more rudimentary and, often, despotic level. Sir Henry Maine found the beginnings of government to be patriarchal, with obligations first to the father and then to the clan premised upon both force and respect. Kingly governance built upon mythology and religious belief, but as early as Hammurabi, there was an expectation that the monarch would not merely restrain, but also "shepherd" his subjects in a fashion where "the great [would] not oppress the weak," and where he would "counsel the widow and the orphan . . . render judgment and make the decisions of the land, and . . . succor the injured."[112]

There was greater recognition of human right in the Greek city-state.[113] Participation in the polis was almost by definition a form of dissent that argued for a greater recognition of a person's nature.[114] But libertarian claims were dwarfed through the seventeenth century, since assertions like the divine right of kings were premised upon one form of absolutism or another, and these led to governing structures not mindful, but rather oppressive, of the human person. The sovereign ruler claimed "unlimited

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111 *Id.* at 25; *see also* Cunningham, *supra* note 92, at 162 ("[The Founders] settled for a more modest understanding of human nature: they no longer sought to make 'bad' men good, so much as to take men as they are, and optimize the satisfaction of each man's private desire.").

112 HILL, *supra* note 102, at 37 (quoting THE CODE OF HAMMURABI 99-101 (Robert F. Harper trans., Univ. of Chi. Press 1904) (2250 B.C.)) (internal quotation marks omitted).

113 *Id.* at 39.

114 *Id.*

power over the consciences as well as the minds and bodies of his subjects."[115]

The seventeenth century and time immediately preceding the constitutional convention was a time of superstition, bigotry, and persecution.[116] When the Founders met in 1787, the governments of the world reflected imperious ignorance more than human nature. When the Founders met in Philadelphia, there were only three countries with any semblance of political liberty: the Swiss cantons, the Dutch Netherlands, and Great Britain.[117] However, none of these governments permitted subjects to be free; the English, for example, would remove their absolutist King for an omnipotent Parliament in 1689.

In coming to America, the incomplete reflection of the human person would continue in the contrast between the less-demanding Anglican efforts toward the acquisition of virtue (not to mention the even-less-structured liberty of nonbelievers who were true rarities in the founding period). Puritan efforts to remake men and women were unyielding, even if the structure of the human persons to which it applied was found wanting. In the Puritan mindset, a failure to conform one's nature to religious laws led not to the accommodation of human nature, but to ever greater stringency and demand to "shape up." The not-surprising consequence was defection from the oppressive demand of Puritan ranks in favor of the more flexible Anglican practice. The costs of the oppression of liberty became more manifest, and the attempt to make men into a singular puritanical mold weakened the remnants of the "medieval search for virtue grounded in theological truth," which "settled for a more modest understanding of human nature: [the Founders] no longer sought to make 'bad' men good, so much as to take men as they are, and optimize satisfaction of each man's private desire."[118] In short, the objectives of law derived from religion could not impose by force every jot and tittle of particularized religious belief or freedom would be lost.

In 1787, therefore, society relied less upon law or licensing regulation to achieve good results and more heavily on individual formation within a religious community and the extensions of that community into the larger, but immediately surrounding, society.[119] Thus, in the founding era, society

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115 *Id.* at 41.

116 PATRICIA U. BONOMI, UNDER THE COPE OF HEAVEN: RELIGION, SOCIETY, AND POLITICS IN COLONIAL AMERICA 14 (2003).

117 HILL, *supra* note 102, at 44-45.

118 Cunningham, *supra* note 92, at 162.

119 In the period of the founding of the United States, the church exhibited "a strong communal sense, expressed through voluntary organization of churches and parachurch special-purpose agencies." Mark A. Noll, *Evangelicals in the American Founding and Evangelical Political Mobilization Today*, *in* RELIGION AND THE NEW REPUBLIC: FAITH IN THE FOUNDING OF AMERICA 137, 149 (James H. Hutson ed., 2000). The church also "tended to stress the family as a sacred space insulated from the hustling

measured a man's character and his actions in concrete obligation to family, neighborhood, religious congregation and profession.[120] It is unsurprising that the social relationships associated with this concept of human nature were local, decentralized institutions. In 2012, by contrast, modern man inhabits a world where families exhibit multiple forms, local neighbors interact minimally, if at all, religious commitment in the Judeo-Christian sects is more free-form and ambiguous, and professional interaction is simultaneously more and less personalized as a consequence of Internet communication.

