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The 2015 Amendments to the Kentucky Business Entity Statutes

Thomas E. Rutledge*

I. INTRODUCTION

As a further component to the efforts to ensure that Kentucky has the most up-to-date business entity statutes available in the country, the 2015 General Assembly passed, and Governor Beshear signed, a series of revisions and additions to those laws. Essentially, these new statutes can be divided into three divisions. Initially, there are a series of miscellaneous changes across the range of business statutes, which revisions are generally intended to provide additional clarity as to applicable rules. Second, there are adopted a series of additions and revisions to the Nonprofit Corporation Acts, revisions which generally speaking bring the law of nonprofit corporations more into line with that of business corporations. Third, there has been adopted the Kentucky Unincorporated Nonprofit Association Act, an entirely new organizational form which will provide certainty for arrangements that previously have had no statutory basis. After a review of the legislative history of this Act and technical revisions addressing the workings of the office of the Secretary of State, these statutes will be reviewed in the order just set forth.

II. LEGISLATIVE HISTORY

This legislation was introduced to the Kentucky General Assembly as House Bill 440 under the sponsorship of Speaker Pro Tem Jody Richards, Representative Tom Kerr, and Representative Chris Harris. H.B. 440 was referred to the House Judiciary Committee where it was called for a hearing by Chairman John Tilly on February 26; it received a unanimous vote in its favor and was recommended to the consent calendar. The bill was heard on the House floor on March 2; the vote was 94 in favor and 0 against. Transmitted to the Senate, the bill was assigned to the Judiciary Committee. Called by Chairman Westerfield on March 9, the bill received unanimous approval and was recommended to the consent calendar. The bill was approved by the entire Senate on March 11 with 36 votes in favor and 0 votes against. The Bill was

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1. On March 11, the House concurred to the Senate Committee Substitute by a vote of 98 in favor and 0 against.
signed by Governor Beshear on March 20. The legislation’s effective date was June 24, 2015.²

III. SECRETARY OF STATE

The statutory authority for the Secretary of State to accept electronic signatures has been supplemented to include filings by a statutory trust as well as those by an unincorporated nonprofit association.³ In addition, the Secretary of State has been granted the express authority to redact documents filed pursuant to the Kentucky Business Entity Filing Act of such information whose disclosure is otherwise prohibited.⁴ By way of example, were the articles of incorporation, in addition to listing the initial directors, to recite their Social Security Numbers, were there a statute providing Social Security Numbers should not be set forth in a public record, the Secretary of State would have the authority to redact them from the filed document.

IV. BUSINESS CORPORATIONS

A. Conforming the Aspirational and Indemnification Standards

With respect to business corporations, one change made corrects a typographical error that can be dated to 1988. At that time, in the course of drafting the Kentucky Business Corporation Act, it being based upon the then existing version of the Model Business Corporation Act, a decision was made to define the aspirational standard of a director as including the more subjective “honestly” in place of the more objective “reasonably.”⁵ However, even as this change was made with respect to the aspirational standard, a similar change was not made with respect to the standard for affording a director indemnification; that provision continued to utilize “reasonably.” In order to address this differential and provide for the intended consistency between the aspirational standard and the standard for indemnification, KRS section 271B.8-510 has been revised to delete “reasonably,” substituting in place thereof “honestly.”⁶

⁴. See id. § 14A.2-010(13).
⁵. Compare id. § 271B.8-300(1)(c) (“honestly”), with MODEL BUS. CORP. ACT § 8.30 (AM. BAR ASS’N 2011) (“reasonably”).
B. Qualification by Foreign Insurance Companies

Having its roots in the law of business corporations, but now set forth in the Kentucky Business Entity Filing Act, a revision has been made for when a foreign corporation must qualify to transact business. Specifically, prior to the enactment of the Kentucky Business Corporation Act, foreign insurance companies were exempt from the obligation to qualify to transact business with the Kentucky Secretary of State. Foreign insurance companies are subject to merit review before they are afforded a Certificate of Insurance by the Commissioner of Insurance. No such merit review is undertaken by the Secretary of State’s office in affording a foreign business entity a Certificate of Authority. Re-adopting the rule that existed prior to 1988, foreign insurance companies holding a Certificate of Authority from the Department of Insurance will not separately be required to qualify to transact business by a filing with the Secretary of State. Consequent to this amendment, it is clear that a foreign insurer will have the capacity to initiate suit in Kentucky notwithstanding that it has not received, from the Secretary of State a Certificate of Authority. Nevertheless, there is no less protection afforded to those who may need to bring suit against a foreign insurer. Rather, each foreign insurer transacting business in Kentucky is deemed to have appointed the Secretary of State as its registered agent.

8. See also generally Thomas E. Rutledge, Kentucky, Doing Business in States Other than the State of Incorporation (BNA Corporate Practice Series Portfolio 84).
9. See KY. REV. STAT. ANN. § 271A.520(1) (West 2015), repealed by 1988 Ky. Acts, ch. 23, § 248 (“No foreign corporation, except a foreign insurance company, shall have the right to transact business in this state until it shall have procured a certificate of authority to do so from the Secretary of State.”) (emphasis added).
10. See id. § 14A.9-030.
11. See id. § 14A.9-010(7).
12. See id.; see also id. § 286.2-670 (addressing the bringing of suit by a foreign insurer not holding a certificate of insurance).
13. See id. § 304.3-230(1)–(2):

(1) Upon issuance of a certificate of authority to do business in this state, the following shall be deemed to have appointed the Secretary of State as their attorney to receive service of lawful process issued against them in this state: (a) Foreign or alien insurers; (b) Domestic reciprocal insurers; (c) Domestic Lloyd’s insurers; (d) Qualified self-insurers.

(2) Such appointment shall be irrevocable, shall bind any successor in interest or to the assets or liabilities of the insurer, and shall remain in effect as long as there is in force in this state or elsewhere a contract that would give rise to a cause of action in this state, made by the insurer, or liabilities or duties arising therefrom.
This is not to say, however, that a foreign insurer is precluded from qualifying to transact business with the Secretary of State. The application for the Certificate of Authority will need to identify the Secretary of State as the registered agent and office. Qualification with the Secretary of State may be necessary if, for example, the insurer desires to transact business under a name other than its real name.

C. Simplification of Merger Filings

Changes made to the Business Corporation and Limited Liability Company Acts simplify the filings that must be made upon a merger. Under the prior system, in order to effect a merger, both articles of merger and the agreement and plan of merger were filed with the Secretary of State. In many circumstances, this necessitated the filing of documents containing business information that would be considered confidential. Kentucky has now adopted the more modern approach, and the only filing required to effectuate a merger is the articles of merger. The requirements for the articles of merger have been slightly revised to ensure that the minimum information necessary is on the public record.

D. The Appropriate Court for Forum Selection

There has been added to the Business Corporation Act the defined term “appropriate court.” The term “appropriate court” is otherwise now utilized as determining where a corporation has the option of requiring that derivative actions or actions to compel the production of corporate records be filed. Note that in Kentucky, the requirement must be set forth in the articles of incorporation; a bylaw provision to the same effect is not authorized by statute.

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14. See id. § 304.3-230(2) (“irrevocable”); see also id. § 14A.9-030(i)(g).
16. See id. § 271B.11-050(1), prior to amendment by 2015 Ky. Acts ch. 34, § 9 (“deliver to the Secretary of State for filing articles of merger or share exchange setting forth (a) the plan of merger or share exchange”); id. § 275.360, prior to amendment by 2015 Ky. Acts ch. 34, § 56 (“deliver to the Secretary of State for filing articles of merger... setting forth: ... (b) the plan of merger”).
17. See, e.g., DEL. CODE ANN. tit. 8, § 251(c) (West 2014); MODEL BUS. CORP. ACT § 11.06 (AM. BAR ASS‘N 2011).
19. See id.; id. § 275.360. In so doing, certain actions such as amendment of the organic documents of the entity surviving the merger must be set forth in the articles of merger in order to be operative. See id. § 271B.11-060, amended by 2015 Ky. Act, ch. 34, § 10; id. § 275.365, amended by 2015 Ky. Acts, ch. 34, § 57.
21. See id. § 271B.7-400(7).
E. Exclusivity of the Dissenter Rights Remedy

A technical but important revision has been made to the exclusivity provision of the dissenter rights’ statute. At one time, major corporate actions such as a merger, sale of substantially all assets or amendment of the articles of incorporation required the consent of all shareholders, a rule that protected the certificate of incorporation or the bylaws. Under the new provisions, it is clear that either the certificate or the bylaws may provide that (a) the Delaware courts are the exclusive jurisdiction for consideration of internal corporate claims or, in the alternative, (b) the courts of a foreign jurisdiction or a permissible venue for the resolution of disputes over internal affairs provided that the Delaware courts as well remain an available venue. At the same time, and this is made express in the official comment released with the statute, neither the certificate nor the bylaws may purport to identify the courts of a jurisdiction outside of Delaware as the exclusive venue for the resolution of internal corporate claims: the statute “invalidates such a provision selecting the courts in a different State, or an arbitral forum, if it would preclude litigating such claims in the Delaware courts.”

The referenced definition of “internal corporate claims” of section 115 is to “claims, including claims in the right of the corporation, (i) that are based upon a violation of the duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.”

Unresolved by the statute is whether and to what degree the corporation’s articles or bylaws may impose additional restrictions upon derivative actions. See, e.g., ATP Tours, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 557–59 (Del. 2014) (holding that by amendment of the bylaws the board of a nonprofit corporation could impose upon the members thereof a fee shifting provision in the event of a derivative action that “does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought.”); See also 18 OKLA. STAT. ANN. tit. 18, § 1126 (West 2015). But see Delaware Proposal Would Restrict Fee-Shifting Corporate Bylaws, Charters, 30 CORP. COUNSEL WEEKLY 73 (Mar. 11, 2015) (reviewing Delaware proposal limiting fee-shifting bylaws); See also Joseph A. Grundfest & Kristen A. Savelle, The Brouhaha Over Internal Corporate Forum Selection Provisions: A Legal, Economic and Political Analysis, 68 BUS. LAW. 325 (Feb. 2013). The 2015 Delaware General Assembly passed amendments to the Delaware General Corporation Law providing, essentially, that fee shifting provisions in either the certificate or the bylaws will not be effective. Specifically, Senate Bill 75, with respect to stock corporations (the contrary rule as set forth in ATP Tours for nonstock/nonprofit corporations was not modified), added a new subsection (f) to section 102 to provide:

The certificate of incorporation may not contain any provision that would impose liability on a stockholder for the attorneys’ fees or expenses of the Corporation or any other party in connection with an internal corporate claim, as defined in § 115 of this title.

In a similar vein, there is added to section 109 of the DGCL:

The bylaws may not contain any provision that would impose liability on a stockholder for the attorneys’ fees or expenses of the Corporation or any other party in connection with an internal corporate claim, as defined in § 115 of this title.

The referenced definition of “internal corporate claims” of section 115 is to “claims, including claims in the right of the corporation, (i) that are based upon a violation of the duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.”
shareholder’s vested property interest in the contractual terms of the venture.\textsuperscript{23} This state of the law permitted opportunistic rent seeking by minority shareholders, whose approval was required for significant transactions.\textsuperscript{24} Responding to pressures to permit significant transactions upon less than a unanimous consent, the various state legislatures reduced the applicable voting thresholds to less than unanimity.\textsuperscript{25} At the same time, in order to ameliorate the impact upon the shareholder’s property rights in the terms of the existing venture,\textsuperscript{26} disserter rights were codified,\textsuperscript{27} affording minority participants in the

\footnotesize

23. See, e.g., Voeller v. Neilston Warehouse Co., 311 U.S. 531, 535 n.6 (1941); \textit{In re Valuation of Common Stock of Mcloom Oil Co.}, 565 A.2d 997, 1004 (Me. 1989) (“The appraisal remedy has deep roots in equity. The traditional rule through much of the 19th century was that any corporate transaction that changed the rights of common shareholders required unanimous consent. The appraisal remedy for dissenting shareholders evolved as it became clear that unanimous consent was inconsistent with the growth and development of large business enterprises. By the bargain struck in enacting an appraisal statute, the shareholder who disapproves of a proposed merger or other major corporate change gives up his right of veto in exchange for the right to be bought out—not at market value, but at ‘fair value.’”) (citations omitted); \textit{In re Enstar Corp.}, No. 7802, 1986 WL 8062, at *5 (Del. Ch. July 17, 1986); Chi. Corp. v. Munds, 172 A. 452, 455 (Del. Ch. 1934); 12B WILLIAM MEADE FLETCHER, FLETCHER’S CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5906.10 (2009).


25. See, e.g., 12B FLETCHER, supra note 23 (“Consequently, statutes were enacted conferring wide powers on the majority or a specified percentage of the stock to amend the charter, sale, consolidate, merge, etc.”) (citation omitted); Shawnee Telecom Resources Inc. v. Brown, 354 S.W.3d 542, 552–56 (Ky. 2011) (recognizing that disserter rights were created to compensate corporate shareholders for the loss of a common law right). As early as the 1928 Uniform Business Corporation Act (the predecessor to the Model Business Corporation Act), a merger could be approved by a vote of two-thirds of the shareholders. \textit{See} MODEL BUS. CORP. ACT § 44(H); \textit{see also} KY. REV. STAT. ANN. § 271.415(2) (West 2015), \textit{repealed} by 1972 KY. ACTS, ch. 274, § 165 (permitting a sale of corporate assets with the approval of a majority of the shareholders).

26. See, e.g., Yanow v. Teal Indus., Inc., 422 A.2d 311, 317 n. 6 (Conn. 1979) (“the appraisal remedy has been described as an adequate quid pro quo for statutes giving the majority the right to override the veto of a dissenting shareholder”); Ala. By-Prod. Corp. v. Cede & Co., 657 A.2d 254, 258 (Del. 1995) (describing appraisal as “a limited legislative remedy developed initially as a means to compensate shareholders of Delaware corporations for the loss of their common law right to prevent a merger or consolidation by refusal to consent to such transactions”); Reynolds Metals Co. v. Colonial Realty Corp., 190 A.2d 752, 755 (Del. 1963) (characterizing disserter rights as “compensation” for the loss of the right to block fundamental transactions); \textit{Salomon Bros.}, 576 A.2d at 651 (“The judicial determination of fair value pursuant to § 262 is a ‘statutory right . . . given the shareholder as compensation for the abrogation of the common law rule that a single shareholder could block a merger.’”) (quoting Francis I. duPont & Co. v. Universal City Studios, 343 A.2d 629, 634 (Del. Ch. 1975)); \textit{In re Enstar Corp.}, 1986 WL 8062, at *5 (characterizing disserter rights as “compensation” for the loss of the right to block fundamental transactions); Hariton v. Arco Elecs., Inc., 182 A.2d 22, 25 (Del. Ch. 1962) (appraisal remedy given to shareholders in “compensation” for loss of right to prevent a merger), aff’d, 188 A.2d 123 (Del. 1963); Chi. Corp., 172 A. at 455 (“In compensation for the lost right [of a stockholder to defeat a merger transaction] a provision was written into the modern statutes giving the dissenting
venture the ability to, upon objecting to the proposed change in the business, extract a proportionate interest in the venture’s value for investment elsewhere. Dissenter rights became more important with the development of the cash-out merger, morphing from a liquidity mechanism to a check on the majority’s valuation of the minority’s interest in the venture. It has long been the rule that the exercise of dissenter rights are the exclusive remedy of shareholders who are in opposition to a proposed organic change to the corporate structure. Essentially, absent extraordinary circumstances, a shareholder entitled to dissenter rights had those rights as their exclusive remedy, and they could not attack the substance of the proposed transaction.

This clear exclusivity has in recent years been violated. Essentially, taking out of context the declaration of the Kentucky Supreme Court in Steelvest v. Scansteel that “breach of fiduciary duty is equivalent to fraud,” and by

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27. For a review of the adoption of the appraisal remedy and its development since that time, see Robert B. Thompson, Exit, Liquidity and Majority Rule: Appraisal’s Role in Corporate Law, 84 GEO. L. REV. 1 (1995). In 2007, Kentucky’s partnership, limited partnership and LLC acts were amended to expressly provide, in those organizational contexts, that dissenter rights would exist only if provided for by private agreement. These amendments preclude the argument that dissenter rights are a matter of common law that protect the interests of partners and LLC members. See Thomas E. Rutledge, The 2007 Amendments to the Kentucky Business Entity Statutes, 97 KY. L.J. 229, 248 (2008-09).


29. Under the Kentucky enactment of the Uniform Business Corporation Act there was no provision for the issuance of cash to a shareholder in a corporation taking part in a merger. See 1946 KY. ACTS, ch. 141; see also KY. REV. STAT. ANN. § 271.470 (West 2015), repealed by 1972 KY. ACTS, ch. 274, § 165. By the 1972 adoption of the Model Business Corporation Act, cash was permitted consideration in a merger. See id. § 271A.355(2)(c), repealed by 1988 KY. ACTS ch. 23, § 248.

30. See Thompson, supra note 27, at 22.

31. See KY. REV. STAT. ANN. § 271A.405(1) (West 2015), repealed by 1988 KY. ACTS, ch. 23, § 248 (“Any shareholder making such demand shall thereafter be entitled only to payment as in this section provided and shall not be entitled to vote or to exercise any other rights of a shareholder.”). The prior law on dissenter rights was silent as to exclusivity. See id. § 271.490. In Yeager v. Paul Semonin Co., 691 S.W.2d 227, 228 (Ky. Ct. App. 1985), notwithstanding the exclusivity language of the statute, the Court wrote that a minority shareholder was not restricted to the dissenter rights remedy. However, the suit was ultimately found groundless as the shareholder could point to no fraud. Id. at 228–29.

32. Steelvest, Inc. v. Scansteel Servs. Ctr. Inc., 807 S.W.2d 476, 487 (Ky. 1991); see also Sahni v. Hock, 369 S.W.3d 39, 49 (Ky. Ct. App. 2010) (Taylor, J., dissenting) (“In Kentucky it is black letter law that the breach of a fiduciary duty is equivalent to fraud.”) (citing Steelvest, Inc., 807 S.W.2d at 476).
referencing the fraud exception to the exclusivity of dissenter rights, plaintiffs had argued that having voted against a particular corporate action but not having exercised dissenter rights, shareholders may pursue claims of breach of fiduciary duty against the directors. This converts a cause of action that arises in contract, namely what is the value of the shares held by the objecting shareholders, into a cause of action arising in tort, namely has there been a breach of fiduciary duty and, if so, what is the value thereof.

Under the revised statute, with respect to a transaction in which the shareholders are afforded dissenter rights, that will be their exclusive remedy – save an application for injunctive relief prior to the consummation of the action. This opportunity to seek injunctive relief will address situations including the absence of actual authority to effect the transaction because there has not been the necessary vote of the shareholders or a failure to make adequate disclosure to the shareholders as to the terms of the proposed transaction.

V. FIDUCIARY DUTIES IN BANKING CORPORATIONS

A last-minute addition to H.B. 440 revised KRS section 286.3-065, it addressing the fiduciary duties applicable to the directors of a bank. The first amendment to the provision expanded it to include bank officers; previously it addressed only directors. Second, and on a more substantive level, while retaining the previous aspirational standard requiring that a director “exercise such ordinary care and diligence as necessary and reasonable to administer the affairs of the bank in a safe and sound manner,” the statute placed certain outer limits on the director’s conduct.

Initially, prior to its amendment, KRS section 286.3-065 set forth the fiduciary duties of the director of a bank; the statute was silent as to the

33. See Ky. Rev. Stat. Ann. § 271B.13-020(2), prior to amendment by 2015 Ky. Acts ch. 34, § 11 (“A shareholder entitled to dissent and obtain payment for his shares under this chapter shall not challenge the corporate action creating his entitlement unless the action is unlawful or fraudulent with respect to the shareholder or the corporation.”).

34. See, e.g., Opinion and Order at 7, May 28, 2013, Snyder v. Baumgardner, Case No. 09-CI-4445 (Jeff. Circuit Ct. Div. 4; Judge Charles L. Cunningham, Jr.).


36. This provision was added in the Senate Judiciary Committee Substitute that was later concurred to by the House on March 11. This section of H.B. 440 is the only one not drafted by the author.


38. See id. § 286.3-065(1) (re-codifying the first sentence of KRS § 386.3-065 prior to amendment by 2015 Ky. Acts, ch. 34, § 77).
obligations of officers. The statute, as revised, is equally applicable to the directors and the officers of a bank. Ultimately, the substantive standard, namely that the director (and now officer) act “in good faith and with such ordinary care and diligence as necessary and reasonable to administer the affairs of the bank in a safe and sound manner” has been retained. There has been added, however, a standard of culpability for monetary damages requiring any of gross negligence, willful or reckless misconduct, a knowing violation of the law or an improper personal benefit. This differential in the aspirational standard from the standard of culpability for monetary damages has precedent in other Kentucky business entity law.

It has now provided the directors and officers, in the discharge of their duties, are entitled to rely upon information, opinions, reports and statements prepared by either certain subsets of the board or certain independent legal parties. That said, no reliance is permitted if the director has knowledge that makes the reliance unreasonable. With respect to the burden of proof, it is laid upon the person bringing the action for monetary damages, they being obligated to prove “by clear and convincing evidence” the breach of the duties as well as causation.

VI. PARTNERSHIPS & LIMITED PARTNERSHIPS

A. Dissolution of a Limited Partnership

An amendment to the Kentucky Uniform Limited Partnership Act (2006) makes express that a limited partnership shall dissolve when the same person is the only general and only limited partner. This is not a change in the law as the definition of a “limited partnership” already incorporated this rule, but now it is

39. Compare id. § 271B.8-420 (obligations of the officers of a business corporation), with id. § 273.229 (obligations of the officers of a nonprofit corporation).

40. Compare id. § 286.3-065(1), amended by 2015 Ky. Acts, ch. 34, § 77, with id. § 286.3-065 prior to amendment.

41. Id. § 286.3-065(1).

42. See, e.g., id. § 271B.8-300(1) (aspirational standard of corporate directors); id. § 271B.8-300(5)(b) (standard of culpability for monetary damages).

43. KY. REV. STAT. ANN. § 286.3-065 (West 2015), amended by 2015 Ky. Acts, ch. 34, § 77; accord id. § 271B.8-300(3). It should be noted that while the Business Corporation Act allows a director to rely upon an officer or employee who they honestly believe to be reliable and competent in the matter under question, a bank director is similarly allowed to rely upon another director. Compare id. § 386.3-065(1)(a) (“one (1) or more officers, directors, or employees of the bank whom the officer or director reasonably believes to be reliable and competent in the matters presented.”), with id. § 271B.8-300(3)(a) (“one (1) or more officers or employees of the corporation to the director honestly believes to be reliable and competent in the matters presented.”).}

44. Id. § 286.3-065(2); id. § 271B.8-300(4).

45. See id. § 286.3-065(3); accord id. § 271B.8-300(6).

46. Id. § 362.2-801(6).

47. See id. § 362.2-102(14) (“Limited partnership,” except in the phrases “foreign limited partnership” and “foreign limited liability limited partnership,” means an entity, having one (1) or more general partners and one (1) or more limited partners, which is formed under this subchapter
clearer and precludes the (incorrect) argument that the requirement of two partners applies only at the moment of the partnership’s formation.

B. Suits Against Partnerships and Limited Partnerships

The statute governing legal actions brought against a limited partnership subject to the Kentucky Revised Uniform Limited Partnership Act has been clarified. In 1994, KRS section 362.605 was created, providing that a general partnership may be sued in its “common name.” Such suits eliminate the requirement that all general partners be named in order to bring an action against a general partnership, and are useful when it is anticipated that the assets of the partnership will be sufficient to satisfy the creditor’s claim. That statute did not, however, address what is the “common name” of the general partnership. At the same time, consequent to the linkage of the general and limited partnership laws, this provision has at times been applied to the effect that, in order to bring suit against a limited partnership, it is necessary to name not only the general partners but also the limited partners.

As revised, the reference to the “common name” of a general partnership has been revised to reference the “real name”; what is the real name of a partnership will be determined by the assumed name statute. A limited partnership may be sued in its real name, that as well being determined under the assumed name statute. Where it is not necessary to access the individual assets of the general partners, they need not be named in the action. However, if it is desired that the general partners be personally liable for any judgment rendered, they must as well be named as parties to the action.

C. Limited Partnership Derivative Actions

To the derivative action provisions of the Kentucky Uniform Limited Partnership Act (2006) there has been added language enabling courts to order plaintiffs to pay defendants’ costs and expenses incurred in defending a proceeding or a portion thereof “commenced without reasonable cause or for an

48. See id. § 362.605.
49. KY. REV. STAT. ANN. § 362.605 (West 2015).
50. See id.
51. See id. § 362.523.
52. See also id. § 362.401(10) (“Partner means a limited partner or a general partner.”).
53. See id. § 365.015(1)(b).
54. Id.
55. KY. REV. STAT. ANN. § 362.605 (West 2015).
56. See id. §§ 362.605(2)–(3).
57. Id. § 362.2-932.
improper purpose." This is the same standard employed in the derivative action provision newly added to the LLC Act and already existing in the Unincorporated Cooperative Association and Statutory Trust Acts.

VII. THE STATUTORY TRUST ACT

Several technical revisions have been made to the Kentucky Uniform Statutory Trust Act. The first pair of amendments go to the provision of the Statutory Trust Act listing items that may be included in the governing instrument. As such, neither these provisions is of themselves operative; rather, they are only enabling. First, it is provided that the statutory trust may itself serve as the beneficial owner associated with a series. This provision will facilitate the use of a statutory trust with series as a holding company. The second provision will allow a statutory trust, in effect, to waive the entity rule as to ownership of its property, thereby permitting each of the beneficial owners associated with either the statutory trust or a series thereof to be deemed the owner, as tenants in common with the other beneficial owners, of the property of the statutory trust or the property associated with the series. This provision will be employed in highly lawyered transactions in which a statutory trust is used for structuring a tenancy-in-common (TIC) ownership. A new provision, it also governing a series of a statutory trust, sets forth a default rule to the effect that, absent contrary private ordering, every beneficial owner of the statutory trust will be associated with each series thereof.


62. *Id.* § 386A.1-030(4)(r).

63. *See id.* § 386A.1-030(4)(s).

64. *Id.*

65. *Id.* § 386A.4-010(7). There was also corrected a typographical error in the Statutory Trust Act. *See id.* § 386A.4-020(6), *amended by* 2015 Ky. Acts, ch. 34, § 63. In addition, revisions to KRS § 360.027 make express that a statutory trust falls within its scope. *See id.* § 360.027, *amended by* 2015 Ky. Acts, ch. 34, § 65. This revision is admittedly redundant of existing law. *See id.* § 446.010(6). Still, it avoids ambiguity and addresses any failure to reference the general definition provisions.
VIII. LIMITED LIABILITY COMPANIES

A. Suits By or On Behalf of an LLC

A new section has been added to the Limited Liability Company Act to set forth rules applicable to derivative actions in LLCs. While the LLC Act as originally adopted did not provide expressly for derivative actions, neither did it preclude them. Clearly such actions exist under the rules of equity, and the Kentucky courts have both entertained express derivative actions with respect to LLCs and otherwise maintained the direct versus derivative distinction. By means of this new statute, it being based upon that adopted by the Kentucky General Assembly in 2012 with respect to statutory trusts, there are set forth the

66. See id. § 275.337.
67. See, e.g., Thomas E. Rutledge & Lady E. Booth, The Limited Liability Company Act: Understanding Kentucky’s New Organizational Option, 83 Ky. L.J. 1, 41 n. 202 (1994-95) (“The LLC Act does not provide for derivative actions as a means of recovering misappropriated assets or opportunities. However, the LLC Act in no way forbids such suits.”); Carter G. Bishop & Daniel S. Kleinberger, Limited Liability Companies: Tax and Business Law ¶ 10.07[2] (Supp. 2015) (“Many LLC statutes expressly authorize derivative actions, but some do not. This distinction should make little difference. Derivative litigation began in the corporate context over 150 years ago without the benefit of statutes, and remains essentially equitable in nature.”); see also generally Thomas E. Rutledge, Who Will Watch the Watchers?: Derivative Actions in Nonprofit Corporations, 103 Ky. L.J. Online 31 (2015).
69. See, e.g., Pixler v. Huff, Civ. Act. No. 3:11-CV-00207-JHM, 2012 WL 3109492, at *2–4 (W.D. Ky. July 31, 2012) (applying the direct versus derivative distinction as traditionally applied to corporations and determining whether certain claims brought by a member could be brought only on a derivative basis); id. at *3 (“Therefore, Plaintiff may maintain her claims against the Defendants only where she has suffered an injury that is separate and distinct from that which would be suffered by other members or the LLC as an entity.”); R.C. Tway Co. v. High Tech Performance Trailers, LLC, No. 3:2012-CV-00122, 2013 WL 842577, at *3 (W.D. Ky. Mar. 5, 2013) (“Each of the claims identified above clearly alleges that High Tech or Hanusosky violated some duty it owed directly to [Performance Trailers], thus causing [Performance Trailers] injury. As [Performance Trailers] is the allegedly injured party for each of these claims, it is the one that is entitled to enforce the rights granted by substantive law. Accordingly, [Performance Trailers] is not a nominal party, but instead is a real party in interest as to those claims.”); Chou v. Chilton, Nos. 2009-CA-002198-MR, 2009-CA-002284-MR, 2014 WL 2154087 (Ky. Ct. App. May 23, 2014) (“[The LLC] and not Chou himself would benefit from any recovery for breach of the operating agreement, fraud, misappropriation, breach of fiduciary duty or gains taken by the defendants. While Chou may or may not receive funds from [the LLC] on dissolution of that company, any wrongs for breach of the operating agreement, fraud, misappropriation, breach of fiduciary duty or gains taken by the defendants perpetrated by any of the [defendants] or possibly [a separate LLC controlled by the defendants] would be wrongs against [the LLC] and not Chou individually.”); Turner v. Andrews, 413 S.W.3d 272 (Ky. 2013) (rejecting effort by the sole member of an LLC to bring on his own behalf (rather than on behalf of the LLC), a claim for lost profits); see also Gross v. Adcomm, Inc., No. 2014-CA-001031-MR, 2015 WL 8488900 (Ky. Ct. App. 2015) (purported direct action by corporation against director/shareholder dismissed for failure of authorization).
procedural limitations and requirements as to bringing a derivative action.\textsuperscript{71} With this addition to the LLC Act, Kentucky law is brought more consistent with that of Delaware, the Revised Uniform Limited Liability Company Act, and the Revised Prototype Limited Liability Company Act.\textsuperscript{72} Not addressed is the question of whether the operating agreement may (a) modify (presumably by raising additional thresholds) the standing requirements or (b) alter the rules for the potential for fee shifting. That said, neither should be possible. Initially, while such is of itself not determinative, the provision’s modification by the operating agreement is not provided for.\textsuperscript{73} Second, the parties to an operating agreement may not, by private ordering, alter or limit the equitable powers of the court, by means of a derivative action, to review and as necessary correct abuses and breaches of duty.\textsuperscript{74}

The distinction between a direct and derivative action, the former involving a unique injury to the plaintiff while the latter involving an injury to the LLC as a distinct legal person, has been incorporated into the statute.\textsuperscript{75} A direct action is not subject to the standing, procedural and pleading requirements of a derivative action.\textsuperscript{76} A derivative action is subject to: (i) a demand requirement or the pleading of futility\textsuperscript{77} and (ii) the requirement of member status at the time the action is commenced and at the time of the complained of actions.\textsuperscript{78} All

\textsuperscript{71} See id. § 275.337.