## IV. HOW MIGHT THESE CULTURAL SHIFTS MATTER TO AN ENGAGED JUDICIARY IN TERMS OF CONSTITUTIONAL STRUCTURE?

If neurobiology is accurately supplying a fuller and more up-to-the-moment understanding of individual human nature, this scientific data will be an important source for a judicially engaged jurist; only with a true grasp of the nature of the human person as we exist today can a judge evaluate whether particular legislative ends are compatible with human freedom in the twenty-first century. A judicially engaged judge, if he or she is to be faithful to the idea of the Constitution as a reflection of human nature, must reconcile proffered laws and regulations with how men and women within our modern community are living a significantly different life than that of 1787.[121] To impose the Framers' conception of man, of woman, or of community would be as coercive, and likely more nonsensical than even the Puritans' attempt to remake men and women two centuries ago. A judicially engaged judge cannot prattle on about contextual meaning in 1787 and leave matters there, for that would be a direct contradiction of the Framers' insight, most notably made by the Founders' natural law scholar, James Wilson. Wilson remarked that each succeeding generation would know more of human nature than the previous one.[122]

Given the founding-era understanding of how the human person then lived in a small geographic, economic, professional, and spiritual community, it was not surprising that the Framers conceived the Constitution as using federalist means to push decision making down to its lowest level. It is

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confusions of the marketplace, but nonetheless participated vigorously and with discipline in that marketplace." *Id.*

120 *See generally* BONOMI, *supra* note 116.

121 *See* James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 21-26, 33 (1991) (arguing that the power of the judiciary to interpret the Constitution is derived from the consent of the governed, and that such consent-based positivism requires that judges consider the generational evolution of human nature and understanding in order to better adhere to the original intent of the Founders).

122 *See generally* James Wilson, Of Man, as an Individual, *reprinted in* 1 COLLECTED WORKS OF JAMES WILSON 585, 585-620 (Kermit L. Hall & Mark David Hall eds., 2007).

hardly the same today. Science and sociology may indeed reveal that human nature is presently shaped by a common biological language and cultural practices that focus well beyond our immediate environs. In that case, there ought to at least be the possibility of a matching increase in the scope of liberty accorded each of us as against the outdated claims of the imperious collectivity we know as (for example) the local city council that demands exactions in money or kind when citizens request permits— claims the Institute has confronted many times. So too, the modern understanding of gender equality renders laughably embarrassing the prior judicial acceptance of female exclusion from the professions and other positions of economic prominence. Engaged judges must account for such societal evolution.

We are wise to be cautious, however, because any claim of a universal human nature can also give rise to a like claim for universal government. An overall less-intrusive government arguably would be compatible with a claim that human nature has become more altruistic, but if history be a guide, the more concentrated power becomes, the greater the need to check the abuse of power. It is worth recalling how important it was to the advance of human freedom to resist the collectivized voice of Rousseau, who argued that it was necessary to undo local and regional preferences for family and household in order to realize the greater objectives of peace and unity.[123] An engaged judiciary would rightly point out that the original Constitution did not allow the American people to express themselves as an undifferentiated mass of individuals, and they would surely contend that it is contrary to the original understanding to fashion such a device.[124]

This conservative objection is prudent in that it warns against the inevitable abuse of centralized power. Yet constitutional law professors know that the conservative dissent to the judicial recognition of mild forms of universal principle—say, the judicial insistence on one person/one vote[125]—meets year after year with looks of anachronistic disbelief by students. Defending the skewed representation of malapportioned legislative districts simply has no currency with modern students, who see the common biological denominator of human nature transcending national, rural, and urban boundaries. It may well be true that "[i]n asserting the one-man-one-vote formula as integral to the Constitution, the Warren Court introduced a[] . . . notion alien to the Framers."[126] Again, though, if the Framers instructed that the Constitution was for human nature, and not vice versa, then Ryn's objection is of no particular moment, given our different understanding of the human person and his cultural milieu.

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123 Ryn, *supra* note 88, at 304.

124 *See id.*

125 The Supreme Court has "consistently held . . . that each person's vote counts as much . . . as any other person's." Hadley v. Junior Coll. Dist. of Metro. Kan. City, 397 U.S. 50, 54 (1970).

126 Ryn, *supra* note 88, at 305.

In speculating how our understanding of human nature and related cultural interaction may have changed from the founding conception, it is not necessarily my purpose to approve or to disapprove. Some scholars will no doubt rise immediately to the defense of the Founders' view of the human person and insist that moral value ought not to be left to international sentiment or a generalized, abstract concern for mankind.[127] Conservative defenders of the founding view will contend that virtue is a matter of character forged by making the best of oneself by acting responsibly toward real people who know us well.[128] The modern view of our nature, these critics will say, sees us as caring about everyone but not caring about anyone in particular. It is a morality made easy. Anybody can do it. You can be an odious person to direct acquaintances while professing noble principles and feelings to the world at large.

We are getting somewhat ahead of ourselves, however. If we agree that human nature is evolving, and if we further acknowledge that science can demonstrate a strong underlayment of universality in that nature, have we not also agreed that human nature has become more altruistic than the flawed variety perceived in 1787? I suspect that the leaders of the Institute will harbor such doubt about the perfectibility of human nature because it is familiar—or nominally friendly to greater judicial scrutiny of human activity—if the concept of man or woman is as broken as ever. I recommend caution, however, because continuing to see human nature as having the same flaws perceived in the eighteenth century may sacrifice both reality and the basis upon trust that might allow a reduction in government intrusion.

### A. *Man's Flawed Personality in 1787*

It was the founding concept that men abuse power when they have it.[129] If our fuller, modern understanding of human nature does not refute this profound shortcoming sufficiently, does that trump all other considerations in terms of constitutional design? The Founders shared Madison's view that the Constitution is a profound reflection of human nature and that the reflection must be a realistic one.[130] That realism led the founding generation to conclude that "constitutional government was dictated by the selfish nature of man and his relentless pursuit of interest."[131] As already

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127 *Id.* at 306.

128 *Id.*

129 *See, e.g.*, Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 130 (2011).

130 THE FEDERALIST NO. 51 (James Madison).

131 SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 389 (1960).

suggested, the constitutional framers of 1787 anticipated that a person would be well known to local community and religious congregation, and they supposed that his localness would give him an identification with the needs and desires of his home region. Regardless of his home locality, man was seen as passionate, ambitious, avaricious, and most of all, not to be trusted with power.

This highly skeptical assessment of the human character was nevertheless thought to be capable of "[a] new civil status . . . to which there was in Europe at that time nothing comparable,—the status of free *citizenship*."[132] This is what is meant when it is said that "[n]o man in Great Britain, and no one at first in America, thought of himself as a 'citizen.' All Englishmen . . . were . . . 'subjects.'"[133]

By the time of the Constitution's drafting, though, Americans formed a new social category that did not depend upon a royal grant or patent, class standing, or intellectual superiority. The now-commonplace (but then extraordinary) insight that men and women are born with right and dignity was very much a revised statement of the nature of man, and two things must be noted about the founding's remarkable revisionary moment. First, the status shift from subject to citizen was flattering, but it obviously collided with the Founders' far more skeptical appraisal of man as at least largely selfish. Second, the rapidity and significance of the change from subject to citizen suggested to the Founders that later insights revealing more of man's nature were likely. "Deeply impressed with the natural dignity of human personality, the American colonists saw an opportunity to found upon it a government that should embody the distinctive attributes of human nature."[134] To say that this enterprise involved a bit of hubris quite understates that "[n]o government, so far as history records, had ever been created by any nation as the realization of its own untrammeled thinking."[135]

### B. *Putting a Flawed Human Nature to Work in the Plan of Government*

The Founders reconciled their pessimistic assessment of man with their assumption that he could establish his own plan of government by having the Constitution reflect that pessimism. It would not be abstract political philosophy or the suppositions of theology that saw man in God's image that would determine the initial constitutional design; rather, the Constitution provides the anthropological answer to the question of what is

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132 HILL, *supra* note 102, at 50.

133 *Id*.

134 *Id*. at 53.

135 *Id*. at 54.

needed to check ambition with ambition.[136] "While Hobbes proposed that passionate self-interest is best overcome by a strong sovereign, Publius believed that human self-interest should be used to counterbalance the self-interest of others, mitigating the negative effects of self-interest within society."[137] Professor Arthur Lovejoy wrote:

> The ablest members of the Constitutional Convention were well aware that *their* . . . problem was not chiefly one of political ethics but of practical psychology, a need not so much preach to Americans about what they *ought* to do, as to predict successfully what they *would* do . . . . Unless these predictions were in the main correct, the Constitution would fail to accomplish the ends for which it was designed. And the predictions could be expected to prove correct only if they were based upon what—in the eyes of the chief proponents and defenders of the Constitution—seemed a sound and realistic theory of human nature.[138]

It is the thesis of this Article that a realistic understanding of human nature depends upon an up-to-date assessment of human nature, including how we have modernly chosen to live more anonymously in physical terms and more openly in a metaphysical sense in the Facebook community, if you will. Science now confirms that both human nature and its appraisal are dynamic.[139] Given that, the usefulness of any method of constitutional interpretation will be proportionately reduced if it reflects an out-of-date view of human nature.

### C. *1787 Selfishness, Meet 2012 Innate Moral Sense*

How might our modern assessment of human nature differ from the founding generation's view? As mentioned earlier, it is now understood that "[e]volution has endowed us with ethical impulses," with a "moral instinct."[140] While earlier philosophers from Cicero to Aquinas to Kant reflected upon the moral law within a human person,[141] "[t]he human moral sense turns out to be an organ of considerable complexity, with quirks that reflect its evolutionary history and neurobiological foundations."[142] Unlike

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136 David Bosworth, The View of Human Nature in the United States Constitution as Expressed in *The Federalist Papers* 34 (Nov. 2001) (unpublished Th.M. thesis, Dallas Theological Seminary) (on file with author).

137 *Id.* at 40.

138 ARTHUR O. LOVEJOY, REFLECTIONS ON HUMAN NATURE 46-47 (1961).

139 Larry Arnhart, Darwinian Conservatism 12 (2006), *available at* http://64.112.226.69/one/apsa/apsa06/ (type "Darwinian Conservatism" into the "Quick Search" box) (describing a "Darwinian understanding of human nature as changeable").