\textsuperscript{73} Compare KY. REV. STAT. ANN. § 275.170 (West 2015) (“Unless otherwise provided in a written operating agreement”); id. § 275.220 (same).

\textsuperscript{74} See id. § 275.003(1) (“Unless displaced by particular provisions of this chapter, the principles of law and equity shall supplement this chapter.”); In re Carlisle Etal., No. 10280-VCL, 2015 WL 1947027 (Del. Ch. Apr. 30, 2015); BISHOP & KLEINBERGER, supra note 67, ¶ 10.07[3] (“However, derivative suits began as, and remain, essentially equitable in nature. It is questionable (at best) whether private agreements can restrain a court’s power to do equity,”) (citations omitted).

\textsuperscript{75} See KY. REV. STAT. ANN. § 275.337 (West 2015); accord id. § 386A.6-110(i); id. § 362.2-931(1)—(2); see also CMS Inv. Holdings, LLC v. Castle, No. 9468-VCP, 2015 WL 3894021, at *7–8 (Del. Ch. June 23, 2015) (applying direct versus derivative distinction under Delaware law).

\textsuperscript{76} See also Marhula v. Grand Forks Curling Club, Inc., 863 N.W.2d 503 (N.D. 2015) (action challenging termination of membership in nonprofit corporation is not subject to derivative action requirements).

\textsuperscript{77} KY. REV. STAT. ANN. §§ 275.337(2)–(4) (West 2015); accord id. § 271B.7-400(2); id. § 362.2-832, -934; id. § 272A.13-010, -060; id. § 386A.6-110(2).

\textsuperscript{78} Id. § 275.337(3). The requirement of having been a member at the time of the action complained of may be derived from an assignor if the assignment was by operation of loss or pursuant to the terms of the operating agreement; accord § id. 271B.7-400(1); id. § 272A.13-020(1); id. § 362.2-933; id. § 386A.6-110(3).
proceeds of the action are property of the LLC. 79 Dismissal or settlement of the derivative action requires court approval. 80 The proper venue for a derivative action is the circuit court of the county in which the LLC maintains its registered office. 81 If the derivative action results in substantial benefit to the LLC, the court may require it to pay the plaintiff-member’s reasonable expenses, including counsel fees. 82 Conversely, to the extent the suit or an aspect thereof was brought without reasonable cause or for an improper purpose, the court may order the plaintiff member to pay each defendants’ reasonable expenses, including counsel fees. 83

It is to be expected that disputes as to the alignment of the LLC will oft occur. Where an individual or other minority of the members asserts they are vindicating the LLC’s rights through a derivative action, the LLC will typically, at least initially, be aligned as a plaintiff. An argument may be made that the initial alignment should be as a defendant as the suit has two components, namely (a) against the LLC for failure to bring a direct action to vindicate its rights and (b) against the person or persons who are alleged to have injured the LLC.

79. Id. § 275.337(5).
80. Id. § 275.337(6); accord id. § 271B.7-400(3); id. § 272A.13-040; id. § 386A.6-110(6).
81. Id. § 275.337(7). Almost never may a derivative action be brought in federal court on the basis of diversity jurisdiction. The LLC will be either a plaintiff or a defendant in a derivative action. See, e.g., Gabriel v. Preble, 396 F.3d 10 (1st Cir. 2005) (regarding the plaintiff or defendant alignment of the entity). And as the entity will have the citizenship of all members, there will never be diversity of citizenship. See, e.g., Lotan v. Horizon Properties LLC, No. 14 Civ. 3134(PAC), 2014 WL 2210536, at *1 (S.D.N.Y. May 27, 2014) (“Plaintiffs common citizenship with the LLC destroys complete diversity.”) (citing Bischoff v. Boar’s Head Provisions Co., Inc., 436 F. Supp. 2d 626, 634 (S.D.N.Y. 2006) (“There is no dispute that as long as [Plaintiff] may bring derivative claims on behalf of [the LLC] is a true defendant that destroys complete diversity in this case.”)); Richardson v. Edward D. Jones & Co., 744 F. Supp. 1023 (D. Colo. 1990); Gen. Tech. Applications, Inc v. Exro Ltda., 388 F.3d 114 (4th Cir. 2004); Cook v. Toidze, 950 F. Supp. 2d 386, 391 (D. Conn. 2013) (“If the action at hand is a derivative suit, the [LLC] is not a nominal party.”).
82. KY. REV. STAT. ANN. § 275.337(8)(b) (West 2015); accord id. § 272A.13-050(2)(b); id. § 362.2-935(2); id. § 386A.6-110(9)(b); see also Toler v. Clark Rural Electric Cooperative Corp., 512 S.W.2d 25, 26–27 (Ky. 1974) (affirming denial of attorney’s fees in shareholder litigation that successfully obtained judgment setting aside election of board of directors as “a pecuniary benefit [to the corporation] is a prerequisite to recovery” of attorney fees); Orbit Gás Co. v. Arnett, 620 F.2d 304, 304 (6th Cir. 1980) (in reliance on Toler, holding that a pecuniary benefit is a prerequisite to recovery of fees and costs in derivative litigation on behalf of a Kentucky corporation).
Where the LLC is initially aligned as a plaintiff, realignment as a defendant may be appropriate where there is animosity (when will there not be?) between the minority-member plaintiff and those exercising control over the LLC. This treatment reorganizes that even as the minority may have the right to, on the LLC’s behalf, initiate and maintain a derivative action, the majority members or the manager who are the target of the suit will typically retain control over the LLC. Still being controlled by the targets of the suit, animosity may dictate the LLC’s alignment as a defendant.84

Still on the topic of lawsuits involving LLCs, the provision governing authority to bring suit on behalf of an LLC has been streamlined.85 This provision, KRS section 275.335, was itself based upon section 1102 of the 1992 Prototype Limited Liability Company Act, that having been the primary source for the drafting of the original Kentucky LLC Act.86 The provision, being charitable, was significantly over complicated and curious in several respects. Initially, KRS section 275.335 is an exception to the generally applicable rule of LLC management set forth in KRS section 275.165. Pursuant thereto, if the LLC is member-managed, then all decisions as to the LLC’s management, a class of action that would otherwise include initiating a lawsuit on its behalf, would require the approval of a majority-in-interest of the members.87 Alternatively, if the LLC is manager-managed, the decision for the LLC to bring suit would be made by the managers with the members not having a voice therein.88 But then KRS section 275.335 is an exception to KRS section 275.165.

Under KRS section 275.335, which only addresses how an LLC may be authorized to bring suit, a per-capita majority of the members may authorize a member to on the LLC’s behalf bring suit. Particular to this circumstance: (i) an alternative mechanism for counting the members is utilized;89 (ii) in the case of a vote of the members a disinterested limitation is sometimes imposed;90 and (iii) the restriction of exclusive management of a manager-managed LLC to the managers is eliminated. If the LLC is manager-managed, suit may be initiated by a majority of the managers, but an interested manager is barred from participation in that vote.91 While the different rules as to disinterestedness

85. KRS § 275.335 is not a derivative action provision. In a derivative action, assuming no realignment consequent to animosity, the entity is a nominal defendant. In a suit brought under KRS § 275.335, the LLC is the plaintiff.
86. See Rutledge & Booth, supra note 67, at 9.
87. See Ky. REV. STAT. ANN. §§ 275.165(1), .175(1) (West 2015).
88. See id. § 275.165(2).
89. Under KRS § 275.165, through cross-reference to KRS § 275.175(3), members vote in proportion to their respective capital contributions to the LLC. For purposes of authorizing suit under KRS § 275.335, members vote on a per-capita (one member = one vote) basis.
90. See id. § 275.335(1)(a).
91. See id. § 275.335(3). Managers, absent a contrary provision in the operating agreement, vote per capita. See id. § 275.175(1); see also 2007 Ky. Acts, ch. 137, § 110; Rutledge, supra note 27, at 258.
between members and manager votes was perhaps nonsensical, it was driven by the statutory language. All of these rules are subject to modification in a written operating agreement.

Irrespective of whether the LLC is member-managed or manager-managed, unless a written operating agreement provides a contrary rule, the members remain empowered to cause legal action to be initiated by the LLC. This capacity exists even in a manager-managed LLC in which the managers have “exclusive power to manage the business and affairs of the [LLC].” If the members are considering whether the LLC should bring suit, the members vote per-capita, and the suit is authorized if it is approved by more than one-half of the members “eligible to vote thereon.” The statute does not explain or expand upon who is or is not a member “eligible to vote thereon”, the next sentence of the statute does not fill that role. The second sentence of KRS section 275.335(1)(a) provides:

In determining the vote required under KRS 275.175, the vote of any member who has an interest in the outcome of the suit that is adverse to the interest of the limited liability company shall be excluded.

92. See KY. REV. STAT. ANN. § 275.335(2) (West 2015). The distinction between the second sentence of each of § 275.335(1) and (2) arises out of the former’s application when reference needs to be made to § 275.335(2) while the latter does not. For ease of comparison:

<table>
<thead>
<tr>
<th>2nd sentence, KRS § 275.335(1) (emphasis added)</th>
<th>2nd sentence, § 275.335(2)</th>
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<tbody>
<tr>
<td>In determining the vote required under KRS 275.175, the vote of any member who has an interest in the outcome of the suit that is adverse to the interest of the limited liability company shall be excluded;</td>
<td>In determining the required vote, the vote of any manager who has an interest in the outcome of the suit that is adverse to the interest of the limited liability company shall be excluded.</td>
</tr>
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93. Id. § 275.335(1).
94. Id. There is to date a dearth of guidance as to what would constitute “otherwise provided in a written operating agreement.” At one end of the spectrum would be a multi-paragraph provision addressing how suit may be brought on behalf of the LLC – no real question there arises. In contrast is the statement in the operating agreement of a manager-managed LLC that “all management decision on behalf of the LLC shall be made by the managers.” Some might argue this is insufficient to constitute “otherwise provided in a written operating agreement.” Alternatively, “all management decisions on behalf of the LLC, including bringing suit on its behalf, shall be made by the manager” likely would be sufficient.
95. Id.
96. See id. § 275.165(2).
97. Id. § 275.335(1)(a).
98. See KY. REV. STAT. ANN. § 275.335 (West 2015).
This provision is applicable only if the operating agreement has required that all members approve the LLC bringing the action. Thus, in the face of a requirement of unanimity, the member “who has an interest in the outcome of the suit that is adverse to the interest of the [LLC] shall be excluded.” Where, in contrast, the applicable operating agreement is silent as to bringing suit, there is not a statutory directive to exclude from the determination of whether one-half of the number of members have approved doing so have an interest adverse to that of the LLC. While a court could find such an exclusion to be what is intended by “eligible to vote thereon,” it will do so without support from the statute itself or the commentary to the Prototype LLC Act. Alternatively, if the operating agreement provides, inter alia, “that all decisions as to the management and affairs of the company will be made by a majority-in-interest of the members,” and the agreement is silent as to both bringing suit and barring conflicted members from voting, it may be credibly argued that the written operating agreement has “otherwise provided” and no exclusion based upon an alleged adverse interest is appropriate.

In that an action under KRS section 275.335 is bought by the LLC, it will be aligned as the plaintiff in the action, and any member or manager acting on the LLC’s behalf should not be named as a party except to the extent, if any, they are pursuing individual claims.

It needs to be recognized that KRS section 275.335 is by its terms a quite limited provision. It addresses only the approval of bringing a suit on behalf of the LLC; it says nothing about the prosecution and settlement of the suit. These lacuna can be quite troubling in the case of a suit arising out of a dispute internal to the LLC. Consider Lilliput LLC having eleven members, one holding a 60% interest, and ten other members, each holding a 4% interest. Lilliput LLC, which is member-managed, has no written operating agreement and is as to these matters governed by the default rules of the LLC Act. Irrespective of whether Gulliver, the 60% member, is or is not eligible to vote thereon, a group of seven of the various 4% members are a clear per-capita majority, and they decide the LLC should bring suit against Gulliver. Assume as well that the suit is against Gulliver for misappropriation of the LLC’s assets. KRS section 275.335 does not provide that the suit is after filing under control of the members who on

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99. Any requirement would have to be in writing. See id. (“Unless otherwise provided in a written operating agreement”); id. § 275.175(1) ("Unless otherwise provided in the articles of organization, a written operating agreement, or this chapter . . . .").
100. Id. § 275.335(1)(a).
101. Section 275.335, as enacted in 1994, was based upon section 1102 of the Prototype Limited Liability Company Act (1992).
102. See KY. REV. STAT. ANN. § 275.335(1) (West 2015) (“a suit on behalf of the [LLC]’); id. § 275.330 (an LLC may sue or be sued in its own name); id. § 275.155 (a member is not a proper party to an action by or against LLC except as to individual claims or liabilities).
103. See id. § 275.003(3).
104. See id. § 275.003(1).
the LLC’s behalf initiated it, and it does not provide that any member not “eligible to vote thereon” is after initiation barred from participating in any company actions involving the suit. Specifically, KRS section 275.335(1) does not say that Gulliver may not, as the majority-in-interest member of Lilliput LLC, direct the LLC’s legal counsel to drop the suit. This is not to say that Gulliver has free reign to do exactly that. Rather, such an action may violate his obligation to avoid self-dealing and may even constitute waste of the LLC’s property. A court sitting in equity could find that Gulliver may not so act, but in so doing the court will not be relying upon the words of KRS section 275.335. Alternatively, a court could (and likely should) determine that after the suit is brought KRS section 275.175 controls and that it is not for the court to write protections not provided for in the LLC Act or the operating agreement.

As revised, the statute is significantly simplified. First, an individual member may, on behalf of LLC, initiate a legal action in its name when authorized to do so by more than one half (per capita) of the members entitled to vote with respect to whether that action should be brought. As previously, this right of the members to bring on the LLCs behalf a lawsuit exist irrespective of whether the LLC is member-managed or manager-managed. A member will be disqualified from participation in this vote if they have an interest in the outcome that is adverse to the interest of the LLC. Any member vote to bring action must be in a record signed or otherwise approved by the members giving the authorization. The statute now references the articles of organization (the prior statute referred to the operating agreement) to determine whether management is vested in the managers. The prior provision introduced an unfortunate substantive analysis, this in contrast to the normal positive review of an LLC being either member-managed or manager-managed as provided in the election made in the articles of organization. By changing the reference from the operating agreement to the articles of organization, it is intended that this determination likewise be a positive one made based upon the provision of the articles of organization. Legal action may be brought by any manager authorized by more than one half of the number of managers authorized to vote on the action. The same rule as to the capacity to vote of a member is applied as well to the managers, namely not having an interest adverse to that of the LLC. Also, consistent with the rules as to member action, the action of the managers

105. See also Ky. Ct. R. 1.13.
107. Id. § 275.335(2).
108. Id. § 275.335(3).
109. See id. § 275.335(4).
110. See id. § 275.335(2).
111. See id. § 275.335(1).
must be in a record form signed or otherwise approved the necessary threshold of
the managers.\textsuperscript{113}

There are at least three particularly curious implications of this provision.
First, it is important to recognize that this is the only provision in the LLC Act in
which the members vote on a per capita, rather than a per contributed capital,
basis.\textsuperscript{114} Second, clumsy drafting within the operating agreement can easily add
collision to this point.\textsuperscript{115} For example, a provision in the operating agreement
providing “except as may be required by the LLC Act, all decisions will be made
by a majority of the members” could be interpreted as overriding both (i) the per
capita voting provision, it here being assumed that “majority” refers to the
members voting on the basis of contributed capital, or some rule other than per
capita, and (ii) the provision excluding from participation in that vote those
members having an interest adverse to the LLC. In effect, such a provision could
be read to preclude a majority of the minority members from, on the LLCs
behalf, bringing action to challenge the majority member’s self-interested
transactions with the LLC and to recover the benefits derived therefrom.\textsuperscript{116} Of
course, in such a circumstance, a derivative action may be brought. Third, it
needs to be recognized that this provision has and continues to address only the
authority to initiate legal action.\textsuperscript{117}

As clarified in the amendments, the prosecution of an action brought on
behalf of the company remains a matter of company management to be governed
by the terms of the operating agreement.\textsuperscript{118} Unless there is a vote sufficient to
amend the operating agreement, authority to prosecute the action is vested as
determined by the members; whether or not the suit should be continued is not
governed by KRS section 275.335. Again, careful drafting of the operating
agreement is necessary in order to avoid this admittedly surprising result. For
example, returning to a suit initiated by a majority of the minority members to,
on the LLC’s behalf, seek recovery from the majority member for the benefits of
self-interested transactions with the company, even if the majority member
cannot vote with respect to its initiation because he or she has an interest adverse
to the LLC, that same majority member could conceivably determine that the suit
should be dismissed.\textsuperscript{119}

\textsuperscript{113} See id. § 275.335(4).
\textsuperscript{114} See id. § 275.175.
\textsuperscript{115} Id.
\textsuperscript{116} See also id. § 275.170(2).
\textsuperscript{117} See id. § 275.335.
\textsuperscript{119} See, e.g., Kastern v. MOA Investments, LLC, 731 N.W.2d 383 (Wisc. App. 2007). Therein,
after suit was brought on behalf of an LLC charging the majority with having diverted company
assets and other misfeasance, they amended the operating agreement to in effect cause the suit’s
dismissal. Specifically:

On June 1, 2005, approximately four months after Marie commenced this
action, a consent resolution was adopted amending DD’s operating agreement
B. Default Rule of No Compensation

A provision added to the LLC Act makes express that a member of an LLC, in rendering services to the LLC, is not entitled to compensation for having done so.120 Subject to modification in a written operating agreement, this rule carries forward the rule that a partner is not, absent a contrary agreement, entitled to compensation for services performed on behalf of the partnership121 and is consistent with the rule that a member qua member is not an “employee” of the LLC.122

to permit members with a financial interest in the outcome of pending actions to vote to dismiss such actions, to require members asserting or maintaining a derivative action without approval of a supermajority to indemnify DD for all costs and attorney fees incurred in the action, and to impose a one year limitation on claims asserted by a member against the company or other members. Under the amendment, the supermajority voted to dismiss Marie’s lawsuit and hired counsel to pursue dismissal.

120. See Ky. Rev. Stat. Ann. § 275.165(4). A default rule of no compensation avoids disputes over “I’m entitled to” absent agreement to the contrary. See also CanCan Development, LLC v. Manno, No. 6429–VCL, 2015 WL 3400789, at *16–17 (Del. Ch. May 27, 2015) (holding that manager’s compensation, not set forth in any agreement but unilaterally set by manager, is subject to entire fairness test); accord Calma v. Templeton, 114 A.3d 563, 577, 589 (Del. Ch. 2015) (noting that director fees are subject to the entire fairness test). These citations to Delaware law on entire fairness are not meant to imply that in the context of a Kentucky LLC the taking of unauthorized compensation would be subject to the entire fairness test. See Ky. Rev. Stat. Ann. § 275.170(3) (West 2015).


122. Assuming that the LLC member is treated as a partner for tax purposes, he or she cannot be treated as an employee of the LLC. See Rev. Rul. 69–184, 1969–1 C.B. 256; I.R.S. Gen. Couns. Mem. 34,001 (Dec. 23, 1969); I.R.S. Gen. Couns. Mem. 34,173 (July 25, 1969); see also Borkowski v. Commonwealth, 139 S.W.3d 531, 533–34 (Ky. Ct. App. 2004) (member of LLC is not an “employee” for purposes of unemployment insurance benefits); KY. REV. STAT. ANN. § 342.012 (absent special endorsement, member of LLC not covered by workers compensation insurance); Bowers v. Ophthalmology Group, LLP, No. 5:12–CV–00034–JHM, 2012 WL 3637529, at *6 (W.D. Ky. Aug. 22, 2012), vacated on other grounds, 733 F.3d 647 (6th Cir. 2013) (“One’s status does not change from partner to employee simply because the partner is outnumbered and finds herself in a minority position among the other partners . . . Bowers was a partner in Ophthalmology Group, not an employee.”); RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.03 (2015) (“Unless otherwise provided by law, an individual is not an employee of an enterprise if the individual through an ownership interest controls all or part of the enterprise.”); 54 Alan J. Tarr, PARTNER STATUS, USC LAW SCHOOL 54TH INSTITUTE ON MAJOR TAX PLANNING ¶ 606.1(c) (2012) (“A partner rendering services in his capacity as a partner is not an employee of the partnership. This mutual exclusivity characterization is made clear in various provisions, especially in the context of employment taxes.”); Paying Yourself, IRS (May 31, 2013), http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Paying-Yourself (“Partners are
C. Judicial Supervision of Dissolution

The LLC Act has been amended to provide for judicial supervision of the winding up even where the dissolution itself is not judicial in nature.¹²³ This provision will have application where, for example, the company has dissolved in accordance with its operating agreement or otherwise, but the members either failed to proceed with the winding up and liquidation process or are unable to agree as to how it should be accomplished. This provision is consistent with the law governing business corporations¹²⁴ and the LLC Acts of many other states.¹²⁵

D. Clarity as to Reservation of Voting Rights to the Members

Distributed throughout the LLC Act are default rules for voting, addressing both the topics upon which a vote of the members is required and the voting threshold for action, namely:

<table>
<thead>
<tr>
<th>Default Voting Thresholds Under the Kentucky LLC Act</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Action</strong></td>
</tr>
<tr>
<td>------------------------------------------------------</td>
</tr>
<tr>
<td>Approve Sale of Substantially All Assets</td>
</tr>
<tr>
<td>Approve Conversion to LP</td>
</tr>
<tr>
<td>Initial Adoption of Operating Agreement</td>
</tr>
<tr>
<td>Amend Operating Agreement</td>
</tr>
</tbody>
</table>

¹²⁴ See id. § 271B.14-300(4); see also id. § 272A.12-060(3); id. § 386A.8-050(2).
¹²⁵ See, e.g., MINN. STAT. ANN. § 322B.83 (West 2015); TENN. CODE ANN. § 48-245-801 (West 2012).
¹²⁶ But see KY. REV. STAT. ANN. § 275.365(11) (West 2015) (allowing majority-in-interest of the members approving a merger to adopt the operating agreement of the successor LLC, it being binding upon all members in the successor-by-merger LLC); Thomas E. Rutledge, *The 2010 Amendments to Kentucky’s Business Entity Laws*, 38 N. KY. L. REV. 383, 397–99 (2011).
<table>
<thead>
<tr>
<th>Action</th>
<th>Default Threshold</th>
<th>KRS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Admit Assignee as Member</td>
<td>Majority-in-Interest of the Members other than the assignor</td>
<td>§ 275.265(1)</td>
</tr>
<tr>
<td>Remove a Member as a Member after Assignment of All Interest in the LLC</td>
<td>Majority-in-Interest of the Members other than the assignor</td>
<td>§ 275.280(1)(c)2</td>
</tr>
<tr>
<td>Admit New Member</td>
<td>All of the Members</td>
<td>§ 275.275(1)</td>
</tr>
<tr>
<td>Waive Agreement to Contribute</td>
<td>All of the Members</td>
<td>§ 275.200(4)</td>
</tr>
<tr>
<td>Approve Voluntary Dissolution</td>
<td>All of the Members</td>
<td>§ 275.285(3)</td>
</tr>
<tr>
<td>Approve Merger</td>
<td>Majority-in-Interest of the Members</td>
<td>§ 275.350(1)</td>
</tr>
<tr>
<td>Amend Articles of Organization</td>
<td>Majority-in-Interest of the Members</td>
<td>§§ 275.030(2), 275.175(1)</td>
</tr>
<tr>
<td>Approve Act in Contravention of Written Operating Agreement</td>
<td>Majority-in-Interest of the Members</td>
<td>§ 275.175(2)</td>
</tr>
<tr>
<td>Amend Articles of Organization to Change Management Structure</td>
<td>Majority-in-Interest of the Members</td>
<td>§ 275.175(2)(c)</td>
</tr>
<tr>
<td>Appointment of Managers(^{127})</td>
<td>Majority-in-Interest of the Members</td>
<td>§ 275.165(2)(a)</td>
</tr>
<tr>
<td>Bring Suit in Name of LLC</td>
<td>Half by number of the disinterested members</td>
<td>§ 275.335</td>
</tr>
<tr>
<td>Waive Duty of Loyalty</td>
<td>Majority-in-Interest of the disinterested members</td>
<td>§ 275.170(2)</td>
</tr>
<tr>
<td>Permit Voluntary Resignation of a Member from a Manager-Managed LLC Where That Right Is Not Already Set Forth in a Written Operating Agreement</td>
<td>All of the Members</td>
<td>§ 275.280(3)</td>
</tr>
</tbody>
</table>

The members, as a default rule that may be modified by private ordering, retain the right to vote on these matters even if the LLC is manager-managed.\(^{128}\)

\(^{127}\) Only if the LLC is manager-managed.
The LLC Act has been, however, not nearly as clear on this point as would be desired. It is provided that where the company elects in its articles of organization to be manager-managed, “the manager or managers shall have the exclusive power to manage the business and affairs of the [LLC],” with this delegation authority being subject to the “extent otherwise provided in the articles of organization, the operating agreement, or this chapter.”\(^\text{129}\) It would have been helpful if the statutory language were more express to the effect that the mere fact that the company is manager-managed does not, of itself, constitute an election out of the requirement that the members act upon these particular matters. An amendment to the LLC Act now makes clear that as to the enumerated actions, and absent contrary private ordering, although the LLC is manager-managed, they require member approval.\(^\text{130}\) Still, care needs to be exercised to avoid inadvertent contrary private ordering. The statement in the operating agreement “Except as otherwise required by the Act, all decisions as to the business and affairs of the Company shall be made by the Managers . . .” could be interpreted as being sufficient to abrogate the right of the members to vote on the items listed in KRS section 275.175(2).\(^\text{131}\)

**E. Nonprofit LLCs**

The balance of the provisions dealing with limited liability companies relate to nonprofit LLCs.\(^\text{132}\) When the LLC Act was originally enacted, it was not anticipated that the LLC would be used for nonprofit purpose. However, in Mercy Regional Emergency Medical System, LLC v. John Y. Brown, III, the Franklin Circuit Court held that an LLC need not have a business purpose in order to be validly organized in Kentucky.\(^\text{133}\) In response thereto, skeletal revisions were made to the LLC Act in 2007 to, inter alia, impose limitations on self-inurement, etc. in nonprofit LLCs, tracking the law of nonprofit corporations.\(^\text{134}\) These revisions were driven by the view that typically the

\(^{128}\) KY. REV. STAT. ANN. § 275.175 (West 2015).

\(^{129}\) Id.

\(^{130}\) See id. §§ 275.175(3)(d)–(j).

\(^{131}\) The author does not suggest this is the proper interpretation of what is likely simply a poorly drafted provision. See also Lenticular Europe, LLC v. Cunnally, 693 N.W.2d 302, 308 (Wis. Ct. App. 2005) (“When the legislature provides a specific default term on a topic and the operating agreement does not explicitly refer to that topic, it is reasonable to conclude the parties did not intend to override that default term.”).


\(^{133}\) Cir. Action No. 98-CI-01357 (Franklin Cir. Ct. Feb. 16, 1999).

\(^{134}\) See also Rutledge, *supra* note 27, at 250.
nonprofit LLC creates significant opportunities for abuse. However, in the summer of 2012, the Internal Revenue Service issued important guidance on the use of limited liability companies as subsidiaries of section 501(c)(3) and similar tax-exempt organizations.135

Under the revised statute, a nonprofit LLC may be organized either without members or with members, but if it has members, they themselves must be organized for nonprofit purposes.136 Nonprofit LLCs are exempt from the definitional requirement that an LLC must have at least one member.137 For that reason, nonprofit LLCs are exempt from the rule that an LLC must dissolve when it lacks a member.138

While the typical rule of non-inurement applies in a nonprofit LLC, that rule does not apply if the members are themselves nonprofit organizations.139 Regardless of the nature of the members, the income and profit of the nonprofit LLC may not be distributed to managers,140 but reasonable compensation may be paid to members and managers for services rendered.141

If the only members of the nonprofit LLC are themselves nonprofit organizations, the otherwise applicable prohibition against member loans is inapplicable.142 Still, irrespective of the character of the members, a nonprofit LLC may not make loans to the managers.143 Because in a nonprofit LLC without members the management structure will be almost entirely a matter of private ordering, those matters must be set forth in a written operating agreement.144 This requirement of a written operating agreement is a limitation on the general rule that an operating agreement, in addition to being written, may be oral or arise out of a course of conduct.145

A provision added to the LLC Act will permit a nonprofit corporation to convert into a nonprofit LLC.146 The limitation upon this provision is that the only permitted member of the converted nonprofit LLC must be a section 501(c)(3) or 501(c)(4) organization; an affirmative statement to that effect is

135. I.R.S. Notice 2012-52, 2012-35 I.R.B. 317. Pursuant to this direction, donations made to a single member LLC wholly owned by a 501(c)(3) organization are for purposes of deductibility to be treated as having been made to the to the tax-exempt parent corporation.
138. See id. § 275.285(7).
139. Id. § 275.520.
140. Id.
141. See id.; accord id. § 273.237.
143. Id.; accord id. § 273.241.
144. See id. § 275.175(4).
145. See id. § 275.015(21).
146. See id. § 275.376(13).
required in the articles of organization filed to effect the conversion.\textsuperscript{147} This conversion mechanism is available for all nonprofit corporations organized in Kentucky.\textsuperscript{148} It is also available to foreign nonprofit corporations unless the law of the jurisdiction of incorporation forbids a conversion as contemplated by this provision.\textsuperscript{149}

The statute is of course silent as to the federal and state taxation of any donation or contribution to a nonprofit LLC. As is the case with the nonprofit corporation, the ability to deduct contributions is a distinct issue addressed under federal tax law; mere organization as a nonprofit organization does not of itself give rise to the ability to deduct contributions. The 2016 Kentucky General Assembly exempted these non-profit LLCs from the sales and use tax.\textsuperscript{150}

**IX. AMENDMENTS TO THE NONPROFIT CORPORATION ACTS**

While constituting significantly less than the desperately needed complete rewrite of the Kentucky Nonprofit Corporation Acts,\textsuperscript{151} a series of amendments to the existing law addressed some of the Acts’ logistical limitations.