140 Steven Pinker, *The Moral Instinct*, N.Y. TIMES MAG., Jan. 13, 2008, at A32, *available at* http://www.nytimes.com/2008/01/13/magazine/13Psychology-t.html?pagewanted=all.

141 *See, e.g.*, LOUIS GROARKE, THE GOOD REBEL: UNDERSTANDING FREEDOM AND MORALITY 193 (2002).

142 Pinker, *supra* note 140.

Locke, who thought man a "blank slate" and moral practice largely variable from culture to culture,[143] modern neurobiologists contend that moral judgment differs from other kinds of opinion in far more complicated ways. While modern man moralizes like his eighteenth-century counterpart, and while some things like murder trigger universal condemnation and a desire for punishment, a wide range of other behaviors have been made morally unacceptable over time.

### 1. Changed Nature, Changed Behavior

Where has changed assessment of our nature led to a different behavioral pattern and caused a demand for regulatory or legal adjustment? One example is smoking, which is now shunned or ostracized. Tobacco companies are pursued for mega-damages, but in an earlier, less knowingly-addicted time, smoking symbolized sophistication. Other practices—from women working outside the home to homosexuality—today meet with fewer objections, or even none whatsoever. Regardless of era, we would seek to explain each of these changes as the avoidance of newly discovered harm (secondhand smoke, for example) or the absence of ill consequence to others. Religious doctrine, too, can supply justification, but we tend to admit today that we often cannot explain why we condemn something as immoral. As with many contemporary discussions of same-sex marriage, for example, much of what we offer up is not more illuminating than "I can't explain, I just know it's wrong,"[144] or vice versa.

To try to get beyond this impasse, Hauser offers up an empirical study of several hundred thousand people from a hundred different countries "among men and women, blacks and whites, teenagers and octogenarians, Hindus, Muslims, Buddhists, Christians, Jews and atheists; people with elementary-school educations and people with Ph.D.'s."[145] His principal finding is "[a] difference between the acceptability of switch-pulling and man-heaving,"[146] and "an inability to justify the choice."[147] Professor Joshua Greene, another neuroscientist, suggests that "evolution equipped people with a revulsion to *manhandling an innocent person*."[148] According to Greene:

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143 *John Locke*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/entries/locke/ (last updated May 5, 2007).

144 Pinker, *supra* note 140 (internal quotation marks omitted).

145 *Id.*

146 *Id.* Those surveyed were willing to implement a utilitarian calculus to pull a switch in front of a runaway train in order to save five people at the conscious sacrifice of one; they were unwilling, however, to heave a heavy man onto the tracks for the same result. *Id.*

147 *Id.*

148 *Id.* (emphasis added).

> This instinct . . . tends to overwhelm any utilitarian calculus that would tot up the lives of saved and lost. The impulse against roughing up a fellow human would explain other examples in which people abjure killing one to save many, like euthanizing a hospital patient to harvest his organs and save five dying patients in need of transplants, or throwing someone out of a crowded lifeboat to keep it afloat.[149]

It is beyond this Article's scope to evaluate the strength of the biologists' claim for the existence of a moral sense in all humanity or its content, but MRIs of brain activity do reveal moral decision making to be an amalgam of how our "wiring" presently exists in the evolutionary progression, and not solely dispassionate reason,[150] as the Founders likely surmised. If science has the proof, what is being discussed is something quite extraordinary and well beyond its legal and judicial engagement implications. The modern possibility that science can empirically demonstrate that a universal moral sense exists,[151] one that the Founders could only attribute to religious belief or non-demonstrable theories of natural law, is nothing short of mind-boggling.

Despite the progress in neuroscience, the notion that the normal human brain contains an innate moral law within it is an incomplete one at best. While certain moral themes of fairness do seem to cut across all population groups, there are also notable differences across cultures.[152] Consequently, at this point, there is at best only a theory as to how a moral sense can be both universal and variable at the same time. But the theory suggests that five predominant moral spheres tend to be universal, suggesting a legacy of evolution—harm, fairness, group loyalty or community, authority, and purity—are weighed differently as a matter of culture and place.

Despite this scientific advancement, my focus here remains the scope of judicial engagement, and I accept the new knowledge of our natures as the scientists have presented it in order to think about what it means for the control of government power. We should consider the existence of empirical evidence of such a moral sense and its implications for the Founders' axiom that constitutional utility, including accurate judicial review of constitutional interpretation depends upon a realistic assessment of human nature.

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149 Pinker, *supra* note 140

150 *Id.*

151 *Id.* ("A list of human universals collected by the anthropologist Donald E. Brown includes many moral concepts and emotions, including a distinction between right and wrong; empathy; fairness; admiration of generosity; rights and obligations; proscription of murder, rape and other forms of violence; redress of wrongs; sanctions for wrongs against the community; shame; and taboos.").