Initially, a comprehensive definition of what constitutes “notice” has been added to the act, defining how notice is to be provided to either a director or a member.\textsuperscript{152} Based upon the current provision from the Kentucky Business Corporation Act,\textsuperscript{153} this provision importantly provides “notice by electronic transmission is written notice.” The provision adopted a mailbox rule as to communications to members.\textsuperscript{154} Any notice to a domestic nonprofit corporation or to a foreign nonprofit corporation authorized to transact business in Kentucky may be addressed to the organization’s registered agent at its registered office, to the corporation, or its secretary at the principal office address.\textsuperscript{155} In furtherance thereof, new defined terms have been added for “deliver/delivery,” “effective date of notice,” “electronic transmission/electronically transmitted,” “notice,” “sign” and “signature.”\textsuperscript{156}

The provision addressing notice of a special meeting of the members has been revised to delete references to how the notice is to be given.\textsuperscript{157} Those issues are now addressed in the new notice provision.\textsuperscript{158}

\begin{footnotesize}
\textsuperscript{147}Id.
\textsuperscript{149}Id.
\textsuperscript{151}Id. §§ 273.161–390.
\textsuperscript{152}Id. § 273.162.
\textsuperscript{153}See id. § 271B.1-410.
\textsuperscript{154}See id. § 273.162(3).
\textsuperscript{155}Ky. Rev. Stat. Ann § 273.162(4) (West 2015); accord id. § 271B.1-410(4); see also id. § 14A.4-040(1).
\textsuperscript{156}See id. § 273.161(17)–(21).
\textsuperscript{157}See id. § 273.197.
\textsuperscript{158}See id. § 273.162.
\end{footnotesize}
With respect to meetings by unanimous consent, previously the statute provided, in one section, mechanisms by which both the Board of Directors and the members could act by unanimous consent.\textsuperscript{159} Adopting the model employed in the Business Corporation Act, written consent of the Board of Directors and members are now separately discussed.\textsuperscript{160} Under a new section, patterned off of the equivalent provision of the Business Corporation Act,\textsuperscript{161} the directors may act by written consent, provided that, absent specification of the different date, the action is effective when the last director signs the consent.\textsuperscript{162} It is further provided that action by written consent has the effect of a meeting vote.\textsuperscript{163} Note that while the written consent must be signed by each director, pursuant to the new definition of “sign,” which includes an electronic signature,\textsuperscript{164} a unanimous consent may be executed by email.\textsuperscript{165} In parallel to the adoption of a new provision uniquely addressing board action by unanimous consent, the existing KRS section 273.377 has been revised in order to restrict its application to written consent of the members.\textsuperscript{166} This provision has also been supplemented in order to track the equivalent language from the Business Corporation Act, specifically KRS section 271B.7-210. Again, as the signature of each member is required, it may now be delivered electronically.\textsuperscript{167} It should be noted that this provision, with respect to unanimous consent, applies to any "regular or special meeting" of the Board of Directors; it does not by its terms expressly extend to any meeting of a board committee.\textsuperscript{168}

Language newly added to KRS section 273.217 will allow directors to participate in any regular or special meeting by "any means of communication by which all directors participating my simultaneously hear each other during the meeting."\textsuperscript{169} A member so participating is deemed present at the meeting.\textsuperscript{170}

\textsuperscript{160} See id.
\textsuperscript{161} KY. REV. STAT. ANN § 273.375. (West 2015).
\textsuperscript{162} Id. § 271B.8-210.
\textsuperscript{163} See id. § 273.375; accord id. § 271B.8-210(3) ("A consent signed under this section shall have the effect of a meeting vote and may be described as such in any document.").
\textsuperscript{164} See id. § 273.161(21).
\textsuperscript{165} This express rule is cumulative to the prior law to the same effect. See id. § 369.102(8) (defining an “electronic signature” as “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”); id. § 369.107(4) (“If a law requires a signature, an electronic signature satisfies the law.”).
\textsuperscript{166} See id. § 273.377.
\textsuperscript{167} The Business Corporation Act allows the articles of incorporation to reduce the threshold for a "unanimous" consent to a threshold as low as 80%. See KY. REV. STAT. ANN. § 271B.7-040(2) (West 2015). No similar capacity is provided for in the Nonprofit Corporation Acts.
\textsuperscript{168} See id. § 273.377; see also id. § 273.221 (addressing the composition and functioning of board committees).
\textsuperscript{169} See id. § 273.217(2); accord id. § 271B.8-200(2) (creating statutory authority for a board member participating in a meeting by phone or other means of electronic communications.).
\textsuperscript{170} Id. § 273.217(2).
Simply confirming the law as it is always existed even while not set forth in the statute, it has been made express that a director may not vote by proxy.\footnote{171}

Previously, the statute did not set forth a minimum notice as to the meeting of the Board of Directors.\footnote{172} A new provision, consistent with the Kentucky Business Corporation Act,\footnote{173} sets that minimum notice at two days.\footnote{174} A longer or shorter minimum notice may be provided for in the bylaws. Language already in the statute providing, inter alia, that the notice of a regular or special board meeting need not describe the business to be transacted, has been re-codified as KRS section 273.223(2). Likewise, already existing language to the effect that attendance at a meeting constitutes a waiver of any defect with respect to the notice absent an objection on that basis has been re-codified as KRS section 273.223(3). Lastly, existing language with respect to the calling of a special meeting of the Board of Directors by court order\footnote{175} has been re-codified as subsection (4) of KRS section 273.223.

The provisions dealing with the voluntary dissolution of a nonprofit corporation have been modified to conform with the procedure under the Business Corporation Act. Under the prior law, articles of dissolution were filed on behalf of a nonprofit corporation only after the dissolution had been completed, including at the time when “all debts, obligations and liabilities of the corporation have been paid and discharged or that adequate provision has been made therefor.”\footnote{176} Conforming the procedures to those employed in the Business Corporation Act,\footnote{177} after dissolution is authorized, articles of dissolution shall be

\footnote{171. See id. § 273.217(4); see also Haldeman v. Haldeman, 197 S.W. 376, 381 (Ky. 1917) (“Neither can they [directors] vote by proxy.”); Ky. Att’y Gen. Op. 74-645 (Aug. 29, 1934) (proxy may not be given by directors of nonprofit corporations); ABA CORPORATE DIRECTOR’S GUIDEBOOK 18 (6th ed. 2011) (“A director is expected to commit the required time to prepare for, attend regularly and participate (in person when feasible) in board and committee meetings. A director may not participate or vote by proxy; personal participation is required (which may take place by telephone or video when in-person participation is not possible.”)); MODEL BUS. CORP. ACT § 8.20, § 25 cmt. at 206 (AM. BAR. ASS’N 2002); 2 WILLIAM MEADE FLETCHER, FLETCHER’S CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 427 (perm ed., rev. vol. 2014) (“The directors of a corporation generally cannot vote at directors’ meeting by proxy, but must be personally present and act themselves . . . . Their personal judgment is necessary, and they cannot delegate their duties or assign their powers.”) (citations omitted); 3 WILLIAM W. COOK, A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK 2257 (Chicago, Callaghan & Co. 1908) (“Directors, of course, cannot act or vote by proxy.”) (citation omitted); ARTHUR W. MACHEN, JR., A TREATISE ON THE MODERN LAW OF CORPORATIONS § 1455 (Boston, Little, Brown & Co. 1908) (“Directors cannot vote by proxy.”) (citations omitted); id. § 1458 (“At a Directors’ meeting, votes by proxy cannot be received or counted, and the Directors have no power by resolution to alter this rule.”) (citations omitted).


173. See id. § 271B.8-220(2).

174. See id. § 273.223(1).

175. See Rutledge, supra note 126, at 417.


177. See id. § 271B.14-030; accord id. § 272A.12-110; id. § 275.315; id. § 362.1-805; id. § 386A.8-020.
filed with Secretary of State along with a copy of the plan of distribution pursuant to which of the corporation’s assets will be distributed or conveyed. The corporation’s dissolution will be effective upon the filing of the articles of dissolution. The Secretary of State is directed to forward a copy of the articles of dissolution to the Secretary of Revenue. Thereafter, consistent with the equivalent provision of the Business Corporation Act, the existence of the corporation continues after the filing of the articles of dissolution, but the corporation’s purpose of the business is limited to winding up and liquidating its business. To that end, it is specifically provided that the dissolution of the corporation does not “abate or suspend” the rule of limited liability otherwise enjoyed.

Consistent with the Business Corporation Act, the Board of Directors is empowered to hold meetings of the members, whether special or regular, exclusively by means of remote communication.

As previously noted, it is now possible to convert a nonprofit corporation into a nonprofit LLC.

Proposed additions to the Nonprofit Corporation Acts which would have put in place robust and comprehensive rights to indemnification and advancement for the directors and officers of a nonprofit corporation, based upon the language employed in the Kentucky Business Corporation Act, were deleted at the request of the Kentucky Nonprofit Network.

X. UNINCORPORATED NONPROFIT ASSOCIATIONS ACT

The adoption in Kentucky of the Revised Uniform Unincorporated Nonprofit Association Act is important in that, with this new statute, there is the for the first time in Kentucky an analytic paradigm and body of default law by which such organizations may be assessed. Prior to this enactment, Kentucky has

178. Id. § 273.313.
179. See id. § 273.313(3); see also id. § 14A.2-070.
180. See id. § 273.313(2).
181. See id. § 271B.14-050.
182. KY. REV. STAT. ANN § 273.302 (West 2015); accord id. § 275.300(2); id. § 362.2-803(1); id. § 272A.12-060(1); id. § 386A.8-040.
183. See id. § 273.302.
184. See id. § 273.195.
185. See id. § 273.376.
186. See id. §§ 271B.8-500–580.
187. Compare H.B. 440 as submitted on February 12, sections 76 through 84, with House Judiciary Committee Sub (Feb. 26, 2015) (previous sections 76-84 deleted); see also KY. REV. STAT. ANN. §§ 271B.8-500–580 (West 2015).
188. REV. UNIF. UNINC. NONPROFIT ASS’N ACT, 6B U.L.A. (Supp. 2014) 177. It is important to note that the Kentucky adoption is of the 2008 version of the uniform act and is not of the “harmonized” act last edited in 2014.
lacked such a body of law even as unincorporated nonprofit associations have been organized and operated. Further, for the first time it will be possible for an unincorporated nonprofit association organized in Kentucky to effect for its participants the benefits of limited liability.

The Kentucky Uniform Unincorporated Nonprofit Association Act (hereinafter “KyNPAA”) is largely a default statute, setting forth rules as to particular matters that are applicable absent contrary agreement with respect to the topic. In light of their expected informality there are minimal requirements that the agreement be reduced to a writing.

An important defined term used in the law of unincorporated nonprofit associations is the “governing principles.” Roughly equivalent to a partnership’s partnership agreement or a LLC’s operating agreement, and including the “established practices,” the governing principles are the agreements of the members as to the purpose and operation of the association. The governing principles may be oral, written, or arise from a course of conduct. The managers are bound by the governing principles.

A. Formation, Purpose & Powers

An unincorporated nonprofit association is a default structure; it exists if its definition is by a particular venture met; there is no requirement of an intent to

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190. Partnership law has not been the default as a partnership must have a for-profit purpose. See Ky. Rev. Stat. Ann. § 362.175(1) (West 2015); id. § 362.1-201(1); see also Thomas E. Rutledge & Allan W. Vestal, on Kentucky Partnerships and Limited Partnerships 49–50 (Univ. of Ky., Office of Continuing Legal Educ. ed., 2010).


194. See Ky. Rev. Stat. Ann. § 273A.005(2) (West 2015); accord Rev. Unif. Uninc. Nonprofit Ass’n Act § 2(1); see also id. § 2 cmt. 1 (“Established practices’ are essentially equivalent to the commercial law concepts of course of performance and course of dealing.”).


198. See Ky. Rev. Stat. Ann. § 273A.005(11) (West 2015) (defining unincorporated non-profit association); see also id. § 273A.1-010(6) (defining non-profit purpose). This latter definition is non-uniform, and is based upon KRS § 273.167. Note that existing organizations, if they fall within the definition of an unincorporated non-profit association, will be governed by this act. See id. § 273A.155(1); accord Rev. Unif. Uninc. Nonprofit Ass’n Act § 4(a); see also id. § 4(a) cmt. 1 (“This act applies to pre-existing UNAs formed in the enacting state, as well as to all UNAs formed in the state after the effective date of the Act.”). With respect to the statutory treatment of an unincorporated non-profit association as a “entity,” this positive statement of organizational law controls over the statement set forth in Customer Due Diligence Requirements for Financial
form an unincorporated nonprofit association. In fact, there is not even a requirement that the participants in the venture be aware of the possibility of consciously forming an unincorporated nonprofit association.199

An unincorporated nonprofit association is considered to be an entity distinct from its members and managers200 and enjoys perpetual duration201 while being vested with all powers of an individual necessary or convenient to carrying out its purpose.202 While limited for-profit activities are permitted, the proceeds thereof must be applied to the non-profit purpose.203

B. Name Requirements, Annual Report

The name requirements for a Kentucky Unincorporated Nonprofit Association ("KyUNPA") are set forth in the Kentucky Business Entity Filing Act (KRS. ch. 14A) and are dependent in part upon whether the KyUNPA has filed a certificate of association.204 Regardless of whether a certificate is filed, a KyUNPA may not include in its name any of “incorporated,” “corporation,” “Inc.,” “Corp.,” “company,” “partnership” or “cooperative.” If a certificate of association is filed, the name of the KyUNPA must include either “Limited” or “Ltd.”205 Further, that real name as set forth on the certificate of association must be distinguishable from any name of record with the Secretary of State.206 If the KyUNPA has not filed a certificate of association it should not include “Limited” or “Ltd.” in its name as doing so would be misleading. Absent filing a certificate of association the name distinguishability standard is not applicable.

Institutions, RIN 1506-AB25 at 58, where it was stated that “This is because neither a sole proprietorship nor an unincorporated association is an entity with legal existence separate from the associated individual or individuals that in effect create a shield permitting an individual to obscures his or her identity.” (Citation omitted). Simply put, the statement made by the Financial Crimes Enforcement Network of the Department of Treasury is incorrect as to the law of unincorporated nonprofit associations.

199. See REV. UNIF. UNINC. NONPROFIT ASS’N ACT § 2, cmt. 8.
204. See also KY. REV. STAT. ANN. § 273A.030 (West 2015).
205. See id. § 14A.3-010(16).
206. See id. § 14A.3-010(1); see also id. § 14A.1-070(20) (defining “name of record with the Secretary of State”).
The assumed name statute has been revised to define the real name of a KyUNPA and to allow a KyUNPA to file an assumed name. A KyUNPA, subject to distinctions based upon whether or not a particular KyUNPA has or has not filed a certificate of association, is subject to the assumed name statute.

The application of the rules governing annual reports to KyUNPAs is dependent upon whether or not the particular KyUNPA has filed a certificate of association. If no certificate of association is filed, then there is no annual report required. Conversely, if a certificate of association has been filed, an annual report is required.

C. Liability for Association Debts & Obligations; Limited Liability

The members and other participants in an unincorporated nonprofit association are, as a default, each liable for its debts and obligations. While the Uniform Act, by fiat, reversed the rule and afforded limited liability ab initio, this policy has not been carried forward in Kentucky. Rather, under Kentucky law, limited liability is available if and only if the association makes a filing with the Secretary of State. The rationale for this treatment is the protection of third-party creditors. In every instance under Kentucky law, limited liability is conditional upon a state filing. That filing, whether denominated articles of incorporation, articles of organization, certificate of limited partnership, statement of registration, or otherwise, puts third parties on notice that there exists a business organization with whom they are or may be doing business, and that they as creditors may (absent a guarantee or other credit enhancement) look only to the assets of the business for satisfaction of their claims. The

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207. See id. § 365.015.
208. See KY. REV. STAT. ANN. § 365.015 (West 2015).
209. See id. § 14A.6-010(7)(d).
210. See id. § 14A.6-010(6).
211. The mere fact of “entity” characterization of an unincorporated nonprofit association does not compel that the members thereof enjoy limited liability. For example, while a partnership may be treated as an entity, the partners are jointly and severally liable for the partnership’s debts and obligations absent election of limited liability partnership status. See id. § 362.1-201; id. § 362.1-306(1); id. § 362.1-306(3). Consequently, there is at best limited utility in defining a particular form of business organization as being an “entity”; the term itself has no intrinsic meaning in that there is no defined set of consequences that necessarily follow from that label. See also supra note 200.
213. See id. § 271B.2-020 (West 2015) (articles of incorporation); id. § 272A.3-010 (articles of association); id. § 273.247 (articles of incorporation); id. § 275.025 (articles of organization); id. § 362.555 (statement of registration); id. § 362.1-931 (statement of qualification); id. § 362.2-201 (certificate of limited partnership); id. § 386A.2-010 (certificate of trust).
214. See, e.g., id. § 275.025(7); id. § 386A.2-010(6)(a).
215. In parallel, while a partnership may come into existence without a state filing, partners enjoy limited liability if and only if a filing is made with the state on the public record. See, e.g., id. § 362.555; id. § 362.1-931.
grant of limited liability to the participants in the venture is only from the time of filing with the Secretary of State.\(^{216}\)

Affording the participants in an unincorporated nonprofit association limited liability from its debts and obligations absent a public filing would do violence to the symmetry existing in all of the other business entity statutes. Further, the model employed in the Uniform Act is an invitation to abuse. Persons could contract and then assert they did so on behalf of a subsequently conceived unincorporated nonprofit association. While a variety of laws could be utilized by a creditor to impose personal liability upon the direct actors,\(^ {217}\) there is no policy basis for requiring a creditor, who has acted in good faith and in reliance upon the public record, to incur the costs of demonstrating the application of those laws. Kentucky long ago abandoned the notion that nonprofit organizations are in some manner shielded from liability for the consequences of their actions.\(^ {218}\) In the same vein, those who act on behalf of a nonprofit organization are liable for the consequences of their individual actions. Those acting on behalf of an unincorporated nonprofit association are responsible for the debts they create, or permit to be created, unless creditors are put on notice of an election of limited liability.

The filing by which limited liability is elected is a “certificate of association.”\(^ {219}\) The certificate of association must set forth:

- the name of the association;
- its mailing address;
- its registered office and agent; and
- its purpose.\(^ {220}\)

\(^{216}\) See, e.g., id. § 14A.2-070(1); id. § 271B.2-030; id. § 271B.2-040; id. § 272A.3-010(2); id. § 275.025(7); id. § 275.095; id. §§ 386A.2-010(1), (6).

\(^{217}\) See, e.g., RESTATEMENT (THIRD) OF AGENCY §§ 6.01–6.03 (2006). In Perry v. Ernest R. Hamilton Associates, Inc., 485 S.W.2d 505 (Ky. 1972), an individual retained an engineering firm to lay out a proposed subdivision, but did not disclose that proposed subdivision was owned by a corporation. When that engineering firm sued to collect on the fees, and the individual cited the existence of the corporation as a defense to personal liability, the court held the individual was personally liable for the fees as he had failed to disclose the existence of the corporation or to put the engineering firm on notice that it was dealing with a corporation. See also Water, Waste & Land, Inc. v. Lanham, 955 P.2d 997 (Colo. 1998); Hopkins Advertising and Public Relations, Inc. v. Morris, No. 541071, 1997 WL 306653, at *1, 2 (Conn. Super. May 29, 1997) (where individual signed agreement without noting that he did so as agent for an LLC and did not disclose the existence of the LLC principal, he took on personal liability on that obligation); Hosale v. Warren, No. 01A01-9810-CV-00523, 1999 WL 548538 (Tenn. Ct. App. July 29, 1999); Baumstein v. Myklebust, No. 01-0614, 2001 WL 869506 (Wis. Ct. App. Aug. 2, 2001).


\(^{219}\) See KY. REV. STAT. ANN. § 273A.030(1) (West 2015).
The filing fee for a certificate of association is $15.00.\textsuperscript{221} In accordance with the law governing other forms of business organizations, the grant of limited liability effected by the filing of a certificate of association will not protect an individual from liability for their own negligence, wrongful acts, or misconduct.\textsuperscript{222}

In the absence of the filing of certificate of association consequent to which the members enjoy limited liability in any suit brought against the association, the judgment rendered thereon will not be binding upon a member ab initio unless that member was named as a party. There are, however, a series of provisions pursuant to which, in the absence of certificate of association, the members may, consequent to their personal liability for the debts and obligations of the association, be required to satisfy that judgment.\textsuperscript{223}

D. Suits By or Against an UNPA

A UNPA may sue or be sued in its own name.\textsuperscript{224} A suit against a UNPA in which a statement of association has been filed, and thereby a registered agent designated, may be initiated by service on the registered agent.\textsuperscript{225} Where no registered agent has been designated, service may be completed as otherwise provided by law.\textsuperscript{226} The capacity to sue or be sued in its own name is a common characteristic of business organizations.\textsuperscript{227} This capacity extends to suits by a...

\textsuperscript{220} See id. § 273A.025. The name of the association is subject to KRS § 4A.3-010, and the registered office/agent are subject to KRS § 14A.4-010. The effective time and date of the certificate will be determined under KRS § 14A.2-070. Changes in registered office/agent will be made as provided in KRS § 14A.2-040, and the principal office address may be changed as provided in KRS § 14A.5-010.

\textsuperscript{221} See id. § 14A.2-060(1)(p).

\textsuperscript{222} See id. § 273A.030(2); accord id. § 271B.6-220(2); id. § 272A.5-030(3); id. § 275.150(3); id. § 362.1-306(4); id. § 362.2-303(2); id. § 362.2-404(4); id. § 386A.3-040(6).

\textsuperscript{223} See id. § 273A.040(2). This provision is not uniform. It is important to recognize that subsection (2) of KRS § 273A.040 does not create an exception to the rule of limited liability available to the members of an unincorporated nonprofit association from the filing of the certificate of association. Where a certificate of association is in place, the members, qua members, are not liable for the debts and obligations of the association. Subsection (2) of KRS § 273A.040, addressing when a judgment creditor of an association may levy against the assets of the member, is inapplicable if the members enjoy limited liability. Rather, this provision applies if and only if no certificate of association is in place, providing, \textit{inter alia}, that the assets of the association must first be exhausted before the assets of any individual member may be attached in satisfaction of the judgment unless one of the explicated exceptions applies.

\textsuperscript{224} See id. § 273A.035(1); accord REV. UNIF. UNINC. NONPROFIT ASS’N ACT § 9(a), 6B U.L.A. 191 (Supp. 2014). This capacity extends beyond traditional suits in court to administrative and alternative dispute resolution such as arbitration. See id., cmt. 2.

\textsuperscript{225} See KY. REV. STAT. ANN. § 273A.045 (West 2015); see also id. §§ 273A.030(1)(c), 14A.4-040(1); accord REV. UNIF. UNINC. NONPROFIT ASS’N ACT § 11, 6B U.L.A. 193 (Supp. 2014).


\textsuperscript{227} See, e.g., KY. REV. STAT. ANN. § 271B.3-020(1)(a) (West 2015); id. § 272A.1-060(1); id. § 275.330; id. § 362.605; id. § 362.1-307(1); id. § 386A.3-060(1).
member or manager against the UNPA, or a UNPA suit against a member or manager.\textsuperscript{228} If a UNPA has filed a certificate of association and thereby has elected limited liability for its members and other constituents\textsuperscript{229} a member or manager is not a proper party to the action simply by reason of their status as a member or manager.\textsuperscript{230} This provision is not uniform and has no equivalent in the Uniform Unincorporated Nonprofit Association Act.\textsuperscript{231}

Even where the UNPA has not filed a statement of association, and thereby elected limited liability, a judgment against the association is not enforceable against a member or manager thereof unless and until certain conditions have been satisfied.\textsuperscript{232} A creditor may include as parties to the action some or all of the members or managers and conceivably be awarded a judgment against them coincident with the receipt of a judgment against the association. In that instance the judgment against the member or manager may be immediately enforced and need not wait upon a determination that the association is unable to satisfy the judgment. A change in the membership or management of a UNPA will not abate a pending action by or against it.\textsuperscript{233}

If the UNPA has filed a certificate of association, the proper venue for an action against an association is the county in which its registered office is located\textsuperscript{234} Where the UNPA has not filed a certificate of association, the rules applicable to general partnerships are adopted to determine proper venue.\textsuperscript{235}

\textbf{E. Members}

Every UNPA must have two or more members; a single-member UNPA does not satisfy the statutory definition and is not governed by this Act.\textsuperscript{236}

A member of a UNPA is not by reason of that status an agent of the association.\textsuperscript{237} Except as may be otherwise provided in the governing

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\textsuperscript{230} See id. § 273A.035(3); accord id. § 275.155.
\textsuperscript{231} See also id. § 275.155.
\textsuperscript{235} See id. § 273A.055(2). This provision is similar to, but departs from, the Uniform Act. See Rev. Unif. Uninc. Nonprofit Ass’n Act § 13, 6B U.L.A. 195 (Supp. 2014).
principles, members vote on a per-capita basis with a majority vote controlling. Unless delegated in the governing principles to the managers, there is expressly reserved to the members the right to vote on certain matters. There are left to the governing principles rules as to notice of, quorum for, and other procedural rules for member meetings. While a member is not, consequent to that status, in a fiduciary relationship with either the UNPA or any other member thereof, each member is bound by an obligation of good faith and fair dealing.


A person becomes a member in a UNPA in accordance with its governing principles or, in the absence of governing principles as to admission of members, by a vote of a majority of the incumbent members. On those same terms, a member may be suspended, dismissed, or expelled from the association. Resignation, suspension, dismissal, or termination of a member will not relieve that person of unsatisfied obligations to the association. A member may resign at any time unless the governing principles impose limitations upon the right to resign. Unless a contrary rule is set forth in the governing principles, a member’s interest in the association is not transferrable.

F. Management

Every UNPA is required to be managed by “managers” who have the authority to make all decisions on the association’s behalf except those reserved

Int’l, 55 A.3d 629 (Del. Ch. 2011).

The covenant of good faith and fair dealing will not preclude a party from exercising their contractual rights. See, e.g., Scheib v. Commonwealth Anesthesia, P.S.C., No. 2010–CA–000781–MR, 2011 WL 5008089, at *5 (Ky. Ct. App. Oct. 21, 2011); Willmott Hardwoods, 171 S.W.3d at 11; see also United Propane Gas, Inc. v. Federated Mut. Ins. Co., Nos. 2005-CA-001101-MR, 2005-CA-001111-MR, 2007 WL 779443, at *3 (Ky. Ct. App. Mar. 16, 2007) (“Since Federated had a right to settle under the contract and therefore was merely exercising a contractual right, and UPG has otherwise cited us to no specific policy provision alleged to have been breached, we affirm the circuit court’s award of summary judgment on the breach of contract claim.”); Hunt Enters. v. John Deere Indus. Equip. Co., 18 F. Supp. 2d 697, 700 (W.D. Ky. 1997) (stating that the covenant of good faith and fair dealing, “does not preclude a party from enforcing the terms of the contract . . . . It is not ‘inequitable’ or a breach of good faith and fair dealing in a commercial setting for one party to act according to the express terms of a contract for which it bargained”). Another important point is that the implied covenant does not serve to preclude self-dealing conduct, but rather only police it at the margins by protecting the express contractual terms. See, e.g., Scatourchio Racing Stable, LLC v. Walmac Stud Management, LLC, 2014 WL 2113096, *9 (E.D. Ky. 2014) (“As to allegations that “constitute self-dealing,” a party may act in its own interest and not breach the covenant of good faith and fair dealing, as long as its discretion is not used in a way that is contrary to the spirit of the agreement.”).


Managers are selected by a majority of the members, and there is no requirement that a manager be a member. If the members do not elect or otherwise designate managers, then every member is as well a manager. Each manager has an equal vote, and the managers act by a majority. There exists no requirement as to a minimum number of managers beyond one. Each of these rules may be altered in the governing principles.

Managers owe to the association fiduciary duties of care and loyalty. The statutory formula for the duties of care and loyalty owed to the association by the managers thereof is unique as contrasted to other formulas employed in Kentucky’s business entity statute. For that reason it is crucial that the focus be upon the words employed; loose analogy to the laws of other organizations is not proper.


253. KY. REV. STAT. ANN. § 273A.095(2) (West 2015); accord REV. UNIF. UNINC. NONPROFIT ASS’N ACT § 22(2), 6B U.L.A. 202 (Supp. 2014); see also KY. REV. STAT. ANN. § 271B.8-020 (West 2015) (director of corporation not required to be a shareholder therein); id. § 275.165(2)(b) (manager of LLC not required to be a member therein). Contra id. § 272A.8-030(1) (director of unincorporated cooperative association must be a member therein).


256. Contra KY. REV. STAT. ANN. § 273.211(1) (West 2015) (nonprofit corporation required to have not fewer than three directors).


258. See KY. REV. STAT. ANN. § 273A.100 (West 2015); accord REV. UNIF. NONPROFIT ASS’N ACT § 23(a), 6B U.L.A. 203 (Supp. 2014) (stating expressly that the duties are owed to the association; it is clear that they are not owed to the members either individually or collectively); see also 1400 Willow Council of Co-Owners, Inc. v. Ballard, 430 S.W.3d 229 (Ky. 2013); Baptist Physicians Lexington, Inc. v. New Lexington Clinic, P.S.C., 436 S.W.3d 189, note 4 (Ky. 2013); BSA Mull, LLC v. Garfield Investment Company, Nos. 310989, 311911, 315359, 315544, 2014 WL 4854306, *6 (Mich. Ct. App. Sept. 30, 2014) (“The LLC’s requirement that a manager discharge duties ‘in the best interest of the [LLC],’” MCL 450.4404(1), indicates that a manager’s fiduciary duties are owed to the company, and not the individual members.”); accord Sires v. Linden Shores Ass’n, No. X04IHDCV146054149S, 2015 WL 3798173 (Conn. Super. Ct. May 27, 2015) (“A condominium association owes a duty of care and loyalty [to] all unit holders collectively but owes no fiduciary duty directly to any individual unit holder . . . .”).

259. See also Pannell v. Shannon, 425 S.W.3d 58, 67-68 (Ky. 2014). In Pannell, the court stated:

[The] common law of business entities has largely been abrogated by the adoption of the various statutes like the Kentucky Business Corporation Act
The fiduciary duty standard, which is not identified as being subject to modification in the governing principles, obligates each manager to manage in good faith, in a manner the manager honestly believes to be in the best interest of the association, and on an informal basis. Reliance upon the opinions and information provided by others is conditionally appropriate. A related-party transaction (which would otherwise violate the duty of loyalty) may be approved or ratified after full disclosure by a majority of the disinterested members. The governing principles may limit the exposure of a manager to liability for breach of the fiduciary standards, provided that failure does not fall within certain prescribed conduct.

Pursuant to a non-uniform provision, rules as to notice, quorum, and other procedural requirements for manager meetings shall be set by the governing principles.

and the Kentucky Limited Liability Company Act. In fact, “limited liability companies are creatures of statute controlled by Kentucky Revised Statutes (KRS) Chapter 275,” not primarily by the common law. To the extent that common law doctrines could arguably govern limited liability companies, the Kentucky Limited Liability Company Act is in derogation of common law, KRS 275.003(1), and the traditional rule of statutory construction that require[s] strict construction of statutes which are in derogation of common law shall not apply to its provisions. Thus, to the extent the statutes conflict with common law, the common law is displaced.

This Court must therefore first look at the controlling statutory law. Id. (citations omitted). 260. KY. REV. STAT. ANN. § 273A.100(2) (West 2015); accord REV. UNIF. UNINC. NONPROFIT ASS’N ACT § 23(b), 6B U.L.A. 203 (Supp. 2014).

261. KY. REV. STAT. ANN. § 273A.100(2) (West 2015). In 1988, the General Assembly passed a “Good Samaritan” statute precluded personal liability of uncompensated directors for the consequences of actions: (i) undertaken in good faith; (ii) within the scope of official functions and duties; and (iii) not caused by willful or wanton misconduct. Id. § 411.200. Presumably this statute could be applied to the managers of an unincorporated nonprofit association. The differential between the standards of this statute and the substantive requirements of the law governing directors of a nonprofit corporation and the managers of an unincorporated nonprofit association is potentially troubling. The issue was resolved in 1991 by an opinion of the Attorney General finding that KRS section 411.200 is unconstitutional in that it violates Sections 14 and 54, and potentially violates Section 241, of the Kentucky Constitution. See Ky. Att’y Gen. Op. 91-89, 1991 WL 533922 (June 3, 1991).

262. See KY. REV. STAT. ANN. § 273A.100(3) (West 2015); accord REV. UNIF. UNINC. NONPROFIT ASS’N ACT § 23(c), 6B U.L.A. 203 (Supp. 2014). Note that a “fair to the association” defense to a related party transaction is not provided for. Accord KY. REV. STAT. ANN. § 275.170(3) (West 2015); id. § 362.1-404(5); id. § 362.2-408(5); id. § 386A.5-070(3); see also id. § 386B.10-030(1). Contra id. § 271B.8-310(1)(c).

263. See KY. REV. STAT. ANN. § 273A.100(5) (West 2015); accord REV. UNIF. UNINC. NONPROFIT ASS’N ACT § 22(e), 6B U.L.A. (Supp. 2014) 203. Any such limitation must be in a record.

G. Inspection of Books and Records

Members in their capacity as members and managers in their capacity as managers have the right to inspect association books and records. The right of inspection is collared by the requirement of a proper purpose, and a limitation to information “material to the member’s or Manager’s rights and duties under the governing principles.” The Kentucky act is not uniform as to the right of the association to limit access to and use of association information. Essentially, where the uniform act would defer to the association to unilaterally impose limitations on access to and use of information, the Kentucky Act looks to the governing principles for such limitations, and unless set forth in written governing principles assented to by the member or manager seeking inspection, the association bears the burden of showing the reasonableness thereof. While former members and managers are afforded inspection rights, it is difficult to imagine how they satisfy the requirement that any particular records be maintained by the association. Ergo, the right of inspection is collared by the requirement of a proper purpose, and a limitation to information “material to the member’s or Manager’s rights and duties under the governing principles.”

H. Property; Statement of Authority

A UNPA may hold in its name real, personal, and intangible property. With respect to real property, the UNPA may file a “statement of authority” by which there is made a public record of the capacity of a person to on its behalf affect a transfer of the real property. Note that in the Kentucky enactment, the definition of the “statement of authority” set forth as subsection (1) of section 7 of the uniform act has been moved to the table of defined terms. The statement of authority has precedent in partnership law. Filed with the title records of the county clerk where the transfer would be recorded, a statement of authority is conclusive as to the authority of the person executing the transfer on the


269. See id. § 273A.110(4).


273. See id. § 362.1-303 (West 2015); see also Rutledge & Vestal, supra note 190, at 59–61.
association’s behalf as to a grantee without notice of a limitation on the authority who gives value.\textsuperscript{274} A statement of authority has a maximum term of five years.\textsuperscript{275} Note that there is no requirement of a statement of authority to transfer real property held in the name of a UNPA. Rather, it is an optional mechanism by which to avoid questions as to the capacity of the person signing on behalf of the UNPA. A grantee with those concerns, or a title insurer seeking to avoid those questions, may insist that a statement of authority be filed on record prior to the property transfer.

\textit{I. Finance}

An unincorporated nonprofit association may not pay dividends or make other distributions to its members, except to a limited degree upon dissolution.\textsuperscript{276} Still, without violating the limits against dividends/distributions, an unincorporated nonprofit association may pay reasonable compensation,\textsuperscript{277} reimburse expenses,\textsuperscript{278} confer benefits on its members consistent with its nonprofit purpose,\textsuperscript{279} repay a capital contribution, or repurchase a membership if doing so is authorized by the governing principle.\textsuperscript{280} In the event of an improper distribution, a member may bring a derivative action.\textsuperscript{281}

It should be recognized that the Unincorporated Nonprofit Association Act twice addresses reimbursement of expenses. It does so, however, using two different formulas; whether this differential is intentional is open to question. In the initial provision, the association has a permissive (“may”) capacity to “reimburse reasonable expenses to a member or manager for services rendered.”\textsuperscript{282} The second provision, which is set forth as a mandatory “shall”


(subject to a contrary provision the governing principles), obligates the association to “reimburse a member or manager for authorized expenses reasonably incurred in the course of the member’s or manager’s activities on behalf of the association.” The commentary provided to the act is silent as to explanation of this apparent duplication.

An unincorporated nonprofit association has the capacity, but not the obligation, to indemnify its members and managers from debts, obligations, or liabilities incurred on behalf of the association, provided that the person seeking indemnification has, in the case of a member who is not a manager, acted in good faith or, in the case of a manager, discharged their fiduciary obligations. In a rare application of the statute of frauds in the statute, the right to indemnification may be broadened or limited in the governing principles provided the broadening or limitation is in record form.

J. Dissolution

An unincorporated nonprofit association may be dissolved:

- as provided in the governing principles as to either time or method;
- when the governing principles are silent, with the approval of a majority of the members;
- if the activities of the association have been discontinued for at least three years, by its current or last managers;
- by court order;

283. See also Ky. Rev. Stat. Ann. §§ 446.110(20), (29) (West 2015) (defining, respectively, “may” and “shall”).
290. See Ky. Rev. Stat. Ann. § 273A.125(1)(d) (West 2015); accord Rev. Unif. Uninc. Nonprofit Ass’n Act § 28(a)(4), 6B U.L.A. 207 (Supp. 2014). Note that the statute is silent as to the standard to be employed by the courts in determining whether or not to dissolve the association. The comment states that “it is impossible or impracticable to continue the UNA, for example
• under other law.291

Consistent with the law governing other business organizations, an unincorporated nonprofit association continues its existence after dissolution.292 Upon dissolution, the debts and obligations of the association are to be satisfied,293 assets held subject to trust or requiring return to the donor are to be conveyed in accordance therewith,294 with the remaining assets distributed to other persons with similar nonprofit purposes, to the members, or as directed by the appropriate court.295

It should be noted that, unlike most other business organization statutes, the KyNPAA does not afford a mechanism by which known creditors of an association may be notified of its dissolution and afforded a limited period of time in which to tender claims.296 Likewise, the KyNPAA does not provide a notice-filing mechanism by which unknown creditors can be notified of the dissolution or the winding up and liquidation of an association.297 As a consequence of these omissions, it will often be difficult to determine, on behalf of a nonprofit unincorporated association, that all creditor claims against the association’s assets have been satisfied.298 The absence of these provisions of the uniform act is curious in that they are standard provisions in another uniform unincorporated entity laws.299

because of a deadlock” as a basis of dissolution. See REV. UNIF. UNINC. NONPROFIT ASS’N ACT § 28, cmt. 2, 6B U.L.A. 208 (Supp. 2014). Likewise, the statute is silent as to who has standing to move for judicial dissolution. Contra KY. REV. STAT. ANN. § 271B.14-300 (West 2015); id. § 275.290(1).


292. See KY. REV. STAT. ANN. § 273A.125(2) (West 2015); accord REV. UNIF. UNINC. NONPROFIT ASS’N ACT § 27(b), 6B U.L.A. 207 (Supp. 2014); see also KY. REV. STAT. ANN. § 271B.14-050(1) (West 2015); id. § 272A.12-060(1); id. § 275.300(2); id. § 386A.8-040(1).

293. See KY. REV. STAT. ANN. § 273A.130(1) (West 2015); accord REV. UNIF. UNINC. NONPROFIT ASS’N ACT § 28, 6B U.L.A. 208 (Supp. 2014); see also KY. REV. STAT. ANN. § 271B.14-050(1) (West 2015); id. § 275.310(1); id. § 272A.12-070(1); id. § 362.1-807(1); id. § 362.2-803(2)(b); id. § 386A.8-040(1)(c).


296. See, e.g., KY. REV. STAT. ANN. § 271B.14-060 (West 2015); id. § 272A.12-080; id. § 275.320; id. § 386A.8-060.

297. See, e.g., id. § 271B.14-070; id. § 272A.12-090; id. § 275.325; id. § 386A.8-070.

298. Dissolution of an unincorporated nonprofit association will often be first be reflected in the public record by administrative dissolution consequent to failure to file an annual report, a fate reserved to those associations which file a certificate of association. See KY. REV. STAT. ANN. § 14A.7-010(1)(a) (West 2015).

K. Mergers

The uniform act provides for mergers between unincorporated nonprofit associations with other organizational forms. These provisions have not been carried forward into the Kentucky enactment. As such, until such time as Kentucky adopts a comprehensive “junction box” act governing all organic transactions and entity forms, unincorporated nonprofit associations lack the capacity to enter into a merger.

L. Relationship to Other Law; Uniformity

Principles of law and equity supplement the Act. It is important to recognize that an KyNPAA is its own freestanding body of law. It is not directed or otherwise indicated that the laws of partnerships, corporations (whether for-profit or not-for-profit), limited liability companies (whether for-profit or not-for-profit) or any other body of organizational law shall serve as the “gap filler” when either the agreement as to a particular venture or the unincorporated nonprofit association act are silent. Rather, when the statute and the private ordering of a particular association are silent, general principles of law and equity should be referenced.

If another statute governs a particular form of unincorporated nonprofit association, to the extent of an inconsistency with this act, the other act will control.

It is directed that the act be construed to promote uniformity among the states that have adopted the act. Similar provisions appear in other of Kentucky’s adoption of uniform acts. It needs to be appreciated that this dictate extends only so far as the Kentucky enactment of the statute is consistent with the uniform act. Where the statutory language employed in Kentucky departs from the language employed in the uniform act, uniformity is obviously not the

301. See KY. REV. STAT. ANN. § 273A.150(1) (West 2015); accord REV. UNIF. UNINC. NONPROFIT ASS’N ACT § 3(c), 6B U.L.A. 184 (Supp. 2014).
302. See also KY. REV. STAT. ANN. § 362.1-202(2) (West 2015) (partnership law does not govern organizations formed under another statute); id. § 362.175(2) (partnership law does not govern organizations formed under another statute); id. § 271B.1-400(4) (a corporation is subject to this act); id. § 275.020; id. § 386A.1-020(32) (a statutory trust is “formed under this chapter.”).
303. See id. § 273A.155(1).
304. See id. § 273A.150(2); accord REV. UNIF. UNINC. NONPROFIT ASS’N ACT § 3(a), 6B U.L.A. 184 (Supp. 2014).
306. See, e.g., KY. REV. STAT. ANN. § 272A.17-010 (West 2015); id. § 362.1-971; id. § 362.2-971; id. § 386A.10-010.
307. See, e.g., id. § 273A.025 (requiring the filing of a certificate of association in order for the members and managers to enjoy limited liability).
intended result, and cases and commentary from other states are of diminished or no value as interpretive aids.

M. Tax Treatment

Expressly not considered herein are questions involving federal and state income taxation of an unincorporated nonprofit association. These issues are at a minimum challenging in that, ab initio, an unincorporated nonprofit association is not a “corporation” falling within section 501 of the Internal Revenue Code. While the Kentucky Unincorporated Nonprofit Association Act does set forth a default organizational paradigm for these often informal organizations, these tax complexities may caution against the intentional utilization of this form by persons who are not otherwise well-versed in the tax consequences of this form.

XI. Public Benefit Corporations

There was submitted to the 2015 General Assembly H.B. 11,\textsuperscript{308} proposing amendments to the Kentucky Business Corporation Act which would create an elective status of a “public benefit corporation” (hereinafter “PBC”). The primary effect of PBC status would be increased flexibility in the board of directors to pursue certain goals that in and of themselves do not maximize shareholder value. This proposal, however, did not pass the 2015 General Assembly and as such PBC status is not provided for under Kentucky law. Nonetheless, a review of the proposal is a worthwhile endeavor.

If one starts with the supposition that the board of directors of a business corporation is obligated to maximize shareholder value,\textsuperscript{309} PBC status expressly

\textsuperscript{308} Similar legislation was proposed to the 2014 General Assembly. See 2014 Ky. H.B. 66. Likewise, a proposal to provide for benefit corporations was presented to the 2016 Kentucky General Assembly. See 2016 Ky. H.B. 50. While this bill was passed favorably out of the House, it did not receive a hearing in the Senate.

\textsuperscript{309} Whether or not that is actually the law is open to significant debate. Proponents of this view cite the now nearly century-old decision rendered by the Michigan court in \textit{Ford v. Dodge} and cite as well the more recent decision of the Delaware Chancery Court in the eBay litigation. See \textit{Ford v. Dodge}, 170 N.W. 668 (Mich. 1919); eBay Inc. v. MercExchange, LLC., 547 U.S. 388 (2006); see also \textit{In re Trados Inc. Shareholder Litig.}, 73 A.3d 17, 37 (Del. Ch. 2013) (“In terms of the standard of conduct, the duty of loyalty therefore mandates that directors maximize the value of the corporation over the long-term for the benefit of the providers of equity capital, as warranted for an entity with perpetual life in which the residual claimants have locked in their investment.”); \textit{In re Novell, Inc. Shareholder Litig.}, No. 6032–VCN, 2013 WL 322560, at *7 (Del. Ch. May 1, 2013) (“There is no single path that a board must follow in order to maximize stock holder value, but directors must follow a path of reasonableness which leads toward that end.”); see also Leo Strine, \textit{A Job is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematical Implications}, 41 J. CORP. L. 71 (2015). Others have put forth cogent arguments that shareholder maximization is in fact not the obligation of the board of directors. See, e.g., Lynn A. Stout, \textit{Why We Should Stop Teaching Dodge v. Ford}, 3 VA. L. BUS. REV. 163 (2008); LYNN A. STOUT, THE SHAREHOLDER VENTURE MYTH: HOW PUTTING SHAREHOLDERS FIRST HURTS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012). Under Kentucky law, a board of directors, in the
permits the board of directors, in the discharge of their fiduciary obligations, to consider the defined public benefits. What those public benefits are will be defined on a case-by-case basis of each benefit corporation in its articles of incorporation. Thereafter, actions of the board of directors in applying corporate assets to those purposes will not in and of itself constitute a breach of the directors’ (supposed) obligation to maximize shareholder value.

Under existing law, there exists significant flexibility to in the articles of incorporation specify a “public benefit” and authorize the board of directors to discharge corporate assets in furtherance thereof. For example, the articles could specify a maximum amount that could be devoted to the public benefit measured in terms of a fixed amount (e.g., $100,000 per year), an amount per share, or a percentage of a measure such as net income or EBITDA. So long as that determination is sanctioned by the shareholders, and absent insolvency, distributions in accordance therewith will not violate a director’s duty to act “in the best interest of the corporation.” Consequently, it is open to debate whether there is under Kentucky corporate law the need for a PBC status and the resulting flexibility to avoid a wealth maximization obligation.

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discharge of its fiduciary obligations, is permitted to consider the interests of constituencies other than the shareholders. This provision is not restricted in its application to situations involving possible changes in control. See Ky. Rev. Stat. Ann. § 271B.12-210(4) (West 2015) (“or otherwise”); see also Rutheford B. Campbell, Kentucky Corporate Fiduciary Duties, 93 Ky. L.J. 551, 562 (2005). As such, there is statutory authority for the proposition that the board of directors of a Kentucky corporation does not have a shareholder wealth maximization obligation.

FEDERALISM, MANDATES AND INDIVIDUAL LIBERTY

Professor John T. Valauri

ABSTRACT

This article presents the missing federalism and individual liberty portion of Chief Justice Roberts’ health care case opinion. It illuminates and reinforces the commerce power and limited and enumerated powers arguments he makes there just as the Tenth Amendment and the doctrine of federalism more generally illuminate and reinforce the commerce power and the doctrine of limited and enumerated powers in constitutional law and doctrine. It also answers and explains the claims made by the Chief Justice’s critics on and off the bench that his opinion and similar arguments made by like-thinking lower court judges and law professors use a semi-respectable cover of federalism and enumerated powers arguments to mask their real constitutional doctrine and goals—turning back commerce power doctrine to the bad old days of *Hammer v. Dagenhart* and economic due process doctrine to the much-maligned case of *Lochner v. New York*. These critics, in effect, take the Chief Justice and his supporters here to be conservative deconstructionists, intent on reversing the status and valorization of the current constitutional canon and anti-canon.

The Chief Justice’s critics are right to say that his opinion is based on (largely unstated) individual liberty grounds, but they are wrong to charge that these are economic due process grounds. The unconstitutionality of individual economic mandates can be established without turning back the constitutional clock or overturning modern precedent. It can be better accomplished in a doctrine of federalism and individual liberty fully consistent with Supreme Court precedent since 1937, including the health care case. This argument brings together the doctrine of the Court’s state anti-commandeering cases and their Tenth Amendment/individual liberty decision in *Bond v. United States* to argue for the unconstitutionality of individual economic mandates and appeals to the spirit as well as the letter of the Constitution.

These critics misperceive the differences between their constitutional vision and that of Chief Justice Roberts, taking them to involve a difference in canons, when instead they arise out of a difference in constitutional gestalts. The two sides here do not follow different cases; they only have different takes on the same cases. Chief Justice Roberts’ critics overlook the view of federalism and individual liberty here presented, mainly because there is no logical space for it in their constitutional worldview which, for example, sees the Tenth Amendment as merely a truism. For this reason, they wrongly conclude that those holding opposing views can only do so because they reject post-1937 constitutional
precedent and doctrine and wish to bring back *Lochner*, *Hammer* and the constitution in exile.

I. INTRODUCTION

This article presents the missing federalism and individual liberty portion of Chief Justice Roberts’ 2012 health care opinion. It illuminates and reinforces the commerce power and limited and enumerated powers arguments he makes there just as the Tenth Amendment and the doctrine of federalism more generally illuminate and reinforce the commerce power and the doctrine of limited and enumerated powers in constitutional law and doctrine. It also answers and explains the claims made by the Chief Justice’s critics on and off the bench that his opinion and similar arguments made by like-thinking lower court judges and law professors use a semi-respectable cover of federalism and enumerated powers arguments to mask their real constitutional doctrine and goals—turning back commerce power doctrine to the bad old days of *Hammer v. Dagenhart* and economic due process doctrine to the much-maligned case of *Lochner v. New York*. These critics, in effect, take the Chief Justice and his supporters here to be conservative deconstructionists, intent on reversing the status and valorization of the currently accepted constitutional canon and anti-canon.

Now, the Chief Justice’s critics are right to say that his opinion is based, at least in part, on largely unstated individual liberty grounds, but they are wrong to charge that these are economic substantive due process grounds. There are alternative individual liberty grounds that strengthen the Chief Justice’s anti-mandate argument, rather than undercut it, as his critics seek to do. The unconstitutionality of the individual mandate of the Affordable Care Act can be established without turning back the constitutional clock or overturning modern precedent. In fact, this unconstitutionality can be demonstrated using doctrines.

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1. Nat’l Fed’n of Indep. Bus. v. Sebelius [hereinafter NFIB], 132 S. Ct. 2566, 2573 (2012) (Chief Justice Roberts holding that “[t]he individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority.”).

2. *Hammer v. Dagenhart*, 247 U.S. 251, 273-74 (1918) (striking down a federal statute prohibiting the interstate transport of the products of child labor, the Court says, “The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.”).

3. See generally *Lochner v. New York*, 198 U.S. 45 (1905) (utilizing a liberty of contract right said to be implied by the Due Process Clause of the Fourteenth Amendment to strike down a state statute regulating bakers’ hours of work).

4. *Lochner* and its like are now part of the judicial anti-canon, not the canon. See also NFIB, 132 S. Ct. at 2609 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting in part) (Justice Ginsburg argues that, “The Chief Justice’s crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress’ efforts to regulate the national economy[,]”).
of federalism and individual liberty expressed in Supreme Court precedent since 1937. My argument here brings together the doctrine of the Court’s state anti-commandeering cases\(^5\) and their Tenth Amendment/individual liberty decision in Bond v. United States\(^6\) to argue for the unconstitutionality of the individual mandate. In doing this, it appeals to the spirit and underlying principles as well as to the letter of the Constitution.\(^7\)

Mandate defenders misrepresent the differences between their constitutional vision and that of Chief Justice Roberts, taking them to involve a difference in canons, when instead they arise out of a difference in constitutional gestalts.\(^8\) The two sides here do not accept different cases and canons; they only have different takes on the same cases and canons. Chief Justice Roberts’ critics overlook the view of federalism and individual liberty here presented, mainly because they find no logical space for it in their constitutional worldview, which, for example, sees the Tenth Amendment as merely a truism\(^9\) rather than a recognition of the federalism and individual rights based limits on the scope of enumerated federal powers. For this reason, they wrongly conclude that those holding opposing views can only do so because they reject post-1937 constitutional precedent and doctrine and wish to bring back Lochner, Hammer, and the constitution in exile.\(^10\)

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\(^5\). See New York v. United States, 505 U.S. 144, 161 (1992) (“We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to directly compel the States to require or prohibit those acts.”); see also Printz v. United States, 521 U.S. 898, 899 (1997) (quoting The Federalist No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) (“Although the states surrendered many of their powers to the new Federal Government, they retained a ‘residuary and inviolable sovereignty.’”)).

\(^6\). Bond v. United States, 131 S. Ct. 2355 (2011) (holding that individuals, as well as states, can bring Tenth Amendment challenges to the constitutionality of federal statutes).

\(^7\). In the immortal words of John Marshall, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

\(^8\). See Lawrence Solum, The Decision to Uphold the Mandate as Tax Represents a Gestalt Shift in Constitutional Law, L. Theory Blog (June 28, 2012, 10:32 PM), http://lsolum.typepad.com/legaltheory/2012/06/the-decision-to-uphold-the-mandate-as-a-gestalt-shift-in-constitutional-law.html (describing a gestalt as a norm that provides “the core ideas” and one that creates a “holistic picture” which is “shaped by all the relevant legal materials”).

\(^9\). See United States v. Darby, 312 U.S. 100, 124 (1941) (after quoting the Tenth Amendment, Justice Stone says, “The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.”).

\(^10\). See Randy E Barnett, Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional, 5 N.Y.U. J.L. & Liberty 581, 605 (2010) (“[A]ll these [post-1937 commerce clause] cases involve activity, not inactivity. In none of these cases did the government mandate that citizens engage in economic activity by entering into a contract with a private company.”).
The battle over the constitutionality of the individual mandate is itself part of a larger war over limiting principles for federal power. One way that the fog of this war manifests itself here is in the confusion and disagreement over the basic terms of the debate and their meanings. Individual mandate opponents argue that the mandate is unprecedented and unconstitutional, while supporters reply that even the founders created economic mandates. Secondly, these mandate opponents argue that Congress’ commerce power is limited to the regulation of economic activity, so that it cannot constitutionally regulate inactivity. In response, mandate defenders point out that the activity/inactivity distinction is a novelty without foundation or support in constitutional text or precedent. They add that anything that can be described as inactivity can also be described as a form of activity. Thirdly, opponents charge that the individual mandate improperly commandeers the people, while defenders note the anti-

11. See id. at 637 (“If, however, Congress is allowed to regulate any decision that has an economic effect, or that Congress deems essential to its regulatory ambitions, then the scheme of limited and enumerated powers would be at an end. Because it is both unnecessary under existing doctrine and also improper, the individual health insurance mandate is unconstitutional.”).

12. See, e.g., Randy E. Barnett, Still Unprecedented: Recycling the Same Two Examples of Supposed Economic Mandates, VOLOKH CONSPIRACY (April 13, 2012, 3:59 PM), http://www.volokh.com/2012/04/13/still-unprecedented-recycling-the-same-two-examples-of-supposed-economic-mandates/ (“Every court that has considered the constitutionality of the insurance mandate, including those judges that upheld its constitutionality, have concluded that this mandate is unprecedented. The fact that these two examples have been so well discussed, debunked, and rejected explains why the Solicitor General cited neither in his oral argument when Justice Kennedy characterized this Commerce Clause mandate as unprecedented.”).

13. See, e.g., Einer Elhaug, If Health Insurance Mandates Are Unconstitutional, Why Did the Founding Fathers Back Them?, NEW REPUBLIC (April 13, 2012), http://www.newrepublic.com/article/politics/102620/individual-mandate-history-affordable-care-act?page=1 (in the 1790’s, Congress passed, and Presidents Washington and Adams signed, three laws that required that “ship owners buy medical insurance for their seaman,” “all able-bodied men . . . buy firearms” and “seamen to buy hospital insurance for themselves . . . there is no evidence that any of the few framers who voted against these mandates ever objected on constitutional grounds.”).

14. See Barnett, supra note 10, at 600 (“by limiting the substantial effects doctrine to economic intrastate activity, the Supreme Court provided the modem legal ‘test’ or ‘criterion of constitutionality’ for whether a regulation of intrastate activity is what ‘may truly be said’ to be necessary under the Necessary and Proper Clause. By this doctrine Congress is held within its enumerated powers and denied the ‘right to do merely what it pleases.’”).

15. See, e.g., Mark A. Hall, Commerce Clause Challenges to Health Care Reform, 159 U. PA. L. REV. 1825, 1834 (2011) (“Commerce clearly includes both the purchase of products and their manufacture and sale. Because regulation includes mandating as well as prohibiting behavior related to products, it follows logically that ‘regulating commerce’ can include mandating a purchase.”).


17. See Barnett, supra note 10, at 583 (“A newfound congressional power to impose economic mandates to facilitate the regulation of interstate commerce would fundamentally alter the relationship of citizen and state by unconstitutionally commandeering the people.”), id. at 626-27 (quoting U.S. CONST. amend. X) (“T]he anti-commandeering cases that limit the commerce power
commandeering cases protect state sovereignty, not individual rights. They note that the Constitution, unlike the Articles of Confederation, was designed to operate directly upon the people and not through the medium of the states.

Even this brief listing of the disagreements over basic terms and distinctions shows that the two sides in the mandate debate cannot be using terms like “mandate,” “activity,” and “commandeer” in the same ways. As a result, these terms have confused, rather than clarified, the constitutional issues in question. For this reason, this article starts by examining the use of these terms in the health care debate in order to sort out problems and to suggest improvements. It concludes that, of the three terms just mentioned, the commandeering notion best expresses and supports the constitutional arguments against the individual mandate. It is also the term with the firmest grounding in constitutional precedent and principle.

Once the terms of the dispute have been sorted out, this article moves on to banishing the ghost of *Lochner*, which hangs over the debate in strange ways. Mandate opponents primarily cast their critique of the mandate in terms of federalism and the commerce power, but sometimes let individual liberty claims slip out. Mandate supporters, in turn, use *Lochner*, *Hammer* and other cases from the constitutional anti-canon as rhetorical clubs to claim that these federalism and commerce power arguments are just a cover to reverse the New Deal Settlement, thereby undoing generations of doctrine and precedent. Although these claims are frequently made by mandate defenders, they are unfounded. Once the ghost of *Lochner* is thus banished, the New Federalist of Congress were ultimately grounded by the Supreme Court in the text of the Tenth Amendment. Yet the letter of the Tenth Amendment is not limited to the states. It says that the ‘powers not delegated by the Constitution to the United States . . . are reserved to the states respectively, or to the people.’ . . . In this way, the text of the Tenth Amendment recognizes popular as well as state sovereignty.”

18. *Id.* at 636 (“True, extending its anti-commandeering doctrine from the states to the people would be novel, but this is due entirely to the novelty of the individual mandate itself. Before Congress attempted to commandeer the American people, the Court never needed to explain why such a thing was improper.”).


20. *See generally* *Lochner v. New York*, 198 U.S. 45, 45 (1905); *see also supra* text accompanying note 4 (describing that *Lochner* and its like are now part of the judicial anti-canon, not the canon).