152 *See id.* (detailing the story of a British teacher in Sudan who was jailed for allowing her students to name a teddy bear "Muhammad;" protesters outside the prison called for her death).

2. The Founders Knew We Would Know More, and We Do

James Wilson lectured widely on the natural law, but he may have anticipated that our understanding of our natures would be far greater than his own.[153] Whether or not modern science can identify the precise contours of the innate moral core of the human person, the possibility of it makes the 2012 assessment of the human person different than the more rudimentary assessment of humanity by the Framers in 1787. Yet is there anything in this different or better grasp of man's nature that refutes our self-centeredness? Putting neuroscience to one side, some modern writers have criticized the Framers for their dour assessment of humankind. For example, Jacob Needleman—writing without neuroscience to suggest incompleteness—argued that the Framers overlooked "the paradox of human nature," and thereby missed the American soul.[154] Needleman explains the paradox this way:

> [W]e are inwardly free and inwardly slaves at one and the same time; we are gods and beasts at the same time; we are great *and* fallen, strong *and* weak at the same time. It is ideas like these which lie far back at the root of texts which seem otherwise purely political and external.[155]

In 2012, we can speculate that we must capture the fullest possible understanding of man as presently perceived[156] if the search for original understanding in constitutional interpretation is not to go awry. The words in the Constitution may be the same in 2012 as they were in 1787, but even if we can surmount all the difficulty in identifying original meaning, and if today's judges can resist the temptation to manipulate the historical account toward the outcome they favor, words meant to advance an eighteenth-century understanding of the human person may well do a disservice to the twenty-first century understanding of man.

Consider, for example, the American ideal of religious liberty as the right of every human being to search for and to attend to the dictates of conscience. During the founding era, man was often deeply embedded in particular religious communities, and even state establishments of religion

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153 Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 149 (2003) ("Wilson believed that God places an 'innate moral sense' in 'our own breasts' as a 'guide' and 'witness' to lead us to a proper understanding of His 'law of nature.'" (quoting James Wilson, On the Law of Nature, *reprinted in* 1 THE WORKS OF JAMES WILSON 126, 130-32 (Robert Green McCloskey ed., Harvard Univ. Press 1967))).

154 JACOB NEEDLEMAN, THE AMERICAN SOUL: REDISCOVERING THE WISDOM OF THE FOUNDERS 156-60 (2002).

155 *Id*. at 160.

156 This might relate to man's "soul," as Needleman puts it, or to an internal moral sense, as Hauser and science describe it.

were more common. The Framers considered liberty of conscience supportive of human life and nature and the civil order. But today, we cannot be so sure life and order are promoted when we seldom think of ourselves answerable in any serious way to priest, minister, rabbi, or Imam. We certainly know post-9/11 that some religious belief is a form of intolerant fanaticism that can precipitate a clash of civilizations and even promote a profound and episodic disregard for life. In light of this disturbing modern knowledge of human nature, should the interpretation of religious liberty be less generous to reflect the lesser ability of certain religious communities to sanction their members? In the alternative, should this liberty perhaps be more generous in light of the innate moral sense?

Human nature, as it manifested itself in religious practice at the founding, was a largely homogenous Christianity, but that is not the case in 2012.[157] As a result, some major issues of the day, such as same-sex marriage, divide believers.[158] What, then, should we include in religious liberty? Should we deny Catholics favored tax status and public-program participation or require that they marry both same-sex and different-sex couples? If Catholics do not have a protection-worthy liberty to set their own doctrines, have we permitted the claim of a better-understood human nature to trump a basic civil liberty—freedom of conscience—and if so, why might that be justified? One might presume that the claimed justification lies in the empirical proof of the moral sense. This neuroscientific explanation of right and wrong would arguably avoid what Needleman describes as "the idea of liberty descend[ing] into the glorification of desire as such, which is an infantilization of its fundamental meaning."[159]

### 3. Worshipping at the Altar of Science?

The notion that evolution has given us an innate moral sense is somehow both attractive and unsettling. The allure stems from its similarity to the natural law tradition; the dismay is related to what the natural law tradition has always lacked, outside of religious revelation: any acknowledged basis for its specific demonstration from one person to the next. Natural law has relied upon the principle of noncontradiction for some support of a moral reality's existence,[160] but the support for that proposition has always

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157 *See, e.g.*, THE FEDERALIST NO. 2, *supra* note 81, at 32 (John Jay) ("With equal pleasure I have . . . often taken notice that Providence has been pleased to give this one connected country to one united people—a people . . . professing the same religion . . . .").

158 *See, e.g.*, Bruce Nolan, *Gay Marriage Divides Evangelicals Along Generation Gap*, HUFFINGTON POST (Sept. 9, 2011, 7:06 PM), http://www.huffingtonpost.com/2011/09/07/gay-marriage-evangelicals_n_952888.html.