22. *See NFIB*, 132 S. Ct. at 2629 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (Justice Ginsburg critiques the Chief Justice’s reading of the Commerce Clause as “stunningly retrogressive,” saying that his opinion “bears a disquieting resemblance to . . . long-overruled decisions.”); *see also Hall, supra* note 15, at 1862 (“[N]ot only would [opposition to ACA] reinstate Lochner-esque protections of economic liberties, but the modern constraints would be far stronger than those in the Lochner era.” (2011); *see also Jamal Greene, What the New Deal Settled*, 15 U. Pa. J. CONST. L. 265, 287 (2012) (“Lochner, then, is the hardest-working case in the U.S. Reports. It is both a synecdoche and a rhetorical resource . . . . Like an athletic seven-footer, Lochner alters even the shots that it cannot block.”).
doctrine of federalism and individual liberty can be seen. Chief Justice Roberts and the other New Federalists do not reject the New Deal Settlement (in fact, they demonstrate the continuity and consistency of the two views), but they do not see that settlement as creating a general federal police power. They still hold to the notion of limited and enumerated powers and to the idea that federalism and the Tenth Amendment protect individual rights as well as state sovereignty. This protection, in both cases, takes the form of an anti-commandeering principle, which is part of a more general limit on federal power to coerce states and individuals (as seen, for example, with regard to the Medicaid expansion and contraception mandate portions of the ACA).

23. Most simply defined, the “New Deal Settlement” refers to doctrine followed by the Court since 1937; see also NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding that Congress has authority to regulate various operations of an interstate company, including labor relations in manufacturing that have a substantial effect on interstate commerce); see also Lawrence B. Solum, How NFIB v. Sebelius Affects the Constitutional Gestalt 1, 2 (Georgetown Public Law Research Paper No. 12-152, October 16, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152653 (“Whatever direct legal effects the Court’s decision ultimately produces, the thesis of this Essay is that the most important and far-reaching legal effects of NFIB are likely to be indirect. NFIB marks a possible shift in what we can call the ‘constitutional gestalt’ regarding the meaning and implications of what is called the ‘New Deal Settlement.’”) (internal citations omitted).

24. See NFIB, 132 S. Ct. at 2590-91 (Chief Justice Roberts acknowledges that, “The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions.”); see also United States v. Lopez, 514 U.S. 549, 552 (1995) (In one of the leading New Federalism cases, Chief Justice Rehnquist begins his discussion of constitutional doctrine in the case with this declaration: “We start with first principles. The Constitution creates a federal government of enumerated powers.”) (internal citation omitted).

25. NFIB, 132 S. Ct. at 2603 (quoting New York v. United States, 505 U.S. 144, 194 (1992)) (holding that “Congress ‘crossed the line distinguishing encouragement from coercion’ in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States’ existing Medicaid funds.”) (internal citation omitted); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1137 (10th Cir. 2013) (“The government urges that there can be no substantial burden here because ‘[a]n employee’s decision to use her health coverage to pay for a particular item or service cannot properly be attributed to her employer.’ There are variations on this same theme in many of the amicus briefs supporting the government’s position [that] one does not have a RFRA claim if the act of alleged government coercion somehow depends on the independent actions of third parties . . . . This position is fundamentally flawed because it advances an understanding of ‘substantial burden’ that presumes ‘substantial’ requires an inquiry into the theological merit of the belief in question rather than the intensity of the coercion applied by the government to act contrary to those beliefs.”) (internal citations omitted); Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs., 724 F.3d 377, 410 (3d Cir. 2013) (“[R]eligious exercise is substantially burdened by a law that puts substantial pressure on a person to commit an act discouraged or forbidden by that person’s faith, and the Hahns’ Mennonite faith forbids them not only from using certain contraceptives, but from paying for others to use them as well.”).
II. UNPRECEDEDENTED, UNLIMITED AND UNCONSTITUTIONAL

A. Liberty and Mandates

The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for liberty; but in using the same word we do not all mean the same thing. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men’s labor. Here are two, not only different, but incompatible things, called by the same name—liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatible names—liberty and tyranny.\(^{26}\)

Constitutional and political disputes in the United States sometimes arise out of disagreements concerning the scope and meaning of liberty. In Lincoln’s day the conflict was between the slaveholders’ definition in which, according to Chief Justice Roger Taney’s notorious statement, African-Americans had “no rights which the white man was bound to respect”\(^{27}\) and Lincoln’s view, based on the Declaration of Independence, that “all men are created equal.”\(^{28}\) So, too, it has been in other constitutional/political disputes, even in the health care debate, which culminated in the Supreme Court’s NFIB decision. That decision is not explicitly focused on issues of liberty; instead, the main constitutional issues explicitly involved there are Congress’ commerce, taxing and spending powers\(^{29}\)

\(^{26}\) Abraham Lincoln, Address at Sanitary Fair, Baltimore, Maryland (April 18, 1864), in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 301-02 (Roy P. Basler, ed. 1953) (emphasis in original).

\(^{27}\) Scott v. Sandford, 60 U.S. 393, 407 (1857).

\(^{28}\) See supra note 26, at 499-500 Abraham Lincoln, Address at Chicago, Illinois (July 10, 1858) (“[B]ut when they look through that old Declaration of Independence they find that those old men say that ‘We hold these truths to be self-evident, that all men are created equal,’ and when they feel that that moral sentiment taught in that day evidences their relation to those men, that it is the father of all moral principles in them, and that they have a right to claim it as though they were blood of the blood, and flesh of the flesh of the men who wrote that Declaration, (loud and long continued applause) and so they are. That is that electric cord in that Declaration that links the hearts of patriotic and liberty-loving men together, that will link those patriotic hearts as long as the love of freedom exists in the minds of men throughout the world [Applause.’”). Lincoln’s speech was given in response to the Supreme Court’s Dred Scott decision.

\(^{29}\) NFIB, 132 S. Ct. at 2572-73 (the power to regulate commerce presupposes the existence of commercial activity to be regulated. This Court’s precedent reflects this understanding: As expansive as this Court’s cases construing the scope of the commerce power have been, they uniformly describe the power as reaching ‘activity.’ The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.”) (internal citations omitted); id. at 2600 (“The Affordable Care Act’s requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”).
as well as federalism. But questions of individual liberty underlie and give rise to these issues. After all, as the Court has said elsewhere, federalism and enumerated powers limitations on Congressional power are designed to protect individual liberty and not merely as ends in themselves. Thus, for example, when the advocates on both sides came to sum up their cases in the NFIB oral argument, they cast their arguments in terms of individual liberty, not merely as a rhetorical flourish or as a play for Justice Kennedy’s vote, but, more importantly, as an explanation and support for their other arguments. Solicitor General Verilli told the Court that, “There is an important connection, a profound connection between that problem and liberty.” He continued, arguing that Medicaid expansion beneficiaries “will be unshackled from the disabilities that those diseases put on them and have the opportunity to enjoy the blessings of liberty.” In reply to General Verilli, Paul Clement said, “Let me finish by saying that I certainly appreciate what the Solicitor General says, that when you support a policy, you think that the policy spreads the blessings of liberty. But I would respectfully suggest that it’s a very funny conception of liberty that forces somebody to purchase an insurance policy whether they want it or not.” And so, here, too, one person’s liberty is another’s tyranny.

When Lincoln gave his address in 1864, he certainly was not arguing for the moral equivalence of different definitions of liberty or value relativism. He gave his life for a contrary assertion. The NFIB advocates take a similar view. But, as Lincoln suggests, using the same word (here “liberty”) to mean different things confuses, rather than facilitates, debate. This is exactly what happened in the health care litigation concerning terms such as “mandate,” “(in)activity” and “commandeer”—all terms used, at least in part, to express deprivation of individual liberty. This article will next examine these terms and their use in the health care debate in a search for what exactly is at stake for liberty here in constitutional terms. My hope is that this will clarify the underlying issues and differing conceptions of liberty in the debate and the case, the better to decide between them as a matter of constitutional principle and doctrine.

30. See id. at 2578 (quoting THE FEDERALIST NO. 45, at 293 (James Madison)) (“Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which ‘in the ordinary course of affairs, concern the lives, liberties, and properties of the people’ were held by governments more local and more accountable than a distant federal bureaucracy.”).

31. See Bond, 131 S. Ct. at 2364 (“Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.”) (internal citations omitted).


33. Id.

34. Id. at 83.
B. Unprecedented Mandates?

The arguments of the health care debate opponents on the constitutionality of the individual mandate could hardly be more divergent. Critics of the individual mandate assert that it is unprecedented,\textsuperscript{35} gives Congress unlimited power\textsuperscript{36} and, therefore, is unconstitutional.\textsuperscript{37} In contrast, some mandate defenders argue that not only are economic purchase mandates like the individual mandate not unprecedented, but were, in fact, well known and constitutionally accepted by the framers themselves (thus making unlikely that such mandates are suspect on originalist grounds).\textsuperscript{38}

Logically, two explanations might account for this disagreement on the constitutionality of purchase mandates generally and of the individual mandate in particular. One possibility is that both sides in the argument are talking about the same thing when they say “mandate” and it is simply the case that one side is factually and constitutionally correct in its arguments and that the other side is not. This is certainly the tenor of Einer Elhauge’s account of the debate. The second possibility is that neither side is making factually false assertions; rather, they are instead using the same word, “mandate,” to refer to two different notions or things, of differing constitutionality, much like the two sides in Lincoln’s liberty example. The question in the latter case then becomes exactly what those different things are and what their constitutional significance is. In what follows, I make the argument for the second possibility, based upon a distinction between conditional and unconditional mandates, that is, between mandates involving those already engaged in the regulated activity and those not doing so.

Let us first examine what Professor Elhauge says on framing era and other mandates and the conclusions regarding the individual mandate he seeks to draw from his eighteenth century and other examples. After that, we will turn to the argument between Elhauge and several individual mandate critics on the relevance and salience of his purported founding era purchase mandate examples.

\textsuperscript{35} Barnett, supra note 10, at 606.

\textsuperscript{36} See, e.g., Neil S. Siegel, Four Constitutional Limits That the Minimum Coverage Provision Respects, 27 CONST. COMMENT. 591, 593 (2011) (“If anxiety about unlimited federal power attracts the attention of five Justices, they will take a hard look at what the government’s limiting principles are.”); see also Ilya Somin, Insurance Mandate Has Fatal Flaws, NEWSDAY (Aug. 16, 2011, 7:24 PM), http://www.newsday.com/opinion/oped/somin-insurance-mandate-has-fatal-flaws-1.3101602 (“In this case, the law is improper because its logic would give Congress virtually unlimited power to mandate anything, destroying the balance between the federal government and the states.”).

\textsuperscript{37} See Siegal, supra note 36; see also Barnett, supra note 10, at 607.

\textsuperscript{38} Mandate supporter Einer Elhauge, for example, asserts, “It turned out that the constitutional challenge not only lacked any persuasive authority, but simply ignored the fact that the constitutional framers themselves had approved many purchase mandates, including mandates to buy health insurance itself!” EINER ELHAUGE, OBAMACARE ON TRIAL 1-2 (2012).

In this article, I will use Elhauge as my main example of defenders of the constitutionality of purchase mandates who deny that the individual mandate is unprecedented. I do this because he is representative of this group in a particular way; he says more and goes further than the others, often making explicit what is only implicit in most other arguments. This fact facilitates quicker and deeper analysis of the underlying issues here.
My aim here is not to pick a winner or to settle a factual dispute between the parties in this debate, but rather to examine the different usages and definitions of the term “mandate” in this debate in order to explain the disagreements in it and distinguish constitutional mandates from unconstitutional mandates.

Elhauge starts by noting three federal purchase mandates enacted (with the support of numerous framers) during the 1790’s requiring that “ship owners buy medical insurance for their seamen,” “all able-bodied men . . . buy firearms” and “seamen . . . buy hospital insurance for themselves”\(^3^9\) noting (with special satisfaction) that the third mandate example was a founding era individual mandate. Turning to the modern era, he finds a purchase mandate in “agency fees’ to cover the cost of services received from a union acting as a bargaining agent” for employees who do not, in fact, wish to be represented by the union.\(^4^0\)

By Elhauge’s lights, these are purchase mandates because they are government requirements that individuals buy certain things, whether or not they want to buy them. These instances of purchase mandates, both old and new, Elhauge would have us conclude, show that the individual mandate is not unprecedented, hence not unconstitutional. To the contrary, it has, he feels, varied and venerable precedent in its favor. In any event, he points out that the Constitution has “no anti-innovation clause,”\(^4^1\) which is an undeniable truth.

Individual mandate opponents seek to undercut and refute Elhauge’s examples and his arguments in several ways. Randy Barnett notes that the statute in the gun purchase example does not actually require the purchase of a gun (guns can be obtained in a variety of other ways) and that, in any event, it “was an exercise of Congress’s militia power,” rather than its commerce power.\(^4^2\) It, therefore, provides neither precedent nor authority for the individual mandate. Philip Hamburger further attempts to distinguish Elhauge’s examples by arguing that the alleged purchase mandates relating to seamen are, history demonstrates, exercises of federal naval powers, rather than commerce powers.\(^4^3\) A number of mandate opponents point out that Elhauge’s examples of supposed purchase mandates involve those already voluntarily engaged in the activity the mandate concerns.\(^4^4\) Barnett also distinguishes between mandates affecting those already engaged in the activity being regulated and mandates compelling action by those

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39. Id. at 3.
40. Id. at 60.
41. Id. at 16.
42. Barnett, supra note 12.
44. See, e.g., Matthew J. Franck, The Founders Loved Mandates?, NAT’L REV. ONLINE (May 1, 2012, 4:00 AM), http://www.nationalreview.com/articles/297347/founders-loved-mandates-matthew-j-franck/page/0/1 (“Before you say, ‘Wow, no deductible or co-pay for sick seamen,’ notice two things. First, this provision is a regulation of commerce in which somebody is already engaged . . . as many commentators have long since noted.”).
not already so engaged. The next question is whether these distinctions make any constitutional difference.

Elhauge is aware of, but unfazed by, this “already engaged in commerce” distinction and argument. He argues that Barnett’s acknowledgement that the founding era maritime mandates are exercises of Congress’ commerce power logically then permits the imposition of purchase mandates in one market on those participating in a wholly different market. Is this a fair or cogent inference? I think not. There is a closer relationship that Barnett and the other individual mandate critics see between activity and mandate in Elhauge’s examples than Elhauge admits. In his examples, those voluntarily participating in an economic activity may be required to purchase something that is functionally related to their voluntary economic activity that is a fair or concomitant cost associated with that voluntary, underlying economic activity; it is not, in that sense, something from a totally unrelated economic market. This sort of necessary connection appears elsewhere in constitutional doctrine, in the essential nexus requirement in regulatory takings doctrine, for example. The Supreme Court has a history imposing these sorts of conditions and a demonstrated ability to apply them. The Court’s purpose in doing, both here and in regulatory takings doctrine, is twofold. It seeks to deny Congress unlimited power over individuals. It also will permit Congress to impose reasonable conditions on activity, but not to coerce those engaging in that activity.

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45. Randy E. Barnett, In What Sense is the Personal Health Insurance Mandate “Unconstitutional”?, in A CONSPIRACY AGAINST OBAMACARE: THE VOLOKHI CONSPIRACY AND THE HEALTH CARE CASE 38, 39 (Trevor Burrus, ed. 2013) (“But regulating HOW one engages in economic activity (or prohibiting an activity) and mandating THAT one engage in economic activity are not the same thing. It is the latter that is unprecedented.”) (emphasis in original).

46. ELHAUGE, supra note 38, at 6 (“One could argue that laws for seamen and ship owners mandated purchases from people who were already engaged in some commerce. But this is no less true of everyone subject to the health insurance mandate.”).

47. Id. at 11 (“Randy . . . Barnett acknowledge[s] that our early maritime statutes exercised the commerce power, but distinguish them on the grounds that they were imposed on actors who were already in commerce. But this argument concedes that these precedents show that if one is engaged in commerce in one market, such as the shipping market or the seamen labor market, then Congress has the power to impose a mandate to purchase in a totally unrelated market—such as the medical insurance market.”).

48. See Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 837 (1987) (“The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition . . . . [T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.”).

49. See id. (“[E]ven though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster. Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was.”); NFIB, 132 S. Ct. at 2603 (2012) (quoting New York v. United States, 505 U.S. 144, 166 (1992)) (“[C]ongress has ‘crossed the line distinguishing encouragement from coercion’ . . . . in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions,
the line between regulating economic activity and mandating it.\textsuperscript{50} This line disappears in an approach like Elhauge’s, which allows almost any connection to be a sufficient jurisdictional hook for purposes of constitutional validity. With the disappearance of this line goes any meaningful limit on congressional power.

Is Medicare a helpful example for Elhauge’s argument? He clearly thinks so,\textsuperscript{51} rejecting an “already engaged in commerce” distinction and objection,\textsuperscript{52} denying that it is a “distinction of substance.”\textsuperscript{53} He goes on to say that his challengers would accept the assertion that “Congress can mandate the purchase of health insurance as long as it conditions that mandate on engagement in some commercial activity.” He feels that, “[T]he challengers would have to admit that a statute saying that ‘anyone who has ever engaged in commercial activity must buy health insurance’ would be constitutional.”\textsuperscript{54} But these are certainly not concessions that mandate challengers have ever made or accepted. These statements are, for example, in conflict with assertions by a majority of the \textit{NFIB} justices that any interpretation of the commerce power giving Congress effectively unlimited power cannot be constitutional or correct.\textsuperscript{55} In fact, Elhauge’s definition reduces the jurisdictional hook required for the exercise of Congress’ commerce power to the vanishing point. Everyone has engaged in commerce at some point in their lives. Elhauge’s test would effectively give Congress a general police power, something five justices in \textit{NFIB} and elsewhere

\textsuperscript{50} See John Valauri, \textit{Regulate/Mandate: Two Perspectives} (Feb. 14, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217883 (“What motivates [Professor Somin and the Chief Justice’s] complaint of a constitutional problem here, from the perspective that they both share, is more the compulsion involved in the individual mandate than it is the existence or timing of the economic activity concerned . . . . ‘Mandate,’ at least, does a better job of conveying the compulsion aspect which mandate opponents find constitutionally objectionable in the individual mandate.”).

\textsuperscript{51} \textit{ELHAUGE}, supra note 38, at 18 (“But not only is there precedent for this, there is also clear support for it in the Constitution. For decades, Americans have been subject to a mandate to buy a health insurance plan—Medicare.”).

\textsuperscript{52} \textit{Id.} at 19 (“Many opponents dismiss this argument because Medicare (unlike the new mandate) requires the purchase of health insurance as a condition of entering into a voluntary commercial relationship, namely employment, which Congress can regulate under the commerce clause.”).

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textit{NFIB}, 132 S. Ct. at 2589 (“Accepting the Government’s theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.”); \textit{Id.} at 2646 (Scalia, Kennedy, Thomas and Alito, JJ., dissenting) (quoting \textit{THE FEDERALIST} NO. 33, at 202 (C. Rossiter ed. 1961)) (“If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power, or in Hamilton’s words, ‘the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane.’”).
say it cannot constitutionally possess. The challengers would only have to admit the constitutionality of Elhauge’s hypothetical statute if they accepted his constitutional assumptions, which they do not. Quite the contrary, they explicitly reject the assumptions that lead Elhauge to his constitutional conclusions.

A similar difficulty afflicts Elhauge’s attempt to employ the commerce power’s substantial effects test in service of his argument for the constitutionality of purchase mandates. Citing Wickard v. Filburn, he claims that, “[A] statute saying, ‘anyone who has engaged in any activity that affects commerce must buy health insurance’ would clearly be constitutional and cover everyone, just like the new mandate.” He thinks that this would, then, be the functional equivalent of the individual mandate. But, the above refutation of Elhauge’s “anyone who has ever engaged in economic activity” applies here, too. If anything, this claim grants Congress even broader, unconstrained power and departs even further from statements that other participants, on the bench and in the academy, have made during the individual mandate debate. The fact that even those who agree with Elhauge about the clear constitutionality of economic purchase mandates in general and of the individual mandate in particular hesitate to make the sort of sweeping “anyone who has engaged” claims indicates an uncertainty about the constitutional correctness of such assertions. In addition, functional equivalence does not mean like constitutionality.

If one examines the assertions made by participants in the individual mandate debate, both on the bench and in the academy, one finds that Elhauge’s “anyone” here includes few, if any, writers other than him. The fact that even those who agree with Elhauge on the constitutionality of economic purchase mandates in general and the individual mandate in particular hesitate to make the sort of “anyone who has engaged” statements he does (even though they may agree that

56. See id. at 2590-91 (“Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.”); see United States v. Lopez, 514 U.S. 549, 567 (1995) (“To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated.”) (internal citations omitted).

57. See Wickard v. Filburn, 317 U.S. 111, 129 (1942) (applying the substantial effects test and holding that “wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.”).

58. Id.

59. ELHAUGE, supra note 38, at 20.
these mandates are clearly constitutional\textsuperscript{60}) indicates an uncertainty on their part of constitutional correctness of such assertions and such doctrines.

Moreover, even if one means to a particular end is constitutional, it may well not be the case that a different means to the same end is likewise constitutional. As the NFIB joint dissenters note, the Constitution grants Congress only enumerated powers, not enumerated ends.\textsuperscript{61} What we have here is a question of whether or not certain means to an end are proper, which is a different and independent question from whether or not that end is legitimate.\textsuperscript{62} This point is realized even by those who would reduce to a bare minimum the jurisdictional hook Congress needs in order to constitutionally exercise its commerce power. Elhauge’s “anyone who” arguments do more than minimize the jurisdictional hook requirement; they reduce it to the vanishing point. But his honest statement of this view at least has the virtue of making clear the true views of mandate defenders, as well as the width of the gulf that doctrinally separates mandate defenders from mandate opponents.

Clarification of the differences between the two sides here (a prerequisite to the resolution of those issues) is hampered by the ambiguity of the word “mandate.” The case that opponents wish to make against the “unprecedented” individual mandate appears to be undercut by seemingly plausible assertions, like Elhauge’s, that the framers themselves approved of and enacted purchase mandates. It may not seem that both sides can be right, but, in fact, they are in this case because there are two senses of the word “mandate,” one constitutional and the other unconstitutional.

Just what is a mandate? Is there only one kind of legal mandate, or are there several? Chief Justice Roberts says that a mandate is a command.\textsuperscript{63} The nineteenth century English legal philosopher John Austin asserted that all laws are commands,\textsuperscript{64} although later legal philosophers, notably H.L.A. Hart,

\textsuperscript{60} See Hall, supra note 15, at 1826; see also Jack M. Balkin, Commerce, 109 Mich. L. Rev. 1, 46-47 (2010) (“People who do not buy health insurance are actually self-insuring . . . . These practices involve borrowing, purchasing, and consuming goods and services; their cumulative economic effect is substantial, and they impose significant economic costs on the rest of the country. Because uninsured persons contribute to a national problem, Congress may regulate them as part of a national solution.”).

\textsuperscript{61} NFIB, 132 S. Ct., at 2646 (“The lesson of these cases is that the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not carte blanche for doing whatever will help achieve the ends Congress seeks by the regulation of commerce.”).

\textsuperscript{62} See McCulloch v. Maryland, 17 U.S. 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

\textsuperscript{63} See NFIB, 132 S. Ct., at 2593 (“The most straightforward reading of the mandate is that it commands individuals to purchase insurance. After all, it states that individuals ‘shall’ maintain health insurance.”) (citing 26 U.S.C. § 5000A(a) (2012)).

\textsuperscript{64} See John Austin, The Province of Jurisprudence, 21 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832) (“Every law or rule . . . is a command. Or, rather, laws or rules, properly so called, are a species of commands.”) (emphasis in original).
convincingly argued that such a view oversimplifies and distorts the nature of law,\(^{65}\) overlooking, for example, power-conferring rules, which do not fit into a command-based theory of law.\(^{66}\) Not all laws are mandates and not all mandates are commands. This is because laws that can be called mandates are not all of the same sort. Some mandates are conditional, that is, they apply as a governmentally imposed condition only if you voluntarily engage in the activity to which the mandate is attached. The so-called “contraception mandate” of the ACA, for example, applies only to employers.\(^{67}\) If you do not employ workers, you are not required to pay for the employee contraception coverage required by the contraception mandate.\(^{68}\) Linguistically, it is a stretch to call such a legal rule a command because it does not apply unconditionally. All of Elhauge’s examples are conditional mandates, that is, they apply only to those who voluntarily engage in an economic activity (e.g., working as a seaman or working for an employer who has signed a union contract) to which the mandate is legally attached. One can avoid the mandate simply by not engaging in the predicate activity to which it is attached.

The individual mandate is different from these conditional mandates just discussed. It is an unconditional mandate, not tied to some activity voluntarily engaged in. Instead, it attaches to an individual based upon their status\(^{69}\) or, more dramatically, merely because of their legal presence in the United States.\(^{70}\) For

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\(^{66}\) See id. at 35-38.

\(^{67}\) The Affordable Care Act requires an employer’s group health plan to cover women’s “preventive care,” which includes contraception. 42 U.S.C. § 300gg-13(a)(4) (2012); see Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1124-25 (10th Cir. 2013) cert. granted, 134 S. Ct. 678 (2013) (“The Greens run the Hobby Lobby health plan, a self-insured plan, which provides insurance to both Hobby Lobby and Mardel employees . . . . Because the Greens believe that human life begins at conception, they also believe that they would be facilitating harms against human beings if the Hobby Lobby health plan provided coverage for the four FDA-approved contraceptive methods that prevent uterine implantation . . . .”); but see Little Sisters of the Poor Home for the Aged v. Sebelius, 134 S. Ct. 1022 (2014) (acknowledging ACA’s non-profit exemption that, “If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions of the . . . Affordable Care Act.”).

\(^{68}\) See 26 U.S.C. § 5000A(f) (2012); see also Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dept. of Health & Human Servs., 724 F.3d 377, 381 (3d Cir. 2013) (“The ACA requires employers with fifty or more employees to provide their employees with a minimum level of health insurance.”).

\(^{69}\) See NFIB, 132 S. Ct. at 2594 (“[The shared responsibility payment] does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status.”) (internal citations omitted).

\(^{70}\) See Ilya Somin, *A Mandate for Mandates: Is the Individual Health Insurance Case A Slippery Slope?*, 75 L. & CONTEMP. PROBS., 75, 100 (2012) (predicting prior to the NFIB opinion that, “If the Supreme Court strikes down the mandate, it will most likely do so because the mandate is a regulation of ‘inactivity,’ forcing people to purchase products based merely on the fact of their presence within the United States.”).
this reason, Chief Justice Roberts is correct to call it a command, while it is not correct to call conditional mandates commands. But what constitutional difference should this make? Elhauge, for example, is aware of this distinction based upon voluntary engaged in a predicate activity, but sees no particular constitutional significance to the point. After all, there is no clear textual basis or record in precedent for making the distinction between conditional and unconditional mandates, let alone endowing it with an important constitutional importance. The distinction may help sort out and explain the reason for the confusing argument concerning the unprecedented nature of the individual mandate, but it does not, without more, resolve that debate. Standing alone, it is at best of interest only to legal academics.

So far, the debate over the constitutionality of the individual mandate has been conducted largely in terms of commerce power, federalism, and limited and enumerated powers grounds. Mandate terminology finds two homes in these doctrines. The first is in the meaning of “regulate” in the Commerce Clause. The second is in the meaning of “proper” in the Necessary and Proper Clause.

The word “mandate” does not appear in the Constitution, but the power to mandate action, some think, is included in the meaning of a word that does—the word ‘regulate’ in the Commerce Clause. This meaning—and its opposing denial—has been expressed in three ways during the course of the individual mandate controversy. The first expression involves the definition of the word “regulate.” The argument here is that “regulate” means to make regular or subject to a rule, a meaning that may include mandates. The contrary definition is that “regulate” means only adjust or limit, but not mandate. The second

71. See Elhauge, supra note 13 (“True, one could try to distinguish these other federal mandates from the Affordable Care Act mandate. One could argue that the laws for seamen and ship owners mandated purchases from people who were already engaged in some commerce.”).

72. See id. (“[B]ut that is no less true of everyone subject to the health-insurance mandate: Indeed, virtually all of us get some health care every five years, and the few exceptions could hardly justify invalidating all applications of the statute.”).

73. By “commerce power,” I mean to include both the Commerce Clause and the Necessary and Proper Clause.

74. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.”) (emphasis added).

75. U.S. CONST. art. I, § 8, cl. 18 (“To make all laws which shall be necessary and proper for carrying into Execution, the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”) (emphasis added).

76. See generally Hall, supra note 15.

77. See Balkin, supra note 16 (“The power to regulate, as Chief Justice John Marshall said in Gibbons v. Ogden, is ‘to prescribe the rule by which commerce is to be governed.’ That is to say, under the original meaning of the Constitution, ‘regulate’ simply means ‘prescribe a rule for.’”); see also Randy E. Barnett, The Original Meaning of the Commerce Clause, 68 U. Chi. L. Rev. 101, 112 (2001) (“‘To regulate’ might be limited to ‘make regular,’ which would subject a particular type of commerce to a rule and would exclude, for example, any prohibition on trade as an end in itself . . . .”).

78. See Gibbons v. Ogden, 22 U.S. 1, 227 (1824) (Johnson, J., concurring) (“The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and
expression asks whether the meaning of “regulate” is symmetrical, that is, if it includes the power to prohibit commerce, why should it not include the symmetrical power to mandate commerce? The third, related expression asks whether “regulate” assumes already existing activity to be regulated or not.

A glance reveals that these three expressions of the meaning of “regulate” are related to one another, rather than being freestanding, independent arguments. They present, in slightly different ways, a contrast between narrow and broad definitions of “regulate.” The narrow definition, in all three expressions, excludes the power to mandate from the power to regulate commerce, while the broad definition, in all three expressions, includes the power to mandate in the power to regulate commerce. Unsurprisingly, the narrow view is taken by opponents of the individual mandate and defenders of the doctrine of limited and enumerated powers (who constitute much the same group), while the broad

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79. See Hall, supra note 15, at 1834 (“‘Based on plausible meanings of ‘regulate,’ there is no reason why a mandate to engage in commerce could not be considered the regulation of commerce just as much as a prohibition of commerce. A mandate may be a strong form of regulation, but it is no stronger, in the abstract, than a prohibition.’); but see Barry Friedman, & Genevieve Lakier, “To Regulate, ’Not ‘To Prohibit’: Limiting the Commerce Power, 2012 SUP. CT. REV. 255, 320 (2012) (“Congress’s power ‘to regulate’ interstate commerce does not include the power to prohibit commerce . . . . This interpretation of the Commerce Clause is supported by history, and by the structure and theory of the Constitution.”).