159 NEEDLEMAN, *supra* note 154, at 20.

160 Ellis Washington, *Reply to Judge Richard A. Posner on the Inseparability of Law and Morality*, 3 RUTGERS J.L. & RELIGION 1, ¶ 52 (2001) ("[A] basic principle of Natural Law [is] what St. Thomas

been more philosophical than real. Everyone knows that something cannot simultaneously exist and not exist, but this nostrum hardly solves in any practical way any day-to-day problem. Inevitably, natural law thinkers fall back upon particular religious traditions to explicate the meaning of the natural law.[161] The moment they introduce religious belief, however, freedom of conscience necessarily precludes agreement among them. If evolutionary science can actually demonstrate that a common moral sense exists, its ability to circumvent this freedom of conscience difficulty would have obvious appeal. Nevertheless, modern scientific assessment of innate human nature poses its own difficulty, not the least of which is that it seemingly anoints scientists as high priests and arbiters of our moral makeup. Since for most of us, science is no more accessible than the theology, it is not clear that relying on science would be any more rational than the Founders' reliance on faith.

Despite the substantial objection to the modern scientific assessment of human nature, this Article achieves its goal if it has at least demonstrated that the assessment of human nature in 1787 was less complete than ours today. Again, the incompleteness is a problem, since the Founders designed our constitutional government for man as he actually exists. Proposing to limit another's faith is awkward and uncomfortable, but failing to inquire would disserve the Founders' intended purpose for the Constitution.

### 4. History Revised?

A better grasp of human nature, especially one that perceives more accurately man's innate and growing concern for others, may allow for libertarian, judicially engaged challenges to regulatory practices premised on a more negative view. As Needleman writes,

> there are two histories of . . . America. [There is] "the history of crime," [measured] by wars, convulsions, revolutions, assassinations and violent usurpations . . . But there is another history . . . that flows from the efforts of more inwardly developed men and women to introduce truth and wisdom into the life of humanity.[162]

Historian Richard Hofstadter similarly comments on the insidious consequence of relying upon man's negatives to accomplish the common good. To the Founders,

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Aquinas called, "the principle of noncontradiction" . . . . [which] holds that certain laws of nature are immutable . . . . A violation of these principles invites an inescapable consequence . . . .").

161 Bosworth, *supra* note 136, at 32-33 ("For Madison, his Anglican heritage and Presbyterian influence instilled a strong sense of human sinfulness. . . . [He and Hamilton therefore] had few pretensions about the inherent goodness of humanity when constructing that government.").

162 NEEDLEMAN, *supra* note 154, at 14-15.

> a human being was an atom of self-interest. They did not believe in man, but they did believe in the power of a good political constitution to control him . . . From a humanistic standpoint there is a serious dilemma in the philosophy of the Fathers, which derives from their conception of man. They thought man was a creature of rapacious self-interest, and yet they wanted him to be free—free, in essence, to contend, to engage in an umpired strife, to use property to get property . . . They had no hope and they offered none for any ultimate organic change in the way men conduct themselves. The result was that while they thought self-interest the most dangerous and unbrookable quality of man, they necessarily underwrote it in trying to control it.[163]

Thomas Jefferson too said,

> free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obligated to trust with power . . . . [L]et no more be heard of confidence in man, but bind him down from mischief, by the chains of the Constitution.[164]

This, of course, is a call for an expanded regulatory state. Hardly what the Institute had in mind when inviting a more engaged judiciary. A better, more altruistic appraisal of human nature might yet save our freedom from those who wrongly or presumptively assume our wretchedness. Of course, one must keep in mind the degree of the burden this places upon scientific verification.

### D. *Does This Mean Government Can Remake Human Nature?*

If this were my claim, I would already hear the "merry band" back at the Institute firing up the shredders. Nevertheless, at the time of the founding, some believed that government could mold human nature and the culture it inhabits. Russell Kirk spoke of the founding generation as being "[c]ontemptuous of the notion of human perfectibility."[165] The view is not uniformly accepted, however, even among conservative thinkers. For example, Richard Epstein comments that

> *The Federalist Papers* also recognized that the division of individuals between good and bad, virtuous and devious, is not something which is forever fixed in concrete, but is rather something which could vary, and perhaps substantially, with changing external events. The task, therefore, is to develop a system that improves the odds that good people will be able to survive in bad times and that enables them to flourish in good ones. There is no unerring secret

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163 RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 3, 16 (8th prtg. 1964).

164 Thomas Jefferson, Kentucky Resolutions, *reprinted in* THE AMERICAN REPUBLIC: PRIMARY SOURCES 399, 402 (Bruce Frohnen ed., Liberty Fund 2002).