80. See Randy E. Barnett, Not So Baffled About the Activity-Inactivity Distinction, VOLOKH CONSPIRACY (May 11, 2011, 5:40 PM), http://www.volokh.com/2011/05/11/not-so-baffled-about-the-activity-inactivity-distinction/ (Barnett discusses the third expression by incorporating Judge Motz’ inquiries and assertions during NFIB oral arguments in the Fourth Circuit: “just bear with me that this is not an activity, what do we do with the word ‘regulation’? Because, you know, that—even though it has not been pressed with any great concern here—in the research that we’ve done and apparently has now been done in other cases that you’re going to face so you’re going to have to deal with the question, that has always assumed that there’s a predicate that’s going to be regulated, an activity, if you will, and the regulation is right — the power that Congress has is ‘to regulate,’ and that’s right in the Constitution.”); but see Elhauge, supra notes 71 and 72.

81. See Jonathan Adler, What does the mandate regulate?, SCOTUSBLOG (Aug. 10, 2011, 10:52 AM), http://www.scotusblog.com/2011/08/what-does-the-mandate-regulate/ (“ . . . Unlike the law in Raich, the mandate is not conditional upon anyone having taken an affirmative step. Angel Raich was only subject to prosecution because she chose to obtain marijuana, just as Roscoe Filburn was only subject to the Agricultural Adjustment Act because he chose to produce wheat for his dairy cows. The mandate, on the other hands, does not require a similar predicate.”); see also Barnett, supra note 77, at 146 (quoting U.S. CONST. art I, § 8, cl. 3) (“The most persuasive evidence of original meaning—statements made during the drafting and ratification of the Constitution as well as dictionary definitions and The Federalist Papers—strongly supports Justice Thomas’s and the Progressive Era Supreme Court’s narrow interpretation of Congress’s power ‘To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes’ . . . . the term ‘To regulate’ means ‘to make regular’—that is, to specify how an activity may be
view is taken by defenders of the individual mandate and expansive federal powers82 (also much the same group).

The fact that both sides in the individual mandate controversy can find not one, but three, ways of expressing their positions on the constitutionality of purchase mandates like the individual mandate greatly reduces the usefulness of the notion of mandates in resolving the controversy over the individual. Neither side can get much traction in the argument because the other side has its own notions about the meanings of “mandate” and “regulate,” notions emanating from more comprehensive views and theories of the basis and scope of federal powers.

C. Activity and Inactivity

We next turn to another argument advanced by individual mandate opponents, one based upon the distinction between activity and inactivity,83 to see if it can do what the assertion of unprecedented mandates has failed to do, that is, to provide a clear, useful distinction which can be employed to clarify, if not settle, the debate over the constitutionality of the individual mandate. Encouragingly, even some mandate supporters have found the argument based on this distinction to be the mandate opponent’s strongest argument.84 Here, once again, the main goal of the mandate opponents is to show that the individual mandate is unprecedented, gives Congress unlimited power and is, therefore, unconstitutional. To help achieve this aim, an important purpose of the activity/inactivity distinction is to demonstrate and emphasize the fact that the Supreme Court’s prior descriptions and definitions of the commerce power are all explicitly premised on the regulation of commercial activity,85 while the individual mandate is, instead, based upon the regulation of inactivity (i.e., a transacted—when applied to domestic commerce, but also includes the power to make ‘prohibitory regulations’ when applied to foreign trade.”).

82. See Hall, supra note 15, at 1828 (“In brief, plausible arguments can be constructed on both sides of the first issue. The more persuasive positions are that a mandate to obtain insurance constitutes a regulation of commerce and the Commerce Clause’s fundamental purposes do not compel limiting congressional authority to regulate inactivity simply for the sake of setting some limit.”).

83. See Randy E. Barnett, Is Health Care Reform Constitutional?, WASH. POST (March 21, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/19/AR2010031901470.html (“. . . [T]he Supreme Court has long allowed Congress to regulate and prohibit all sorts of ‘economic’ activities that are not, strictly speaking, commerce . . . . But the individual mandate extends the commerce clause’s power beyond economic activity, to economic inactivity. That is unprecedented.”).

84. See Hall, supra note 15, at 1855 (“The strongest argument for a categorical exclusion of mandatory purchases is simply that Congress has never before regulated inactivity in its purest form under the Commerce Clause.”).

85. See United States v. Lopez 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000) (In both cases, the Court held that Congress lacked power under the Commerce Clause to regulate non-economic local activity on the theory that such activity, in the aggregate, has a substantial effect on interstate commerce.).
Mandate opponents can then go on to argue the mandate is unprecedented and threatens to give Congress unlimited police power, allowing it to regulate not only what we do, but also what we do not do. From this, they once again infer the unconstitutionality of the mandate. In addition, they can argue that activity/inactivity distinction requires only the striking down of the individual mandate, rather than the invalidation of large portions of the administrative state.

The predictable, and equally true, reply from mandate supporters is that the activity/inactivity distinction lacks any textual, historical or precedential basis, but is instead a distinction recently invented by mandate opponents solely for litigation purposes in opposing the individual mandate. From these conclusions, it is easy for them to find the individual mandate constitutional.

They also invoke a parade of horribles, in which the unconstitutionality of the individual mandate might lead to the undermining of the New Deal Settlement. Emphasizing doctrinal symmetry, they argue that if the regulation of commerce

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86. See Barnett, supra note 10, at 582 (“The mandate also fails to satisfy an alternative to the substantial effects doctrine that was proposed by Justice Scalia in a concurring opinion in Gonzales v. Raich because it extends beyond the regulation of intrastate activity to reach inactivity.”).

87. See id.; see also Gonzales v. Raich, 545 U.S. 1, 36 (2005) (quoting United States v. Lopez, 514 U.S. 549, 567 (2004)) (internal citations omitted) (“Thus, although Congress’s authority to regulate intrastate activity that substantially affects interstate commerce is broad, it does not permit the Court to ‘pile inference upon inference,’ in order to establish that noneconomic activity has a substantial effect on interstate commerce.”).

88. See Barnett, supra note 10, at 582 (“In the 1990s, the Supreme Court developed a judicially administrable test for whether it is ‘necessary’ for Congress to reach intrastate activity that substantially affects interstate commerce: the distinction between economic and noneconomic intrastate activity.”).

89. See ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION 62 (2013) (Koppelman is pointing out that this activity/inactivity distinction has so little presidential support that even Raich, a case which came closest to the distinction, never expressly clarified why this distinction matter, and therefore this new limit requiring activity is without any support. As stated in the text “[t]he ACA’s supporters thought that the case for the mandate was so compelling that, even if it was in tension with some of the language in Raich, there was no sense in constructing this as a new limit on the commerce power—a limit that Raich had not expressly declared.”); but see Barnett, supra note 10, at 606 (pointing out that the distinction is without precedent because Congress has never before asserted an individual mandate and therefore the Supreme Court has never had to validate or clarify the activity/inactivity distinction before).

90. See Barnett, supra note 10, at 72 (“No one could have anticipated the constitutional limits that the ACA supposedly transgressed. Those limits did not exist while the bill was being written. They were first devised only in the fall of 2009, quite late in the legislative process.”).

91. See id. at 73 (noting that, before 2009, an analysis of health care reform proposals showed “a bipartisan consensus to have individual mandates,” with no politician or attorney citing any support to the contrary).

92. See KOPPELMAN, supra note 89, at 58 (mocking mandate opponents saying “[i]f you care about the actual liberty of human beings, rather than just constraining Congress, the New Deal reforms look like a pretty good deal.” Koppelman then lists some of the accepted benefits of New Deal legislation, such as the dependence on Social Security by both indigent and middle class seniors.).
includes the prohibition of commerce, then it must also encompass mandating commerce.93

The negative first part of the mandate defenders’ response to the activity/inactivity distinction contends federal regulation of inactivity is not unprecedented; on the contrary, it is quite common and ordinary. One law professor, Corey Rayburn Yung, has, in fact, written a law review article listing and classifying the multitudinous ways in which the federal government regulates and penalizes inactivity. His contention is regulation, even criminalization, of inactivity by the federal government is not unprecedented—on the contrary, it is incredibly ordinary.94 It occurs so frequently that he needs ten different categories to encompass it all—common law duty omission crimes, registration crimes, record keeping crimes, possession crimes, receipt crimes, preventive regulation and punishment, nondisclosure crimes, organizational crimes, misprision crimes and obstruction crimes. None of these crimes punish acts, but rather some form of inactivity or failure to act. They appear, then, to be counterexamples to refute the mandate opponents’ assertion of the unprecedented nature of the individual mandate.

But, as with the asserted framers’ mandates proffered by Professor Elhauge in the last section,95 these purported inactivity crimes are distinguishable from the individual mandate and for much the same reasons. Many of them apply to the alleged inaction of individuals who were previously or are already involved in some predicate activity. Registration, record keeping, preventive regulation, organizational and obstruction crimes all involve omissions related to or arising out of prior action(s). It is true, as Yung correctly notes, that the punishment in these cases may be for the omission and not for the prior act. Or, to put the point another, more technical, way, the omission, rather than the prior action, may constitute the actus reus of the crime. For example, failure of a sex offender to register is a punishment for that failure to register, rather than for the earlier sex offense, lest the punishment otherwise be ex post facto.96 Nevertheless, it is also true that, but for the earlier act, the current omission would not be culpable, simply because the duty to register arises out of that earlier criminal conduct. It

93. See Hall, supra note 15, at 1834 (comparing the individual mandate with the doctrine in Wickard, stating that “[a] mandate may be a strong form of regulation, but it is no stronger, in the abstract, than a prohibition.”).
94. See Corey Rayburn Yung, The Incredible Ordinariness of Federal Penalties for Inactivity, 2012 WIS. L. REV. 841. Professor Yung serves the same role here that Professor Elhauge served in the prior section of this paper. Both writers reject the attack arguments of mandate opponents and respond by offering legal, constitutional and historical counterexamples to the assertion of the unprecedented nature of the mandate (Elhauge as to purchase mandates and Yung as to regulation of inactivity). I cite Yung’s article here, not because his examples are widely repeated by other individual mandate defenders, but more because his analysis makes explicit an attitude implicit in the views of many mandate defenders. Making it explicit more readily permits analysis and critique.
95. See ELHAUGE, supra note 39-41.
96. See Yung, supra note 94, at 848.
is not a freestanding duty. Conceptually, there is a distinction and a difference between the conduct or omission criminalized and the constitutional basis empowering Congress to criminalize that conduct or omission. They are two different things, having two different bases, elements, and rules. Professor Yung and I, then, are making two different points and his argument, though true, does not help him in the argument he seeks to make in favor of the individual mandate and against the arguments of mandate opponents. Why this distinction should make a constitutional difference as well as a conceptual difference is quite a different question, one which will be treated later in this article.\textsuperscript{97}

This but-for connection is also typically found in the facts surrounding possession, receipt, and obstruction crimes. The possession, receipt, and obstruction involved relate back to prior conduct which, in order to be criminally culpable, must occur knowingly. Constructive possession cases may be the strongest examples in support of Yung’s argument since the prior related conduct involved may not even be that of the defendant. But even there, as the main case he cites requires, the defendant must also “knowingly hold the power and ability to exercise dominion and control over it.”\textsuperscript{98}

Civic duties may also be argued to be the bases of some of these crimes, such as misprision and obstruction, as Yung, for example, himself quotes the Supreme Court on the civic duty basis of misprision crimes.\textsuperscript{99} Individual mandate opponents do not argue that Congress can never regulate inactivity, only that their ability to do so is the exception rather than the rule. And these exceptions arise in cases where individuals have civic duties to do certain things such as serve in the armed forces when drafted, pay their taxes, or serve on juries (all examples offered by mandate supporters as evidence of the supposed power of Congress to mandate individual conduct\textsuperscript{100}). Randy Barnett, the inventor of the activity/inactivity distinction, responds that these mandates are all founded upon recognized civic duties citizens owe government.\textsuperscript{101} But this is not the case with the individual mandate and the commerce power.\textsuperscript{102} There is no general power

\begin{itemize}
\item \textsuperscript{97} See infra notes 161-63 and accompanying text.
\item \textsuperscript{98} Yung, supra note 94, at 852 (quoting United States v. Lopez, 372 F.3d 1207, 1211 (10th Cir. 2004)) (internal citations omitted).
\item \textsuperscript{99} See id. at 858 (quoting Roberts v. United States, 445 U.S. 522 (1980)) (“[G]ross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship.”).
\item \textsuperscript{100} See NFIB, 132 S. Ct. at 2627 n.10 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).
\item \textsuperscript{101} See Barnett, supra note 10, at 630 (“Each of these duties can be considered essential to the very existence of the government, not merely convenient to the regulation of commerce.”).
\item \textsuperscript{102} See id. at 637 (“unlike the type of preexisting fundamental duties that have traditionally been recognized, such as the duties to defend one’s country and provide the revenue needed to maintain its governance, there is no fundamental duty of citizenship to enter into contracts with private parties when Congress deems it convenient to the regulation of interstate commerce.”).
\end{itemize}
possessed by Congress to mandate conduct by citizens. Citizens are not subjects; Congress is their servant, not their master.103

The observer of this conflict, at this point, may well be tempted to suspect that, once again, both sides here are just talking past each other because, although they are using the same words, they seem to be talking about different things. For one thing, they lack a shared definition of “activity” or agreement on its boundaries. For example, does a decision not to do something qualify as an act for constitutional purposes and, if so, when?104 Further, if an act can be redescribed as inactivity, as some argue it can,105 which description should control in determining the constitutionality of the individual mandate and why? Is it, perhaps, sometimes an act, sometimes not? Further, how wide or narrow a time frame should be employed to define the purported activity (and who gets to decide—Congress or the Court)?106 As a result of these problems and others like these, the activity/inactivity distinction may well generate more heat than light in the individual mandate debate as difference of meaning is obscured by sameness of terminology.

Mandate defenders are correct in saying that that the activity/inactivity distinction is of recent provenance.107 It cannot be traced back through constitutional history, let alone to the founding itself. On the other hand, mandate opponents accurately assert that the commerce power is almost always described in terms of the regulation of some sort of commercial activity,108 even if it is not explicitly so limited. From this they go on to argue that the distinction is at least implicit in the Constitution and its spirit.109 In response, mandate defenders contend that, since the distinction is novel, constitutional text and history do not, in so many words, rule out the regulation of inactivity, so there is room within a Constitution intended to endure for the ages110 for this power, even if it was not explicitly stated or even contemplated by the framers. The debate then becomes one over the meaning of constitutional silence, that is, making

103. See id.

104. See, e.g., Balkin, supra note 77.

105. See Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611, 633 (W.D. Va. 2010) (“Far from ‘inactivity,’ by choosing to forgo insurance, Plaintiffs are making an economic decision to try to pay for health care services later, out of pocket, rather than now, through the purchase of insurance”).

106. See Thomas More Law Ctr. v. Obama, 651 F.3d 529, 560 (6th Cir. 2011) (“Does this test apply to individuals who have purchased medical insurance before?”).

107. Brief for Cato Institute as Amici Curiae Supporting Appellants at 11, Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010) (No. 10-2388) (“[A] doctrinal line between activity and inactivity ... has heretofore escaped articulation because no precedent has presented the distinction as sharply as this case.”).

108. See NFIB, 132 S. Ct. at 2644 (joint dissent).

109. See id. at 2646-47.

110. See NFIB, 132 S. Ct. at 2615-16 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting part) (Justice Ginsburg argues that the constitution is more of an outline and less of a detailed blue print, and was intended to endure for ages and to be openly adapted to a variety of human affairs.).
silence speak. This is a debate more difficult and puzzling than even the admittedly difficult and puzzling debate over the meaning of explicit constitutional text. Which side has the burden of persuasion here and why? There is no consensus or clear answer. This constitutional standoff appears to make the activity/inactivity distinction an unhelpful (because confusing) choice for the establishment of constitutional doctrine. This deadlock spurs the further search for constitutional tiebreakers.

One initially attractive way of breaking the argumentative deadlock and overcoming the constitutional silence here might be to look at the terms that are in the Constitution to determine what they say to us about activity, inactivity, and the meaning of the commerce power. Perhaps the most obvious candidate for such a conceptual exploration is the word “regulate” in the Commerce Clause, since the debate over the activity/inactivity distinction is a debate about what can be regulated by Congress. Here, mandate opponents argue that all regulation is of activity; that regulation, by its very nature, presumes and concerns preexisting voluntary activity, so that Congress cannot regulate inactivity. The individual mandate does not meet this requirement because the action regulated—the purchase of health insurance—is neither preexisting nor voluntarily entered into, but instead mandated by the Affordable Care Act. The mandate, in this way, exceeds congressional regulatory power under the Commerce Clause.

There are two ways of understanding the meaning of “cannot” in the last paragraph, but the difference between them ultimately has little effect on the outcome of our debate. One way of understanding it is to hold that it is logically or grammatically impossible to regulate inactivity, because, for instance, the concept of regulation assumes the preexistence of some underlying activity or activities to be the subject(s) of regulation. This point is argued by individual mandate opponents on the bench and in the academy. These opponents deny that mandating is a form of regulation, but is, rather, something altogether different from regulation. From this, they argue that mandates do not fall within Congress’ power to regulate commerce. This argument is largely limited to

111. See U.S. Const. art I, § 8, cl. 3 (“The Congress shall have the power . . . to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

112. Barnett, supra note 80 (“the power that Congress has is “to regulate,” and that’s right in the Constitution. That is a constitutional provision. The “activity” isn’t to be sure, but “regulation” would seem to think by John Marshall and others to imply a predicate to be regulated. If you don’t have this activity predicate, what do you do?”) (This quotation was transcribed by Professor Barnett from a recording on the Fourth Circuit website. For this reason, I assume that the emphasis is in the original.).


114. See NFIB, 132 S. Ct. at 2644 (joint dissent) (“[regulate] can mean to direct the manner of something but not to direct that something come into being.”).

115. See Barnett, supra note 10, at 605 (“all these cases involve activity, not inactivity. In none of these cases did the government mandate that citizens engage in economic activity by entering into a contract with a private company.”).

116. See NFIB, 132 S. Ct. at 2649 (joint dissent).
commercial mandates because it turns on the meaning of “regulate” and, so, does not directly relate to other sorts of mandates, such as the duties to answer a military draft, pay taxes, or serve on a jury, which are often cited by mandate supporters as counterexamples to this argument made by mandate opponents.117

The second way of understanding the meaning of “cannot” here is the view that Congress lacks the constitutional authorization to regulate inactivity, whether or not there is a logical or grammatical possibility of regulating inactivity. It is not always easy to separate and distinguish these two views in the cases or in academic writings dealing with the activity/inactivity distinction, but the grammatical understanding comes across more strongly in these sources. Both are reflected, for example, in the opinions of Chief Justice Roberts and of the four joint dissenters in NFIB,118 as well as some judges on lower courts who faced the question.119 Further, if one looks back through precedent, one also finds Justice Johnson’s statement in Gibbons v. Ogden that “The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure.”120 Under this view, the power to regulate commerce applies only to voluntarily conducted commerce already entered into; it does not allow Congress to first compel commerce and then proceed to regulate it.121

Although NFIB and the activity/inactivity distinction do not explicitly rely on or relate to the earlier New Federalism Lopez and Morrison cases, which established the economic activity limitation,122 they do complement the doctrine announced in those cases in this way—while Lopez and Morrison limit the scope of congressional power pursuant to the Commerce Clause to the regulation of economic activity,123 NFIB instead limits that power to economic activity.124 A

117. See Elhauge, supra note 71.
118. See NFIB, 132 S. Ct. at 2586 n.4 (Roberts arguing with Ginsburg’s use of more obscure definitions of “regulate,” having the use of different definitions turn on the essential nature of preexisting regulatable activities); see also id., 132 S. Ct. at 2644 n.1 (joint dissent) (quoting Dyche & W. Pardon, A New General English Dictionary (16th ed. 1777)) (Arguing that the definition of regulation suggested is ordinary meaning to put or keep in order, and not an obscure legal meaning)).
119. See Seven-Sky v. Holder, 661 F.3d 1, 16-17 (D.C. Cir. 2011) (Lower court using one definition of regulate which also meant ‘to require action.”’ Further, earlier Commerce Clause cases “did not purport to limit Congress to reach only existing activities. They were merely identifying the relevant conduct in a descriptive way.”) (emphasis in original).
120. Gibbons v. Ogden, 22 U.S. 1, 227 (1824) (Johnson, J., concurring).
121. See Fla. ex rel. Atty. Gen. v. U.S. Dep’t of Health and Human Services, 648 F.3d 1235, 1285 (11th Cir. 2011) (“[T]he Supreme Court has always described the commerce power as operating on already existing or ongoing activity.”).
122. United States v. Lopez 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000) (In both cases, the Court held that Congress lacked power under the Commerce Clause to regulate non-economic local activity on the theory that such activity, in the aggregate, has a substantial effect on interstate commerce.).
123. Lopez, 514 U.S. at 560-61 (holding that “a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise” and therefore is not supported by the Commerce Clause); Morrison, 529 U.S. at 613 (holding that “[g]ender-motivated crimes of
The main aim of both requirements is to deny Congress an unlimited police power and to restrict it to the powers enumerated in the Constitution, but this aim is carried out in two different ways in these cases. As a result, they combine to produce a two-part economic Commerce Clause activity requirement, each part emphasizing different words in the phrase, thereby centering the commerce power on economic activity in two different ways. The individual mandate violates this economic activity requirement, then, by regulating inactivity, rather than economic activity.

The force of the activity/inactivity distinction is largely lost on mandate defenders, who, because they see the commerce power and the Constitution generally quite differently than do mandate opponents, have little trouble in conceiving of and permitting congressional regulation of inactivity in the individual mandate. First of all, they start with a broader view of the meaning of “regulate” in the Commerce Clause than do mandate opponents. They see the power to mandate as included in the power to regulate, not as a separate power (one not granted Congress by the Commerce Clause). They view the meaning of “regulate” as having a symmetry that comprises the power to mandate commerce...
as well as the power to prohibit commerce. They note that both meanings have, at different times, been doubted as within the power to regulate or adjust commerce. Mandate defenders take these doubts to express a woefully crabbed view of the scope of Congress’ commerce power. For this reason, they see NFIB as a repeat performance of the Lottery Cases, in which the Court upheld the power of Congress to prohibit commerce pursuant to its power under the Commerce Clause, rejecting the losing argument by the challengers in the Lottery Cases that the power to regulate includes only the power to adjust or set the rule for commerce. These mandate defenders contend instead that what they see as an analogous argument should also fail with respect to the individual mandate in NFIB.

The Lottery Cases challengers’ argument, mandate defenders insist, unduly narrows and limits congressional power over commerce. Acceptance of this argument as constitutional doctrine would, they feel, prevent Congress from solving important national problems that cannot be adequately dealt with by the

130. See Hall, supra note 15, at 1834 (“A mandate may be a strong form of regulation, but it is no stronger, in the abstract, than a prohibition.”); see NFIB, 132 S. Ct. at 2621 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting in part) (quoting Wickard v. Filburn, 317 U.S. 111, 128 (1942)) (connecting the individual mandate with Wickard (“The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon.”). Thus, the ‘something to be regulated’ was surely there when Congress created the minimum coverage provision.”).

131. See Champion v. Ames, 23 S. Ct. 321, 363 (1903) (A challenger to a statute prohibiting the mailing of lottery tickets unsuccessfully argued that Congress was given power to regulate, not to prohibit).

132. Id. (The Court holding that “lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another is therefore interstate commerce; that under its power to regulate commerce among the several states Congress-subject to the limitations imposed by the Constitution upon the exercise of the powers granted-has plenary authority over such commerce, and may prohibit the carriage of such tickets from state to state”).

133. Id. at 354-55 (In response to the challenger’s argument that “authority given Congress was not to prohibit, but only to regulate” the Court responded “the Constitution does not attempt to set forth all the means by which such powers may be carried into execution. It leaves to Congress a large discretion as to the means that may be employed in executing a given power.” This discretion in the Lottery cases included the power to prohibit.) (emphasis in original).

134. See Hall, supra note 15, at 1856.

135. Champion, 23 S. Ct. at 355 (quoting M’Culloch v. Maryland, 17 U.S. 316, 421 (1819)) (the Court found that challenger’s position rejecting the power to prohibit overly limited Congress’ discretion. “The Constitution does not attempt to set forth all the means by which such powers may be carried into execution. It leaves to Congress a large discretion as to the means that may be employed in executing a given power. The sound construction of the Constitution, this court has said, ‘must allow to the national legislature that discretion, with respect to the means by which the powers it confers to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.””).
states acting individually. These problems, some mandate defenders say, are collective action problems that, by their very nature, require national, rather than local, solutions. These problems occur when the states are “severally incompetent” to deal adequately with the situation because of the multiplicity of states and their relative inability to undertake and carry out effective coordinated action. Interstate and intrastate actions create collective action problems when they produce harmful or counterproductive results or spillover effects in other states from which it is difficult to escape, rather than productive solutions for all affected states, thereby causing downward cycles from which it is difficult to escape. Here, for example, a state adopting the equivalent of the ACA, according to collective action theorists, would attract ill out-of-staters (who would then be entitled to free provision of costly health care procedures they could not have obtained at low or no cost in their home state) and would also at the same time, drive away healthy in-staters (who would be required to pay for

136. See Robert D. Cooter & Neil S. Siegel, Collective Action Federalism: A General Theory of Article I, Section 8, 63 STAN. L. REV. 115, 121 (“The structure of governance established by the Articles of Confederation often prevented the states from acting collectively to pursue their common interests. Solving these problems of collective action was a central reason for calling the Constitutional Convention.”); see also NFIB, 132 S. Ct. at 2628 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting part) (“Far from trampling on States’ sovereignty, the ACA attempts a federal solution for the very reason that the States, acting separately, cannot meet the need.”).

137. See Cooter & Siegel, supra note 136, at 121; see also NFIB, 132 S. Ct. at 2609-10 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting in part) (listing the collective nature of health care, such as the national spending of $2.5 trillion on it, the fact that all people inevitably participate in it, the universal reality of its high costs, the constant problems that come when people neglect routine care, etc.).

138. Cooter & Siegel, supra note 136, at 123, 129-30 (quoting THE RECORDS OF THE FEDERAL CONVENTION OF 1787 131-132 (Max Farrand ed., rev. ed. 1966)) (quoting Carter v. Carter Coal, 298 U.S. 255, 291 (1936)) (Author begins to discuss the intentions of the constitutional convention to create a Congress “to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.”) Author later connects the reluctance to take federal action when the states are severally incompetent to address the problem to Lochnerism by listing Lochner era decisions which categorically rejected the position that the federal government cannot act where ‘the states severally cannot deal or cannot adequately deal’ unless they already have Constitutional authority to act.”).

139. See id. at 138 (the example the authors used to demonstrate spillover effects was pollution. “Water and air circulate in regions formed by natural contours such as rivers and mountains, not political boundaries. Consequently, pollution spills over from one government jurisdiction to another. Spillovers create an incentive for each government to free ride on pollution abatement by others. To avoid free riding by localities, the government with primary responsibility for abatement should encompass the natural region affected by the pollution.”).

140. See NFIB, 132 S. Ct. at 2638 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting part) (the example Ginsburg used of spillover effects was the decisions by States to exercise their option to withdraw from the Social Security program, threatening the integrity of the program for the entire country, by both not providing the necessary funds and also by having states which provide Social Security attracting those without any retirement. Consequently, “Congress thereby changed Social Security from a program voluntary for the States to one from which they could not escape.”).
health insurance they might not want in order to subsidize the insurance for and treatment of the ill out-of-staters who have now become in-staters). These two simultaneous occurrences would likely result in a cost death spiral as health insurance plan costs soar and revenues fall. This untoward result could only be avoided through the implementation of a national health insurance plan, such as the ACA, which could not be evaded by affected individuals merely by moving to another state.\footnote{141}

Collective action supporters find historical, originalist support for their theory in Resolution VI of the Virginia plan presented at the Constitutional Convention in 1787.\footnote{142} This resolution, which appears on its face to propound a collective action federalism principle, was accepted by the convention and referred to the Committee of Detail for redrafting.\footnote{143} The resulting product of the Committee of Detail was what then became the enumeration of congressional powers in Article I, § 8, a statement whose content is quite different than that of Resolution VI. Article I, § 8, at least on its face, does not put forward the collective action federalism principle. On its face, Resolution VI expresses a philosophy diametrically opposed to the notion of limited and enumerated powers encapsulated in Article I, § 8. Getting back to the events of the constitutional convention, what became Article I, § 8 of the Constitution was, nevertheless, put forward by the Committee of Detail and then adopted by the Convention without discussion.\footnote{144}

The upshot of this puzzling sequence of events is that one’s view of the relation of Resolution VI to the meaning of Article I, § 8 is likely to be a function of one’s larger theory of the scope of congressional power, rather than of any historical or textual link between the two. This is because we do not have the historical evidence which would help explain the doctrinal and causal connections between these two dissimilar texts. As a result, the unexplained sequence of actions by the committee and the convention and the lack of

\footnote{141. See NFIB, 132 S. Ct. at 2612 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting part) (quoting Helvering v. Davis, 301 U.S. 619, 644, (1937)) (“States cannot resolve the problem of the uninsured on their own. Like Social Security benefits, a universal health-care system, if adopted by an individual State, would be ‘bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose.’”.

142. See Cooter & Siegel, supra note 136, at 122-23 (quoting Larry D. Kramer, Madison’s Audience, 112 HARV. L. REV. 611, 619 (1999)) (The problems of collective action confronting America in 1787 “necessitated a government with many more powers than were possessed by Congress under the Articles--including the great powers to tax, to raise and support armies, and to regulate commerce.”); see also NFIB, 132 S. Ct. at 2615 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting in part) (quoting Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 PAPERS OF JAMES MADISON 368, 370 (R. Rutland ed. 1975)) (“What was needed was a ‘national Government . . . armed with a positive & compleat authority in all cases where uniform measures are necessary.’”).

143. See Cooter & Siegel, supra note 136, at 122-24; see also NFIB, 132 S. Ct. at 2615 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting part) (the Framer’s solution to the collective action problem was the Commerce Clause).