165 RUSSELL KIRK, THE CONSERVATIVE MIND: FROM BURKE TO ELLIOTT 35 (7th rev. ed. 1986).

> to statecraft . . . No [one] can ever achieve perfection: incremental improvements are all that are obtainable.[166]

As is so often true, Professor Epstein's insightful exposition gives us a better view. First, Epstein reminds us that such publicly induced change would likely be small. Second, there is no hint in the observation of forced enrollment in some form of attitude readjustment. I believe Epstein is merely calling upon the judiciary, as well as other constitutional officers, to adjust their regulatory demand. If optimism is grounded in the moral reality of the human person and not merely in political assertion, the utility of a Constitution (and the regulatory exercises that flow from it) will then be measured by how man actually is, not by what we hope man might become. The Constitution *is* to be understood and interpreted in light of the best available assessment of our human nature as it exists; the Constitution *is not* to be understood and interpreted in light of what we would like human nature to be, but it is not.

As Hill explains, it would be foolish to look to the law to remake human nature for political objectives:

> Thus, ruled by laws incorporated in the very tissues of their being as living organisms, the succeeding generations of men have been subject, and are still subject, to forms of control which it is impossible to annihilate, and the influence of which must always be taken into account, if human government is to be based upon human nature. Instincts, appetites, impulses, and passions are an important part of man's essential being; and, while these are indeed subject to intelligent control, they are not to be annulled or extirpated by any arbitrary rules of conduct imposed upon man by merely political action.[167]

A similar sentiment is captured by Benjamin Hart's observation that

> [w]hatever they accomplished at Philadelphia, the framers recognized that it would not be a panacea. They had no utopian aspirations, no illusions that they were creating heaven on earth. Salvation, they believed, lay on the other side of the grave. Human nature would be changed there, not here. Other revolutions, such as the French and the Russian, attempted to create a new man, believing that corruptions in man's nature were created by corrupt institutions. Clear away the institutions, the French and the Marxists believed, and man's natural virtue would shine. How wrong they were, and how right America's founders were to seek very limited objectives with their revolution.[168]

It is those same limited objectives that the Institute seeks by means of judicial engagement.

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166 Richard A. Epstein, The Federalist Papers*: From Practical Politics to High Principle*, 16 HARV. J.L. & PUB. POL'Y 13, 17 (1993).

167 HILL, *supra* note 102, at 16-17.

168 BENJAMIN HART, FAITH & FREEDOM: THE CHRISTIAN ROOTS OF AMERICAN LIBERTY 325-26 (1997).

## CONCLUSION

We have traveled quite a distance. We should admire the Institute's efforts to balance government power with individual liberty, especially economic liberty. In all likelihood, the new term "judicial engagement" will not make a difference in itself, but it might if it is coupled with a standard of review requiring a showing by public regulator of the relationship not only of regulatory means and ends, but a showing of the compatibility of the regulatory end with human nature as it has evolved and as we presently grasp it.

The analytical challenge of fashioning an appropriate judicial standard for engagement is one for which the Institute is well prepared. There is no greater evidence of this than the effect that the Institute had upon Justice O'Connor's appreciation of the right of property in relation to the public-use limitation in the Fifth Amendment in *Kelo v. City of New London*.[169] It is fair to say that Justice O'Connor was appalled by the eminent domain abuse that the Institute has widely documented and that the *Kelo* decision demonstrated most vividly.[170] Persuading Justice O'Connor was no easy task, as it was the Justice's own opinion in *Hawaii Housing Authority v. Midkiff*[171] that unleashed the legal theory of government power that invited the abuse. To her credit, Justice O'Connor acknowledged how the *Kelo* abuse was the direct result of her own opinion for the Court in *Midkiff*.[172] As Justice O'Connor wrote in dissent in *Kelo*, "this troubling result follows from errant language in . . . *Midkiff*. . . . [W]e said in *Midkiff* that '[t]he 'public use' requirement is coterminous with the scope of a sovereign's police powers.'"[173] While her attempt to distinguish *Midkiff* on the basis of emergency or exigency is less candid,[174] Justice O'Connor did concede that acts of eminent domain that seek to capture the value of property by force in order to transfer it to another private party is subversive of the constitutional standard her oath bound her to apply.[175]

It is unfortunate that the majority in *Kelo* supplied an example of judicial abdication through a modest showing of procedural regularity. As Justice O'Connor opined, the majority's judicial review did not put the substance of the constitutional language to the test. Indeed, O'Connor pointed to this judicial failure of review as leading directly to the nakedly coerced

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169 545 U.S. 469 (2005) (5-4 decision).

170 *See id.* at 502-05 (O'Connor, J., dissenting).

171 467 U.S. 229 (1984).

172 *Kelo*, 545 U.S. at 501-02 (O'Connor, J., dissenting).

173 *Id.* at 501 (fourth alteration in original) (quoting *Midkiff*, 467 U.S. at 240).

174 *See id.* at 498 ("[W]e have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use.").

175 *See id.* at 505.

transfer of property from *A* to *B*.[176] Of course, one might argue that the same thing happened in *Midkiff* twenty years earlier, though Midkiff lacked the benefit of the powerful use of honest narrative that the Institute brought to the assistance of Nurse Kelo, but even a jurist as capable as Justice O'Connor failed to perceive the human implications in the earlier decision.

Better late than never. Once she discovered the mischief that her more casual judicial language and posture in *Midkiff* had allowed, Justice O'Connor refused in *Kelo* to accept what might be the equivalent of judicial engagement; namely, a stronger nexus between regulatory means and ends. In some cases, that nexus, or lack of it, might decide a case, but those who are called to be judicially engaged must be cautious, for governments have a habit of speaking of accomplishment where there is only promise.

In any case, in *Kelo*, Justice O'Connor recognized that it didn't matter whether the government was asserting a positive relationship between the hoped-for redevelopment and the taking of Nurse Kelo's property; the government simply had no antecedent right to take the property.[177] Moreover, Justice O'Connor could not excuse the absence of entitlement by what she called a mere upgrade in the due process standard.[178] In any case, especially where the government is seeking to separate an owner from his or her home and all that it represents in terms of a person's humanity, judicial engagement in the defense of liberty is not to be turned on itself and "get bogged down in" the subjectivity of "predictive judgments about whether the public will actually be better off after"[179] the government takes that to which it has no entitlement.

Since the handiwork of the Institute persuaded Justice O'Connor to see her judicial role as more than merely putting a staple in the planning department's meeting notes, perhaps the Institute should not settle for the scope of judicial engagement being anything less than the heightened scrutiny of the relation of means and ends as well as the ends themselves. As the Justice remarked, it is always possible for a covetous government to claim that another's property use is better than the use being made by the owner.[180] There is only one flaw in undertaking such an assessment: neither the government nor the other party is the owner.

Justice O'Connor's epiphany in *Kelo* is destined to be one of the epitaphs of success of the Institute. Majority approval to steal, even for good purpose, was not enough. Quite alarmed, Justice O'Connor concluded by

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176 *See id.* at 501, 504-05.

177 *Id.* at 502-03.

178 *Kelo*, 545 U.S. at 503 (O' Connor, J., dissenting).

179 *Id.*

180 *Id.* ("[W]ho among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.").

rejecting her own previously deferential standard of review with its radically permissive conception of public use in the harshest terms. It would mean, she wrote, that "any single-family home . . . might be razed to make way for an apartment building, or any church . . . might be replaced with a retail store."[181] To be the "bulwark" in favor of individual rights Madison envisioned, courts must demand that the government demonstrate both a relationship between regulatory means and ends and the propriety of those ends. The proper end, wrote Justice O'Connor, could be found in remembering Madison's words: "'[T]hat alone is a *just* government,' . . . 'which *impartially* secures to every man, whatever is his *own*.'"[182]

Justice O'Connor came to recognize that justifications of force that destroy the liberty of ownership are fundamentally at odds with human nature as understood in either the eighteenth century or the present day. Where human nature is being manifested in a wholly constructive way, as Suzette Kelo's many improvements certainly evidenced, eminent domain is misdirected. Employing private property to "inflict[] affirmative harm on society"[183] triggers the protective purpose of government. When the Court moves away from preventing harms to indulge the notion of extracting benefits as it sees fit, it is not being true to the concept of human nature—either as it existed at the time of the founding or as it is now.

The Founders assumed that human nature was so flawed that there was need for ambition to check ambition if good were to emerge.[184] When that clash failed to yield good outcomes, government had the duty to erect barriers to constrain as necessary.[185]

If the sciences of neurobiology and psychology today reveal that human nature is more positive than it was, or as it was perceived, at the founding, we need less government regulation, not more. Human nature is dynamic, as must regulation be if courts are going to be engaged properly. Indeed, too fixed or too narrow a standard of restraint will not leave room for the fast-changing concept of intellectual property. Intellectual property law reveals indications of the dark aspects of human nature manifested in piracy, but it also demonstrates the ingenious, surprising concept that free, downloadable content triggers a greater income stream than would be generated if the content were sold conventionally.[186] The Internet is a complex tale that is only in its early chapters, and it ought not to be stifled by regulation premised upon an outdated conception of the human person or regula-

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181 *Id.* at 500-01.

182 *Id.* at 505 (first alteration in original) (quoting James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds., 1983)).

183 *Id.* at 500.

184 *See* THE FEDERALIST NO. 51, *supra* note 81, at 319.

185 *See id.*

186 *See Radiohead's Free-for-All: Performance Art or New Business Model?*, KNOWLEDGE@WHARTON (Oct. 17, 2007), http://knowledge.wharton.upenn.edu/article.cfm?articleid=1821.

tion that is so obtuse that laws are enacted characterizing fair or incidental uses as thievery. It turns out that when human nature is allowed to flourish, even that given away for free can prompt people to pay for value received,[187] when combined with an ennobling social cause. The proposed test by the Institute for judicial engagement that requires a closer nexus between regulatory means and ends is a good start, but it is incomplete. Until the law is a reflection of human nature in all of its fascinating wonder, we will be shortchanging ourselves of that which is the greatest gift from the Creator after life: freedom.

187 *See id.*