144. Cooter & Siegel, supra note 136, at 123.
explanation by either have created, needless to say, more confusion than clarity. To this day, the actions of the committee and the convention have been used, with equal plausibility, to argue both for and against the relevance of Resolution VI (and collective action federalism generally) to the meaning and interpretation of the list of enumerated powers in Article I, § 8.145 How one argues (and concludes) here is very likely to be a function of the underlying constitutional principles one posits in the Commerce Clause area, rather than some neutral rule or objective fact. And those arguments and conclusions are, in turn, likely to be a function of one’s choice of constitutional interpretive methodology, a factor that is at the base of most constitutional doctrinal and theoretical disagreements. Until the choice is made and justified, if that ever occurs, the question of the Resolution VI/Article I, § 8 relation must then get added to the list of problems to be resolved and not to the list of resolutions of such problems.

But this is not the end of questions concerning the activity/inactivity distinction. Mandate supporters have also argued that the individual mandate satisfies what Gerard Magliocca calls the “private action requirement” generated by the distinction between activity and inactivity because it regulates individual decisions not to purchase health insurance,146 that is, decisions to “go bare.”147 The question here, then, becomes this—if the Commerce Clause covers only the regulation of economic activity, do economic decisions qualify as economic actions? If they do, the activity/inactivity distinction becomes irrelevant to the debate over the constitutionality of the individual mandate, for the mandate is constitutional whether or not the Commerce Power contains a private activity requirement. The distinction, on this view, poses no constitutional threat to the constitutionality of the mandate even if Congress can only regulate economic activity pursuant to the Commerce Clause simply because individual decisions not to purchase health insurance are, in fact, forms of economic activity.148

Let us put this question in context. The question of whether economic decisions qualify as activity matters here only if the Constitution applies a private activity requirement regarding regulation of commerce. This question, in turn,

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145. See Barnett, supra note 10, at 628 (Barnett uses the Committee of Detail to attack federal power over individual decisions, and consequently the individual mandate of the ACA, by quoting Justice James Wilson, a member of the committee, saying “The only reason, I believe, why a free man is bound by human laws, is, that he binds himself” and he thereby “becomes amenable to the Courts of Justice, which are formed and authorised by those laws.”) (Chisolm v. Georgia, 2 U.S. 419, 456 (2 Dall.) (1793)); see also Cooter & Siegel, supra note 136, at 123 (using the intentions of the Committee of Detail to support collection action federalism).


147. See Hall, supra note 15, at 1838 (arguing that the “passivity of decisions not to purchase does not rob them of their inherently economic nature, especially when considering the nonpurchase of insurance, which is a quintessentially economic product.” Here Hall is arguing that the decision to “go bare” is a private action of economic consequence.).

148. See id.; see also NFIB, 132 S. Ct. at 2622 (Ginsburg, J., concurring in part, concurring with the judgment in part, and dissenting part) (“An individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance.”).
only arises if the word “regulate” requires some underlying, previously existing, voluntary activity that is the subject of the regulation in question (if it does not, mandates are simply a form of regulation of commerce and, thus, fall directly within congressional commercial regulatory power). But if some preexisting private activity is required as a predicate (i.e., as a jurisdictional hook) for congressional regulation, then, in the absence of any other alternative candidates, economic decisions must then fit the bill to provide that hook. This hook must be real and not merely assumed.

There are a number of reasons, however, that economic decisions fail to provide the needed predicate or jurisdictional hook for the individual mandate. These reasons are precedential, definitional/conceptual, textual and evidentiary, among others. Those characterizing bare economic decisions (i.e., mental activity unaccompanied by physical action) as economic activity can point to no prior precedent for such a legal or constitutional classification. Because demonstration of a jurisdictional hook is needed to establish the constitutionality of the mandate, the burden is on the mandate supporters to show that the hook exists and suffices. Now, as with other arguments in this individual mandate debate, mere lack of precedent for a classification or assertion of authority does not settle the issue. On one hand, it can be argued that the lack of precedent here indicates lack of power or constitutional authorization for the measure sought. But it can as well be maintained that the lack of precedent means only that the relevant power has not yet been exercised. In this case, though, the standoff counts against the constitutionality of the individual mandate because that is the side with the burden of proof here.

If we look beyond precedent and ask whether the definition and/or concept of activity include mental activity in general or economic decisions in particular, the results are likewise unclear. Of course, mental activity is, by definition, a type of activity. But if we focus our inquiry more narrowly on law or even more narrowly, on the commerce power itself, the answer is much less clear. Examine, for example, two contemporary constitutional definitions of “commerce.” The most common definition of “commerce” is as trade or exchange of goods, which is inherently a physical and not a mental activity. Even the broader, less common, definition of commerce as interaction requires the physical activity

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149. Hall, supra note 15, at 1828 (admitting that the individual mandate constitutional issues are novel and without precedent).
150. Barnett, supra note 10, at 621 (follows the assertion that individual mandates are literally without precedent followed immediately by a discussion of when Congress violated the Commerce Clause by mandating state governments. This draws a connection between individual mandates, which are unprecedented, and mandates on state governments, which are unconstitutional.).
151. See Hall, supra note 15, at 1839 (“No matter which view courts take, they lack binding precedent. The Supreme Court has never expressly validated or prohibited Commerce Clause regulation of pure inactivity.”).
152. Barnett, supra note 10, at 583.
of two or more people. The answer to this question depends, it seems, on the level of generality or context within which it is asked, thus frustrating the call for a clear right answer.

This raises another problem for the economic decision/mental activity analysis of commerce. Economic decisions and mental activity may well involve only one person, but the notion of commerce (in both of its main versions) requires the physical activity or interaction of at least two individuals. Thus there is a double mismatch here, first regarding the nature of the activity involved and, secondly concerning the minimum number of individuals required. Economic decisions and mental activity are thus doubly disqualified from counting as economic activity. They are definitionally and conceptually wrong for the task of providing a jurisdictional hook for the constitutionality of the individual mandate.

Even without the precedential and conceptual difficulties just noted, there are simpler and more basic evidentiary and textual problems with using economic decisions and mental activity to meet the private activity requirement. Let us start with the textual difficulties. The ACA itself does not require proof of mental deliberation and decision regarding the individual mandate. Instead, it merely penalizes those covered individuals who do not obtain health insurance. Now, it is true that a deliberate decision not to obtain health insurance and the mere failure to get health insurance are functionally equivalent in that they produce the same result—no health insurance, but that will not do here because the jurisdictional hook sought here must be an activity of some sort and the failure to do something is an omission rather than an act. Mere functional equivalence is insufficient. The act/omission distinction is, of course, a basic legal distinction, one found in many areas of law. Typically, an omission, i.e., a failure to perform a certain act, will result in liability only when there is a legal duty to perform the act in question, which duty is violated by the omission in question. As will be discussed in greater detail later in this article, no such duty is present regarding the individual mandate. We have no civic obligation enforceable by law to buy health insurance; no one claims the contrary. This is not to say that we have no duties owed to government. We do have various duties owed to government for reasons of civic duty or responsibility, but buying

social connotation. ‘Commerce’ was interaction and exchange between persons or peoples. To have commerce with someone meant to converse with them, meet with them, or interact with them.”)

154. See 26 U.S.C. § 5000A(b)(1) (2012) (outlining the shared responsibility payment requirements, which impose a tax penalty for more than one month of not maintaining essential coverage. Meaning there is no proof of deliberation concerning self-insurance or any activity, it simply requires proof of maintaining essential coverage or not maintaining basic coverage.).
155. Id.
156. See MODEL PENAL CODE § 1.13 (2014).
157. Id. at § 1.13(4).
158. See infra notes 222-226 and accompanying text.
health insurance is not one of them. These duties, like Congress’ enumerated powers, are few in number and well-established. These civic duties are but exceptions to the rule of individual liberty.

Finally, even if the ACA explicitly required proof of deliberate decisions on the part of covered individuals not to buy health insurance, it would be difficult, if not impossible, short of mindreading, to prove the existence of such decisions (and the ACA does not even try to do so). Solving the textual problem would only lead to insuperable evidentiary problems. Affirmative decisions, i.e., decisions to do something, will normally have physical actions connected with and illuminating them. These physical actions will provide at least some evidence of the existence and nature of prior deliberation and decision to perform the physical action in question. But negative decisions, i.e., decisions not to do something, will not often have these related physical actions. As a result, there will usually exist no readily discoverable evidence from which to infer the deliberation and decision in question. The problem with this is that such evidence is essential here because non-performance of an action need not be the result of a deliberate negative decision. It might just as well result from no deliberation or decision at all. After all, there are innumerable actions that we are all not performing all the time. Most of these non-performances are not the results of deliberation and decision. And it is physically impossible for all our inactions to have been the results of deliberation and decision. They are just things that we have not done. The uncertainty and lack of evidence concerning underlying deliberation and decision not to perform an action is fatal when, as is the case here, it is needed to provide the jurisdictional hook for congressional regulatory authority. Ignoring this shortcoming, as mandate defenders seek to do, effectively gives Congress the power to regulate everything we do as well as everything we do not do.

The activity/inactivity distinction is doubtless the most thought provoking distinction that individual mandate opponents have crafted, but, as we have seen, it is not the most clarity inducing argument that they have made. That honor goes, instead, to the “commandeering the people” argument, which we turn to next.

III. COMMANDEERING THE PEOPLE

A. The Basis in Law and Logic

If we look back at the two arguments and distinctions made by individual mandate opponents canvassed thus far in this article, the unconstitutionality of

159. See Barnett, supra note 10, at 630-31 (contrasting a duty to serve in military when drafted, for which citizens have a duty, with the individual mandate to buy health insurance, which there is no duty owed. The author thus uses this distinction to counter mandate proponents who point to duties such as the draft as a preexisting individual mandates).

economic purchase mandates argument and the activity/inactivity distinction, we find that the mandate supporters’ general reply to these arguments is that they have no basis in law, but were instead invented specifically for the purpose of constitutional litigation opposing the individual mandate and, for these reasons, are both insincere and unavailing.161 The supporters reply to the anti-mandate argument, for example, by pointing out that the founders knew of and supported economic purchase mandates and, from this they contend that such mandates could hardly then be unconstitutional today.162 The mandate supporters also answer the activity/inactivity distinction by pointing out that it is a novel distinction and has never been used by any court prior to the health care litigation to find a federal statute to be unconstitutional.163 Neither side in this debate can gain any argumentative traction here because, like the two sides in Lincoln’s observation on liberty,164 they disagree over the very definition of the word about which they argue. Clarity in this debate is in this way thwarted by lack of agreement on the meaning of the basic terms and, as a result, in lack of agreement on their proper application. Each side prevails only according its own views of meaning, definition and application here, but not under the other side’s views. Clarity is further frustrated by the fact that both sides use the same words to mean different things.

My contention here is that the “commandeering the people argument” advanced by Randy Barnett165 and others, in contrast to the other two anti-mandate moves, largely escapes these difficulties and is, for this reason, the most forceful and cogent anti-individual mandate argument. I make this argument despite the opinion of people like Orin Kerr that the commandeering the people argument is a weak, unconvincing argument.166 In fact, I will make my argument mainly by responding to the anti-commandeering points made by Kerr and others.

Recall that one difficulty with the activity/inactivity distinction is, as Justice Ginsburg points out in NFIB, anything called activity can always be redescribed as inactivity (thus, paradoxically, making it simultaneously constitutional and...
unconstitutional). This, combined with the constitutional novelty of the distinction, makes it difficult to see exactly what inactivity is (and is not) and, therefore, why it cannot be constitutionally regulated. An argument or distinction that is not clear cannot be convincing and the activity/inactivity distinction is neither clear nor convincing. Those taken in by its appeal have not thus far been able to clearly and cogently state it and, as result, have failed to draw in and convince those who fail to appreciate the distinction’s intuitive appeal.

The basic notion of commandeering, in contrast, is clear to all. To paraphrase Holmes’ famous aphorism that “even a dog distinguishes between being stumbled over and being kicked,” everyone knows the difference between having their already existing activity regulated and being commandeered. In both cases there is a contrast between two possible actions and intents of an active party and the impingement on and reaction of a passive party. A regulated activity, by its very nature, has already been voluntarily commenced by the actor prior to and independent of the imposition of the regulation, so that the regulation can generally be escaped by the person or persons whose activity is being regulated by ceasing to perform the activity which is being regulated. This is not, however, the case with commandeering. Here there is no underlying voluntary activity, but rather a situation in which the active party conscripts the party commandeered to obey his will. The party commandeered cannot escape by ceasing the underlying activity because there is no underlying voluntary activity to cease performing. Commandeering is for these reasons, then, a far greater interference with individual will and freedom than simple regulation.

This point can also be made in terms of the way we use the words discussed here. When one talks of regulating something, that something is always an activity of some sort. In contrast, when one talks of commandeering something, that something is a person or thing, not merely an activity. There is a logical and grammatical distinction between the concepts of regulation and commandeering. They are not synonyms for each other and one is not a subclass of the other. They both involve control of persons and actions, but in different ways and to different degrees. The scope and nature of the control exercised is much greater, for example, when commandeering is involved than it is with mere regulation.

The concept of commandeering seems clear even to those who deny that it is constitutionally impermissible. For example, in the state anti-commandeering
cases, *New York*\(^{170}\) and *Printz*,\(^{171}\) although the dissenters deny that commandeering a state is unconstitutional, they understand what commandeering is.\(^{172}\) The fact that the anti-commandeering argument against the individual mandate is clearer than the mandate and activity/inactivity arguments combined with the fact that it involves a larger and more serious interference with individual liberty than the other two strengthens it as an anti-mandate weapon.

This can also be seen if one contrasts the prohibition/m mandate distinction with the prohibition/commandeering distinction. Recall that individual mandate defenders see a conceptual and constitutional symmetry between prohibitions and mandates and, so, see the question of commercial mandate constitutionality as having been settled by the Court’s decision concerning the prohibition of interstate commerce in the *Lottery Cases*.\(^{173}\) Contrast this with the Court’s quite different treatment of the prohibition/commandeering distinction in *Reno v. Condon*.\(^{174}\) The *Reno* case involves a challenge by South Carolina to the Driver’s Privacy Protection Act (hereinafter the DPPA).\(^{175}\) As the Court explains, “The DPPA regulates the disclosure of personal information contained in the records of state DMVs.”\(^{176}\) The DPPA was enacted in response by South Carolina and other states of selling personal information provided to state DMVs by drivers to private vendors,\(^{177}\) who would presumably then use it for marketing purposes. In *Reno* the state argues that DPPA violates the Tenth and Eleventh Amendments in general and the anti-commandeering rule of *New York* and *Printz* in particular because it “‘thrusts upon the states all of the day-to-day responsibility for administering its complex provisions’ . . . and thereby makes ‘state officials the unwilling implementers of federal policy[.]’”\(^{179}\)

However, the *Reno* Court rejects South Carolina’s claim that the case is controlled by the anti-commandeering doctrine of *New York* and *Printz*.\(^{180}\)


\(^{172}\) See *New York*, 505 U.S. at 201-02 (quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 101 S. Ct. 2352, 2366 (1981)) (White, Blackmun, and Stevens concurring in part and dissenting in part) (Agreeing with the majority’s definition of commandeering, but arguing that a finding that the anti-commandeering principle does not spring from tenth amendment Supreme Court precedent); see also *Printz*, 521 U.S. at 963 (Stevens, Souter, Ginsburg, Breyer dissenting) (opining that the dissenters and majority rely on the same language defining commandeering as in Hodel which prohibits an Act which “commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program”).

\(^{173}\) Champion v. Ames, 23 S. Ct. 321, 363 (1903) (validating a statutory prohibition against importing lottery tickets, establishing that commerce power includes the power to prohibit commerce and not only regulate existing commerce).


\(^{175}\) *Id.* at 143.

\(^{176}\) *Id.*

\(^{177}\) *Id.*

\(^{178}\) *Id.* at 147.

\(^{179}\) *Id.* at 149-50 (quoting Brief for Respondents at 10, 11).

\(^{180}\) *Reno*, 528 U.S. at 150.
insisting instead that “this case is governed by our decision in South Carolina v. Baker.”181 In contrast to New York and Printz, Baker involves a Tenth Amendment challenge, again by South Carolina, to the constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982,182 which in the words of the Court in Reno, “prohibited States from issuing unregistered bonds[.]”183 The Court in Reno, then, sharply distinguishes between prohibiting state conduct (as in Baker) and conscripting or commandeering state officials and institutions (as in New York and Printz),184 reaffirming the proposition that the former power is granted to Congress, but that the latter power is not. The prohibition/mandate distinction, on the other hand, does not make this difference clear and is also not reflected in relevant Supreme Court case law and doctrine. Before rejecting mandate opponents’ arguments, defenders of the individual mandate and of an expansive, if not unlimited, view of the federal commerce power ought to address the distinctions and arguments which present the positions they oppose in the strongest and clearest manner possible,185 rather than reply only to weak and unclear arguments and distinctions before dismissing those positions and doctrines.186

Another distinction and a further set of arguments should also be addressed here. Some critics of the Court’s state commandeering decisions in New York and Printz have attacked that doctrine by proffering the distinction between preemption and commandeering in order to make two claims. The first claim is that commandeering is no greater a restriction on the states than is preemption.187 The second claim, which no one denies, is that Congress may preempt state regulation of interstate commerce.188 The conclusion the critics seek to draw from these premises is that congressional commandeering of the states is no more constitutionally questionable than standard, unobjectionable congressional preemption of state regulation.189 In addition, as one writer summarizes the situation, “According to most commentators, the anti-commandeering rule is ill-defined, ineffective, and arbitrary.”190 Now, if these critics of commandeering

182. Id.
183. Reno, 528 U.S. at 150.
184. Id. (“The DPPA regulates the States as the owners of data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.”).
185. This duty is reciprocal, applying as well to mandate opponents and their arguments.
186. See infra note 190.
188. Brown v. Hotel Employees, 468 U.S. 491, 500–501 (1984) (noting the basic interpretation of the Supremacy Clause is that Congress has the power to pre-empt state law).
189. See Adler & Kreimer, supra note 187, at 101.
190. Cox, supra note 187, at 1312.
doctrine are correct in their assertions, then the attempt by me and others to demonstrate the unconstitutionality of the commandeering of either states or persons will be in great danger, both doctrinally and conceptually.

However, the critics’ claims can be answered. Arguments must do more than draw distinctions, for as Heather Gerken notes, “[T]he key to drawing distinctions is not to argue that they exist, but to explain why they matter.” This article seeks to do both things. State commandeering doctrine doubters Adler and Kreimer, for example, seek to undercut the doctrine by claiming that commandeering is no worse a restriction on state action than is preemption (a federal power no one in this debate doubts). They start by “construing the preemption/commandeering distinction as a distinction between action and inaction.” I will not repeat my earlier critique of the activity/inactivity distinction or the instant argument in favor of the superiority of the notion of commandeering in illuminating the issues of this article. Suffice it to say that defining and explaining commandeering in terms of activity and inactivity, as Adler and Kreimer do, needlessly imports avoidable weaknesses and problems into the discussion. Since they seek to criticize, rather than support, commandeering doctrine, this makes their task artificially easier than it should be.

Yet, even within their own narrative, there are two admitted problems with their position which they unfortunately dismiss, rather than answer. The first is that “certain actions are morally worse than parallel inaction.” The second is that “affirmative duties are more ‘demanding’—they interfere more with a person’s own life plan—than negative duties.” After noting these two difficulties, they respond only to the second, saying, “We doubt, however, that this latter justification applies to governmental actors as well as to private individuals.” But this assertion is contradicted by the very case they are discussing. Recall that the main factual claim of the chief law enforcement officer plaintiffs in Printz (who are surely “governmental actors”) is that the time and action demands of the federal statute unduly interfere with their performance of their state law enforcement duties. This points up another important difference between commandeering, on the one hand, and prohibition or

192. See Adler & Kreimer, supra note 187 and accompanying text.
193. Id. at 95.
194. See supra notes 83-160 and accompanying text.
195. In fairness to Adler and Kreimer, it should be noted that their article was published in 1998, not long after the state commandeering cases were decided and years before the activity/inactivity distinction became a central issue in the health care litigation.
196. Adler & Kreimer, supra note 187, at 101 n. 90.
197. Id.
198. Id.
199. Printz v. United States, 521 U.S. 898, 927-28 (1997) (noting that the time demands of performing the vast volume of the required background checks under the Brady Bill were unreasonable, and would interfere with their state duties).
preemption, on the other hand the latter two take no time at all for those whose activity is preempted or prohibited (they can do anything else while not doing the now off-limits activity), while commandeering occupies some or all of a party’s time as long as the affirmative duty imposed by commandeering lasts.

Let us now turn more directly to the basis in constitutional precedent and doctrine for the “no commandeering of the people” argument. This argument has two parts. The first part is the statement of the state anti-commandeering rule developed by the Court in the New York and Printz cases. This statement defines the nature of commandeering and locates its constitutional home in the Tenth Amendment in particular and in federalism doctrine generally. The second part derives from the argument of the Bond case that the Tenth Amendment protects not only the states, but also the rights of individuals from federal interference. All that remains, then, is to put the two parts together to hold that among the individual rights protected by the Tenth Amendment is the right of individuals not to be conscripted or commandeered by the federal government.

The New York and Printz cases deal with federal statutes which respectively compel state legislatures and executive officials to implement federal statutory policy. Although the two cases concern different branches of state government, they raise the same general sort of claim—that the federal statutes in question unconstitutionally commandeering the states to do the federal government’s bidding. These cases involve statutes which do not, the plaintiffs claim, merely regulate state commercial activity; they go farther yet to commandeering the states and state officials. These cases are, for this reason, logically and constitutionally distinguishable from Garcia v. San Antonio Metropolitan Transit Authority, for example, which upholds application of the wage and hours provisions of the Fair Labor Standards Act to a municipal transit system. The statute in Garcia merely regulates commercial activity, but the statutes in New York and Printz do more than that—they commandeering the states and state officials. For purposes of my argument here, the two most important aspects of these state commandeering cases are the nature of the line between

200. New York v. United States, 505 U.S. 144, 202 (1992) (quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981)) (“Congress may not simply ‘commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”); Printz, 521 U.S. at 935 (“We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State’s officers directly”).
202. See id. at 2359 (holding that individuals, as well as states, can bring Tenth Amendment challenges to the constitutionality of federal statutes).
203. New York 505 U.S. at 161; Printz 521 U.S. at 935.
204. New York 505 U.S. at 161; Printz 521 U.S. at 935.
206. See id. at 555-56 (“Congress’ action in affording SAMTA employees the protections of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress’ power under the Commerce Clause.”).
mere regulation and commandeering as well as the explanation of why that line is constitutionally significant.

The first issue, the nature of the line between regulation and commandeering is clearer and easier to explain. I have already argued that one knows when one is being commandeered and that one knows when one is commandeering others. The nature of the act can also be gleaned from the synonyms used for “commandeer” in the commandeering cases. Taking a look just at the Printz case, for example, commandeering is variously described as the power to “press . . . into federal service,” “command,” “impress,” and “directly to compel.” All these words and phrases connote more than the mere adjustment of activity already voluntarily entered into; they also involve control over and compulsion of not just the activity in question, but also of the person or entity involved itself. In the state anti-commandeering cases, this is described as a violation of state sovereignty. Analogously, in the “commandeering the people” situation this is best described as a violation of individual liberty.

Despite (or perhaps because of) the forceful words the Court uses in Printz to describe commandeering, the preceding paragraph gives an exaggerated impression of the nature and baseline of the compulsion (if it can be called that) actually required for a finding of commandeering. This mistaken impression can be cured by looking at the facts of the commandeering cases themselves. Printz, for example, involves the provisions of the Brady Act concerning background checks related to gun sales to be performed temporarily by state “chief law enforcement officers” (hereinafter CLEOs). The duties required of CLEOs by the Brady Act are mainly clerical in nature—filling out paperwork and doing background checks; they are far less dramatic than one might anticipate when first seeing the words the Court uses to refer to the commandeering. This is because “commandeering” and its cognates usually imply physical force or coercion, which is not present in the state commandeering cases or in NFIB.

This corrected impression, however, has the practical effect of lowering the coercive threshold for unconstitutional commandeering by setting a relatively

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207. Others have also noted the relative obviousness of commandeering as compared to other related notions discussed in this article. See, e.g., Cox, supra note 187, at 1340.
208. Printz, 521 U.S. at 905.
209. Id. at 909.
210. Id. at 907, 922.
211. Id. at 924 (quoting New York v. United States, 505 U.S. 144, 166 (1992)).
212. See id. at 932.
213. See Barnett, supra note 10, at 626-27 (connecting the analogy of commandeering the states with violating individual liberty by using the plain language of the Tenth Amendment, which states that “powers not delegated by the Constitution to the United States . . . are reserved to the states respectively, or to the people.” The inclusion of the phase “or to the people” connects the anti-commandeering of states cases, which relied on the same amendment, to the violation of individual liberty.
214. Printz, 521 U.S. at 902.
215. Id. at 903.
216. Id.
low bar for what may count as compulsion here. This will be relevant, for example, when considering whether or not the fine/tax which is part of the individual mandate constitutes commandeering. What is called commandeering need not involve physical force, threat or even psychological pressure. Instead, what the Court calls commandeering is similar to what is called a penalty or an unconstitutional condition in other constitutional areas. Another factor lowers the bar of compulsion still further. The commandeering can be both partial (in terms of the range of activities covered) as well as temporary and, nevertheless, be unconstitutional. The commandeering of the entities and individuals involved in both New York and Printz is both temporary and partial in both cases, and yet is unconstitutional.

One complicating fact also deserving mention here is that certain forms of the commandeering of individuals, such as the military draft, jury service and filling out census forms (examples frequently mentioned by mandate defenders), are conceded to be constitutionally valid even by individual mandate opponents such as Randy Barnett, who must then explain why those duties are constitutionally permitted, while the individual mandate is not. Barnett argues that these other mandates arise from and are justified by civic duties owed by citizens to government. The Supreme Court has used the civic duty argument, for example, to uphold the constitutionality of a military draft against a Thirteenth Amendment challenge. What Barnett and I argue, however, is that there is no general civic duty owed by citizens to government to do its bidding, certainly not a commerce-based duty to obey federal economic purchase mandates like the individual mandate. The Constitution sets out no such general duty. The Supreme Court has never asserted the existence of such a duty. The wording used by the Court in upholding military conscription, for example,

217. Whether this payment is a tax or a fine is, of course, an issue on which the constitutionality of the entire ACA turned, but it is fortunately a question not to be answered in this article. See, e.g., NFIB, 132 S. Ct. at 2596 n. 9.

218. See, e.g., Hall, supra note 15, at 1827 n. 11 (a brief overview from different districts not calling the individual mandate a commandeering of the people, but more of a penalty, or an “assessable payment,” that is appropriate under the taxing power.).

219. See NFIB, 132 S. Ct. at 2627 n. 10 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

220. See, e.g., Barnett, supra note 10, at 630.

221. See id. at 606 (“Historically, one is not responsible for omissions to act unless one has a preexisting duty to act.” Going on to discuss each concededly constitutional mandate and trace them to such duties, e.g., the duty to serve in military. Then noting that the duty to purchase health care is not historically based.).


223. See Barnett, supra note 10, at 631. (“What separates the United States from other countries is the minimal and fundamental nature of the duties its citizens owe to the state,” reinforcing the idea that there are only few and fundamental duties owed to the government by individuals, but no general duty owed to the government.).
treats that duty as exceptional and not as one of a broad range of duties.\textsuperscript{224} Even defenders of the individual mandate do not argue for the mandate in terms of obedience to a civic duty which citizens owe to the federal government, but instead as simply falling within the federal commerce or taxing powers.\textsuperscript{225}

Now, it is true that the restriction on individual liberty involved in the draft is greater than the interference involved in the individual mandate, but this is not a situation where the greater power to curtail freedom implies or includes the lesser power to curtail freedom.\textsuperscript{226} The degree to which freedom is limited by government in a particular law is, doubtless, a factor (an important factor—but still only a factor) in determining its constitutional permissibility. The nature of the governmental justification for the curtailment is also an important countervailing factor which can sometimes outweigh the individual’s interest in freedom. This explains why a very significant liberty limitation, military conscription, for example, is constitutionally permissible while a much less significant liberty limitation, such as the individual mandate, is not.

The state anti-commandeering decisions do not, by themselves, establish that the doctrine also applies to individuals. But they do take several important steps in that direction. The first step is that of describing and defining commandeering in terms of compulsion.\textsuperscript{227} The second step is that of explaining why the commandeering of state legislatures and executives is an unconstitutional violation of state sovereignty.\textsuperscript{228} And the third step is showing why challenged federal statutes may initially appear to be constitutional, in the sense of being

\textsuperscript{224} See The Selective Draft Law Cases, 245 U.S. at 390 (nothing that the duty to enlist in a mandatory draft is so exceptional that the Court stated that they were unable to conceive upon any theory where the citizens could perform this supreme duty of defending the country at a time of war without having a mandatory draft. There were no discussions of any general duty owed to the government by the individuals.).

\textsuperscript{225} See generally, Hall, supra note 15 (never implying that the individual mandate is supported by a general duty owed to the government, but always brings it back to the commerce and taxing powers.).

\textsuperscript{226} See Barnett, supra note 10, at 630-31 (stating, in light of his reading of the court’s conclusions in the Selective Draft cases, that unless they could find an affirmative duty from the citizens upon which to base the conscription, that would have indeed violated the Thirteenth Amendment. Barnett leads from there to narrow down on the argument from mandate supports relying on the duty to register for the draft, and points out that there must still be an affirmative duty upon which the mandate would be justified. And that the duty to register for the draft was so exceptional that it could not conceivably could have justified lesser requirements, such as mandatory purchases of insurance.).

\textsuperscript{227} See Printz v. United States, 521 U.S. 898, 925 (defining commandeering as a prohibition where “the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”).

\textsuperscript{228} See id. at 928 (quoting Brown v. EPA, 521 F.2d 827, 839 (1975) (citations omitted)) (Reasons against commandeering were the “Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than (as Judge Sneed aptly described it over two decades ago) by “reduc[ing] [them] to puppets of a ventriloquist Congress.” It is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.”).
necessary, they can nevertheless unconstitutional when they are not proper. According to these cases, the Necessary and Proper Clause, used as a justification for implied federal powers, imposes two separate and different demands on federal legislation.²²⁹ The state commandeering in New York and Printz is unconstitutional, not because it is not in the relevant sense necessary,²³⁰ but because it is not a proper means for carrying into execution an enumerated power²³¹ (here, the Commerce Clause²³²).

The first Bond case takes another important step towards establishing the "no commandeering the people" doctrine. This step counters and qualifies statements in the state commandeering, which note that it was the plan of the Constitution (in contrast to the plan of the Articles of Confederation) to have the national government operate directly upon individuals, rather than only indirectly through the states.²³³ I am not arguing that these statements are wrong, only that they do not, by themselves, deflect my argument. Yes, it is true that under the Constitution the federal government will operate directly on the people, rather than indirectly through the states. But this operation must still be constitutionally proper—and this is where the Bond case becomes relevant.

Bond's important step is summarized in the doctrinal holding that the Tenth Amendment protects individual liberty directly and not only indirectly as a consequence of federal violations of state sovereignty.²³⁴ The Bond Court states

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²²⁹. See id. at 923-24 (separating the Necessary and Proper Clause, into (1) necessary, and (2) proper, stating that the background checks in the Brady Act may be "necessary" to bring about Congress' intentions, it must also be a proper exercise of an enumerated power. So being relevant to bring about Congresses intentions imposes one demand under the "necessary" requirement, but also connects that relevancy requirement to the execution of an enumerated power, which is another demand under the "proper" requirement.).

²³⁰. See id.

²³¹. See id. (quoting THE FEDERALIST NO. 33, at 204 (A. Hamilton)) ("What destroys the dissent's Necessary and Proper Clause argument, however, is not the Tenth Amendment but the Necessary and Proper Clause itself. When a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions it is not a "La[w] . . . proper for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such."").

²³². See NFIB, 132 S. Ct. at 2573 (analyzing the Necessary and Proper Clause arguments the court points out that "each of this Court's prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power" . . . "The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power and draw within its regulatory scope those who would otherwise be outside of it. Even if the individual mandate is "necessary" to the Affordable Care Act's other reforms, such an expansion of federal power is not a "proper" means for making those reforms effective.").

²³³. See New York v. United States, 505 U.S. 144, 166 (1992) ("In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.").

²³⁴. See Bond v. United States, 131 S. Ct. 2355, 2363-64 (2011) ("The individual, in a proper case, can assert injury from government action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to the state.").
this succinctly, “Federalism secures the freedom of the individual.”

Now, \textit{Bond} does not originate this notion, but it is the first Supreme Court decision to thematize and explain it. Going back to the beginning of our constitutional history, we understand that an important purpose of the Constitution is to “secure the Blessings of Liberty to ourselves and our Posterity.”\textsuperscript{237} \textit{Bond} holds these liberty guarantees spring in part from federalism generally and the Tenth Amendment in particular and that the claims arising therefrom are justiciable.\textsuperscript{238}

Prior to \textit{Bond}, it was not clear that the Tenth Amendment afforded individuals direct protection of their liberties on federalism grounds from otherwise constitutional federal legislation, just as it was not clear prior to \textit{New York} and \textit{Printz} that the Tenth Amendment similarly protected the states from federal commandeering. After all, the \textit{Darby} case famously dismissed the Tenth Amendment as a mere truism, rather than an independent source of rights protection.\textsuperscript{239} But, once the Court established the anti-commandeering rule with regard to the states, one might say that it was fated, if only by the wording of the Tenth Amendment,\textsuperscript{240} to be called upon to answer whether the same doctrine applied also to individuals. It took an important step in this direction in the \textit{Bond} case, holding the Tenth Amendment protected the rights of individuals as well as those of states.\textsuperscript{241}

One last step is needed, however, to get from existing case law and doctrine to the “no commandeering of the people” doctrine. That step is the demonstration that this directly protected liberty is among the individual liberties protected by the Tenth Amendment. One might start here by citing the constitutional preamble or analogizing to state commandeering doctrine, but it would be helpful to have something further, some argument based on underlying first principles in support of this proposed doctrine. It is to this task that we now turn.

\textsuperscript{235} \textit{Id.}

\textsuperscript{236} The state commandeering cases made the assertion well before Bond. \textit{See, e.g., New York}, 505 U.S. at 181 (“[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself. ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’”) (internal citation omitted).

\textsuperscript{237} U.S. CONST. pmbl.

\textsuperscript{238} \textit{See Bond}, 131 S. Ct. at 2365 (“If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object.”).

\textsuperscript{239} United States v. Darby, 312 U.S. 100, 124 (1941) (“The amendment states but a truism that all is retained which has not been surrendered.”).

\textsuperscript{240} \textit{See Barnett, supra} note 10, at 626-27 (Relying heavily upon the “or to the people” phrase in the tenth amendment to argue out that anti-commandeering was extended to individuals by the tenth amendment.).

\textsuperscript{241} \textit{Bond}, 131 S. Ct. at 2364 (“Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions.”).
B. Servants and Sovereigns

In his *NFIB* opinion Chief Justice Roberts, after discussing the provisions of the ACA and the arguments of its proponents, says, “This is not the country the Framers of our Constitution envisioned,” then adding, “Accepting the Government’s theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.”242 Unfortunately, he does not then go on to elaborate on these comments and neither do the other justices. A few commentators do cite his statements,243 but provide little further additional analysis or explanation either. Yet, I believe that these seemingly cryptic statements are highly relevant to the theme of this article and their elaboration will help complete the last step to the “no commandeering of the people” doctrine. For these statements involve the very foundational underpinnings of our constitutional system as the framers established them. They raise questions of sovereignty, what it is, who possesses it and how it functions. And they indicate the way in which individual mandate proponents overturn and reverse those foundations.

The most relevant and important question here is who is sovereign and who is servant under our constitutional system? In the statements quoted above, the Chief Justice suggests, without explicitly stating, the notion that the founders saw the people as sovereign and the government as the servant and also that the constitutional mindset and assumptions behind the individual mandate would deconstruct and reverse this hierarchy. Let me explain why I say “deconstruct.” At the beginning of one of his important papers on deconstruction and law,244 Jack Balkin quotes a famous biblical passage on the subject of hierarchy reversal, “The stone that the builders rejected has become the chief cornerstone.”245 Deconstructive theory postulates that many concepts exist in unstable, nested oppositions246 paired with complementary concepts in a hierarchical, but reversible, manner. Like the Bible, deconstruction preaches the reversal or inversion of these hierarchies.247 When it comes to legal nested oppositions and hierarchies, this reversal is not simply an intellectual process, but also facilitates ideological critique in law.248 In the American Legal theory of a generation ago,

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243. See, e.g., Gerken, supra note 191, at 97 n. 75.
245. Id. (quoting Psalms 118:22).
246. Balkin defines a nested opposition as “a conceptual opposition each of whose terms contains the other, or each of whose terms shares something with the other.” J.M. Balkin, *Nested Oppositions*, 99 YALE L. J. 1669, 1676 (1990) (book review).
247. See Balkin, supra note 244, at 746-67 (describing this inversion using deconstructive concepts including the metaphysics of presence, difféance and trace, arguments that undo themselves and the logic of the supplement).
248. See, e.g., Jack M. Balkin, *Deconstruction’s Legal Career*, 27 CARDOZO L. REV. 719, 725 (2005) (“Deconstruction has proved particularly useful for ideological critique because ideologies often work through forms of privileging and suppression.”).
the deconstructive move of hierarchy reversal was a technique used by Critical Legal Studies members and others to critique and reorient established legal theory and practice. 249

Now, the concept of the sovereign is a notion basic to federalism theory. 250 It does not exist in isolation, but is paired, as deconstructionists would say, in nested opposition with the concept of the servant. 251 The debate in contemporary federalism theory, however, is not directly over the reversal of the hierarchy in the sovereign/subject opposition as such, but instead over who is sovereign and who is subject. Underlying Chief Justice Robert’s objection to the individual mandate is a defense of the traditional notion of popular sovereignty, i.e., the sovereignty of the people. Within this hierarchy, the governments, both state and federal, are servants, or agents, of the people. 252 This understanding is reflected in the common practice of referring to government officials as public servants, for example. In the larger federalism debate which has arisen as a result of the health care case, this notion of popular sovereignty has been introduced and defended mainly by Randy Barnett, who explains the Chief Justice’s complaint by saying that defenders of the individual mandate seek to turn citizens into subjects, by allowing the federal government to commandeer them, 253 thus reversing the hierarchy established by the framers 254 and denying citizens the blessings of liberty the Constitution promises them. 255 Although he would not, of course, phrase it in this way, the Chief Justice is here objecting to the constitutional deconstruction to the structure of popular sovereignty established in the Constitution by the founders.

It is true that the sovereign/servant nested opposition does not currently play a significant, explicit role in the health care debate and litigation. This is simply because that debate so far has been neither argued nor decided on an anti-commandeering basis. This opposition is instead relegated to a few cryptic judicial comments and a few constitutional commentaries. It is a main purpose of this article to remedy this absence. This opposition does, however, loom larger in the earlier round of the commandeering debate in the state

249. See, e.g., Balkin, supra note 246, at 1669 (“Deconstruction has become a prominent force in legal theory in the last few years, especially through its use by feminist scholars and members of the Critical Legal Studies movement.”).

250. For an important exposition of the relation between sovereignty and federalism, see Akhil Reed Amar, Of Sovereignty and Federalism, 96 YALE L. J. 1425 (1987).

251. For a leading presentation of this view, see Heather R. Gerkin, Of Sovereigns and Servants, 115 YALE L. J. 2633 (2006).

252. See Barnett, supra note 10, at 629 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)) (“in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.”).

253. See id. at 634-37 (Barnett dedicates his entire concluding section of his article to this principle, titling his final section “Conclusion: From Citizens to Subjects.”).

254. See id. at 629-30.

255. See id.
commandeering *New York* and *Printz* cases and the associated academic commentary. We can look there for relevant argument and doctrine to apply to the commandeering of the people. The Court in both those cases invokes the anti-commandeering rule to safeguard the sovereignty of the states,\textsuperscript{256} protecting them from federal compulsion and control.\textsuperscript{257} Critics of these holdings and of the related constitutional doctrine reply that such measures were neither called for nor needed. These critics feel that “the political safeguards of federalism,” earlier invoked in the *Garcia* case to strike down formalistic limitations on the power of Congress to regulate the states\textsuperscript{258} are sufficient and appropriate protection for the states.\textsuperscript{259}

Furthermore, as Justice Breyer notes in his *Printz* dissent, other countries with federal systems sometimes administer federal laws in ways quite contrary to American anti-commandeering doctrine. In these systems, constituent states “will themselves implement many of the laws, rules, regulations, or decrees enacted by the central ‘federal’ body.”\textsuperscript{260} Countries with this sort of federal system do this because they think that this approach interferes less with both state independence and authority and with individual liberty less than anti-commandeering doctrine would.\textsuperscript{261} For these reasons, Justice Breyer concludes that, “[T]here is neither need nor reason to find in the Constitution an absolute principle, the inflexibility of which poses a surprising and technical obstacle to the enactment of a law that Congress believed necessary to solve an important national problem.”\textsuperscript{262} Note that the Justice’s argument here is functional, rather than historical or textual, and assumes that the Court has the freedom to interpret and implement basic structural constitutional concepts such as federalism in a functional manner free of limitations imposed by history, text or precedent. Disagreement concerning this assumption, however, pervades debate on this topic.

Justice Breyer’s argument is taken up and extended in the academy by federalism scholars like Heather Gerken, who argues for “the power of the servant” in the federalism context.\textsuperscript{263} This power involves the ability of “an institutional actor placed somewhere down the chain of command to influence the decision-maker who is nominally the boss.”\textsuperscript{264} For Gerken here, the decision-maker is the federal government, the chain of command is the federal/state relation and the servant is the state. This model of federalism assumes complete

\textsuperscript{256} See *New York* v. United States, 505 U.S. 144, 175 (1992); see also *Printz* v. United States, 521 U.S. 898, 963 (1997).

\textsuperscript{257} See *New York*, 505 U.S. at 188; see also *Printz*, 521 U.S. at 900.

\textsuperscript{258} See *Garcia* v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 588 (1985).

\textsuperscript{259} See *New York*, 505 U.S. at 205-06; see also *Printz*, 521 U.S. at 956.

\textsuperscript{260} *Printz* 521 U.S. at 976 (Breyer, J., dissenting) (citations omitted).

\textsuperscript{261} See id. at 976-77.

\textsuperscript{262} Id. at 978.

\textsuperscript{263} See Gerken, supra note 251, at 2635.

\textsuperscript{264} Id.
federal supremacy and denies state sovereignty, at least as it has been traditionally understood.\textsuperscript{265} She does not, however, completely deny state power in this area, but says that it comes instead through “the powerful role states play as servants,”\textsuperscript{266} rather than through the exercise of the states’ own sovereign power.

Now, it is not my purpose in this article to reprise the sovereignty debates which attended and followed the Court’s state commandeerings cases. Although this article is concerned with federalism, the focus here is its relation to individual liberty, rather than its relation to state sovereignty. I bring up the statements of Justice Breyer and Professor Gerken only to argue that, whatever the merits of their views are on the topic of state sovereignty, they do not and should not determine the power of Congress to commandeer persons pursuant to its commerce power or to set the scope of individual liberty protection under the Tenth Amendment. I am here opposing, not the argument that states are servants (powerful or otherwise) of the sovereign federal government, but instead the analogous argument that citizens are servants of the sovereign federal government.

But who is making the sorts of arguments I oppose here—isn’t “government of the people, by the people, for the people”\textsuperscript{267} a civic platitude accepted by all? One answer to this question is, “Who isn’t, at least implicitly, assuming the validity of these arguments?” After all, anyone asserting that the individual mandate is a mandate (as opposed to merely being a garden variety regulation of commerce) and also that the individual mandate is constitutional is making this sort of argument, whether they realize it or not. Another important question is why and how are the state and individual commandeering arguments in important ways disanalogous? The answers to both questions can be illuminated by examining what I shall call the “bad news” series of articles on the individual mandate. These articles are illustrative of important underlying issues here, not because they mirror what others are saying in the health care debate, but for the opposite reason—because they on both sides express, in a forceful manner, what others are not saying, but only assuming, in their arguments. They convey, then, important but largely unexpressed underlying assumptions and orientations of both sides in the debate.

Andrew Koppelman’s \textit{Bad News for Mail Robbers}\textsuperscript{268} begins the series. In this article Koppelman argues for “the obvious constitutionality” of the ACA in general and of the individual mandate in particular, dismissing constitutional

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265. Gerken elsewhere dismisses the notion of state sovereignty in the federal/state relation as “a campfire story.” Gerken, \textit{supra} note 191, at 123.

266. \textit{Id.} at 120.


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objections to this position as silly and asserting that the doctrine of mandate critics would, if applied, “randomly blow up large parts of the U.S. Code.”

The second piece in the series comes from Gary Lawson and David B. Kopel, who argue against Koppelman that the individual mandate does not pass constitutional muster under the Necessary and Proper Clause because it is not an exercise of Congress’ incidental powers under that clause. They, in turn, base their argument upon the claim that the Necessary and Proper Clause incorporates the doctrine of principals and incidents found in the agency, administrative, and corporate law of England and the United States in the eighteenth century. The incidental powers account of congressional power pursuant to the Necessary and Proper Clause more narrowly limits the scope of congressional legislative power than does the account Koppelman gives of that power in the first “bad news” article. This is so because there seem to be few, if any, limits on that power for Koppelman. In that article, for example, he cites the Comstock test of "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power," as expressing the proper description of the scope of congressional power under the Necessary and Proper Clause. Lawson and Kopel, in turn, reply to Koppelman by contending that the doctrine of principals and incidents "must be satisfied before one inquires whether a law is important or customary ("necessary") or within fiduciary boundaries ("proper")." More specifically, they find the individual mandate to be unconstitutional because “the power to order someone to purchase a product is not a power subordinate or inferior to other powers” and is, therefore, not an incidental power.

In his reply to Lawson and Kopel in the third article in this series, Koppelman does not attack the historical bona fides of the research of Lawson, Kopel and others; in fact, he praises them. What he does, however, do is to deny the relevance, let alone the controlling effect, of these eighteenth century legal notions on contemporary Necessary and Proper Clause doctrine. Once again Koppelman claims that Lawson and Kopel’s eighteenth century rules, if

269. See id. at 2.
270. Id. at 10-11.
272. See id. at 270.
274. Lawson & Kopel, supra note 271, at 270 (emphasis in original).
275. Id. at 271.
278. See Koppelman, supra note 276, at 516.
279. See id. at 517.
adopted today, would “randomly blow up large parts of the U.S. Code.”280 In the fourth and (thankfully) last article in this series,281 Lawson and Kopel make two arguments which are relevant here. The first is that Chief Justice John Marshall in *McCulloch v. Maryland*282 also accepted their incidental powers argument,283 a contention which Koppelman concedes, to a point.284 This is important because of the centrality of Marshall’s *McCulloch* opinion to all contemporary understandings of the Necessary and Proper Clause.285 A doctrine, like that of principals and incidents, which forms an important feature of that opinion, cannot be quite so easily dismissed; it must, instead, be answered or accommodated by those who would appeal to *McCulloch* as controlling authority here.

The second and more relevant argument made by Lawson and Kopel in this fourth article is that their incidental powers argument does not “randomly blow up large parts of the U.S. Code,” but instead only one small part of that code—the individual mandate.286 They find these assertions by Koppelman and others to be utterly hyperbolic.287 The reason that the incidental powers doctrine “blows up” only the individual mandate and not “large parts of the U.S. Code” is that, among existing federal statutes, it is only the individual mandate which reduces citizens from sovereigns to servants, thereby reversing the hierarchy assumed by the framers and reflected in the Constitution itself. The doctrines of popular sovereignty and “no commandeering the people” act to block this reduction and reversal and the denial of these doctrines serves to bring about this reduction and reversal.

Let me sum up some seemingly disparate topics and arguments of this section of this article in order to clarify and summarize my argument. If, for example, we translate the statement from Chief Justice Roberts’ *NFIB* opinion which began this article section288 into deconstructionist terminology, we get the accusation that individual mandate backers are reversing a basic hierarchy involving the nested opposition of sovereign and subject assumed by the constitutional text and structure, thereby changing the basic legal and political relations in our form of government. According to both the Chief Justice and to

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280. Id. at 522.
284. See Koppelman, *supra* note 276, at 518.
287. See id. at 538 (“It is interesting to See, how often the advocates of the individual mandate, including Professor Koppelman, keep insisting that, if the Supreme Court strikes down a single, novel and utterly unprecedented congressional usurpation of power, then more than a century’s worth of federal law on other subjects will come crashing down with it.”) (citation omitted).
288. See *supra* text accompanying note 242.
the four NFIB joint dissenters, this change is not proper in a constitutional sense. Here I add the complementary charge that it also violates the rights of the people under the Tenth Amendment by violating individual rights and popular sovereignty. The general power of the federal government to compel citizens to involuntarily actions is simply not in the Constitution, a point mandate defenders seek to avoid rather than to answer. If the people are sovereign, then they are not servants or subjects of government. If the people are sovereign, then the government, state or federal, is not sovereign, but rather agent or servant of the people.

One might counter my argument here by saying that we cannot find the notion of popular sovereignty in the Constitution, either. But the document does, of course, begin with the words, “We the people of the United States,” and later continues that they “do ordain and establish this Constitution for the United States of America.” Who else, then, would possess the power to “ordain and establish the Constitution” other than the people of the United States? My hypothetical objector might still be unsatisfied with this response and might then ask why the document does not more explicitly establish or recognize popular sovereignty. This is because popular sovereignty is an underlying constitutional principle, assumed but not further stated in the text. Many statements, for example, can be culled from the framing and early constitutional periods asserting or assuming the doctrine popular sovereignty.

An indicative example can be found in the case of Chisholm v. Georgia, which contains an early examination by the Court of the concept of sovereignty, of both the state and popular varieties. In this case, Justice Wilson tells us that a claim of popular sovereignty in the Constitution would be proper, although such an assertion is not explicitly made there. He also refers to a free man as “an original sovereign.” Later in that case Justice Jay proclaims “this great and glorious principle, that the people are the sovereign of this country.” Other examples can be gleaned from later cases and the text of the Constitution itself. Chisholm also contains assertions that the protection of individual liberty is the

289. The protections and limits placed upon the federal government by the enumeration of powers and the Tenth Amendment are complementary in this and other ways.
292. See 2 U.S. (2 Dall.) 419 (1793) (allowing a state to be sued by a citizen of another state without its consent—a result soon reversed by the Eleventh Amendment).
293. See id. at 454 (Wilson, J.) (“To the Constitution of the United States the term SOVEREIGN is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves ‘SOVEREIGN’ people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.”) (emphasis in original).
294. Id. at 456.
295. Id. at 479 (Jay, J).
296. See, e.g., Barnett, supra note 290, at 608 (collecting examples).
underlying purpose of government. Popular sovereignty and individual rights are, of course, not the same things, but they are closely related and mutually reinforcing. Each of these notions supports and helps justify the other in describing and constituting the republican form of government.

It is true that these examples are not case holdings, but rather only dicta (and old dicta, at that). But, are they sufficient to demonstrate that popular sovereignty and individual liberty are underlying constitutional principles? The answer to this question depends on what underlying principles are and how they come into being. The argument is stronger if one believes that underlying constitutional principles derive from the original understanding of the Constitution held by the founders. But not everyone today holds such a belief. Living Originalists like Jack Balkin, for example, believe that underlying principles are current constitutional constructions and are not limited to those principles actually held by the framers and the ratifiers, but may be revised and reformulated anew today. However, no new “commandeering the people” constructions have not yet been explicitly created. While defenders of broad federal power may debunk traditional formulations of federalism, they have not made these moves with popular sovereignty and “no commandeering the people.” Justice Wilson may have hesitated to make such assertions because he found them ostentatious, but it is not a desire to avoid ostentation that moves modern day progressives to avoid these claims.

So, even though there is perhaps no knockdown argument to be had here because of the different assumptions of different starting points, my position draws some support from the unwillingness of mandate supporters to publicly deny that popular sovereignty and individual liberty are basic underlying constitutional principles. This is, in part, because it is rhetorically more difficult today to deny the existence and importance of these principles than it is to deny the “campfire story” of state sovereignty. There is an important reason that one denial is more difficult and uncomfortable than the other. Millions of Americans, including judges and legislators, believe this campfire story. In addition, the notion of “no commandeering the people” as I have argued above, is established in current case law, framers’ understanding, and popular sentiment.

IV. THE GHOST OF LOCHNER

One last topic requires discussion here, not so much because of the express content of the individual mandate debate, but rather due to what is not said (at

297. See, e.g., Chisholm, 2 U.S. (2 Dall.) at 468 (“The rights of individuals and the justice due to them, are as dear and precious as those of the States. Indeed, the latter are founded upon the former, and the great end and object of them must be to secure and support the rights of individuals, or else vain is Government.”).


299. See id. at 260.

300. See Gerken, supra note 265, at 123.
least in so many words) in that debate. This unsaid matter has several substantial effects on the explicit content of the debate. Please recall that I began this article by saying that it presents the missing individual liberty portion of Chief Justice Roberts’ NFIB opinion. This missing portion underlies the Chief Justice’s remark that, “This is not the country that the framers of the Constitution envisioned.”301 This absence can also be seen in what mandate defenders say in response to the Chief Justice and other mandate opponents. In this dispute, mandate opponents almost exclusively cast their arguments in terms of federalism and enumerated powers, while mandate defenders nevertheless accuse those opponents of having a hidden economic liberty agenda of bringing back the economic substantive due process arguments of Lochner and its ilk,302 even though neither the Chief Justice nor most other mandate critics positively cite Lochner or explicitly advance economic substantive due process arguments against the mandate.

This situation calls for an explanation as much it calls for a reply, an explanation of why mandate defenders make charges concerning arguments that mandate critics have not been made. These charges are based on the assertion that beneath the commerce and federalism arguments mandate critics actually make hides an unstated agenda relating to Lochner and its dreaded revival.303 This is why I use the phrase, “the ghost of Lochner” here. Although Lochner does not actually appear anywhere in the substantive constitutional argument against the mandate, its presence is nevertheless feared, if not claimed, almost everywhere by mandate defenders. Claims about ghosts are more often based upon fears than upon facts. So, too, it is with the ghost of Lochner.

To these ends, my aim here will be threefold: to explore what “Lochner” means and stands for in the individual mandate debate, to relate this issue to the larger debate over the scope and content of the New Deal Settlement,304 and finally to show how the “no commandeering the people” doctrine can protect constitutional economic liberty under the Tenth Amendment without reviving Lochner and economic substantive due process and, thus, to banish the ghost of Lochner. These aims are not fully distinct and independent; they are, instead, highly interrelated.

Lochner is a complicated and freighted notion; it stands for many things and has different meanings for different groups of people. Among other things, it has been employed as a metonym, a symbol and a rhetorical club. As a metonym, it stands for a group of overruled cases in the constitutional anticanon sometimes

301. See supra note 242 and accompanying text.
302. See, e.g., supra notes 20-25 and accompanying text.
303. For examples of such a hidden agenda assertion, see Peter J. Smith, Federalism, Lochner, and the Individual Mandate, 91 B. U. L. Rev. 1723, 726, 745 (2011).
304. For a recent article exploring this connection at length, see Jamal Greene, What the New Deal Settled, 15 U. PA. J. CONST. L. 265 (2012).
referred to as the Constitution-in-Exile, a phrase coined by Douglas Ginsburg.\textsuperscript{305} This phrase is a catchall for the constitutional provisions and doctrines banished from mainstream constitutional discourse since 1937. According to Ginsburg, these include, “the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins the necessary and proper, takings, and commerce clauses.”\textsuperscript{306} \textit{Lochner} is now commonly used as a metonym for these exiled clauses and doctrines. Its metonymic nature helps explain why, although \textit{Lochner} is a due process case involving a state statute, it can be brought up in argument over a federal statute’s constitutionality under the commerce power. The purpose it serves is symbolic rather than doctrinal. The use of the case name “\textit{Lochner}” also serves to obscure the fact that these clauses and doctrines are covertly, yet effectively, being written out of the Constitution.

To further explain the meaning and role of \textit{Lochner} here, let me add a note on the concept of a canon and an anti-canon in law. Balkin and Levinson, for example, tell us that, “Every discipline, because it is a discipline, has a canon, a set of standard texts, approaches, problems, examples, or stories that its members repeatedly employ or invoke, and which help define the discipline as a discipline. If the study of law is a discipline, it too must have its canons and its own sense of the canonical.”\textsuperscript{307} In addition to possessing a canon or set of positive examples, a discipline may also have an anticanon, or set of negative role models. In constitutional law, each case in the anticanon “embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute.”\textsuperscript{308} There is some dispute as to whether the anticanon is merely a negative canon or whether it is some different sort of entity altogether. Jamal Greene takes the latter position,\textsuperscript{309} as do I. On this view, there are several notable disimilarities between the canon and the anticanon. For one, “the anticanon differs from the canon in that it is both narrower and less contested.”\textsuperscript{310} Greene believes that the anticanon is so narrow that it may contain only three cases—\textit{Dred Scott}, \textit{Plessy}, and \textit{Lochner}.\textsuperscript{311} Secondly, a case’s presence in the anticanon is not merely (or even) a function of its bad reasoning or doctrinal error,\textsuperscript{312} but is instead based “on the attitude the constitutional interpretive community takes toward the ethical


\textsuperscript{306} Id.

\textsuperscript{307} J.M. Balkin & Sanford Levinson, \textit{Preface to Legal Canons} at ix (J.M. Balkin and Sanford Levinson eds., 2000).


\textsuperscript{309} See id. at 382-84.

\textsuperscript{310} Id. at 382.

\textsuperscript{311} See id. at 383.

\textsuperscript{312} Many cases possess these characteristics and are nevertheless not members of the anticanon.
propositions that the decision has come to represent, and the susceptibility of the
decision to use as an antiprecedent.”

This last sentence of Greene’s is dense and important, yet it is unclear, too.
It is in need of some unpacking before we proceed further. On his model, the
anticanon expresses the ethical attitude of the (current) constitutional interpretive
community, rather than the original public meaning of the constitutional text, for
example. This makes it controversial. But it is also ambiguous. That
interpretive community might consist of the judiciary, the legal academy or the
entire American citizenry, to mention only three possibilities. In Greene’s
article, the quoted sentence is followed by a discussion of how a law professor
might explain anticanonical decisions to law students. It is probably then safe
to assume that Greene means the legal academy when he speaks of the
constitutional interpretive community.

But this view becomes problematic when, as in NFIB, the legal academy
“gets it wrong,” i.e., fails to predict or even to accept the basis of the Court’s
decision (at least on the commerce/federalism issue). Randy Barnett explains
that, “most law professors never properly understood the New Federalism of the
Rehnquist Court” and the limits it imposes on congressional regulatory power.
They instead attribute to Congress “a power to regulate the national economy at
its discretion, subject only [to] the express prohibitions in the Constitution and
perhaps some selected unenumerated rights.” From the law professors’
perspective, then, Lochner is wrong because that it exemplifies the exact opposite
constitutional view, that there are numerous judicially enforceable unenumerated
rights. In his treatise chapter on the Lochner Court, Lawrence Tribe calls this
view “the model of implied limitations on government.”

Please note that the canon/anticanon model does not explain the differences
and disagreements between the Chief Justice and the law professors here. Both
sides accept the same canon and anticanon here, but disagree as to what they
mean. They cite the same cases, but understand them differently. In particular,
they differ over the nature and scope of their related underlying principles. Their
disagreement over what these cases mean makes the so called New Deal
Settlement a settlement in name only. Yes, all parties to this debate reject the
doctrines and cases of the Lochner era, but they disagree as to exactly what has
taken its place. To explain the situation we are now in, we must also look
beyond the constitutional canon and anticanon to the notion of competing
constitutional gestalts (i.e., patterns or configurations) developed by Lawrence

313. Greene, supra note 308, at 381 (emphasis in original).
314. See id.
315. For a leading explanation of how and why this happened, see Randy E. Barnett, No Small
Feat; Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)?, 65
316. See id. 1346.
317. Id.
Solum. Solum sees two competing constitutional gestalts regarding the New Deal Settlement. The first, which he calls “The Dynamic New Deal Settlement,” is essentially the view that Randy Barnett attributes to the law professors. The second, more conservative, view, which he calls “The Frozen New Deal Settlement,” is an alternative gestalt which “can be summarized as a slogan, ‘[t]his far, and no farther.’”

What we have here, then, is a contested constitutional gestalt. What then of the constitutional canon and anticanon? Are they contested, too? Their case membership is not contested, but their larger meaning is contested. This is where we see Lochner most frequently used as a “rhetorical club,” a club used by mandate defenders against mandate critics. It is used to accuse the New Federalism of the Rehnquist and Roberts Courts of Lochnerism, i.e. attempting to bring back the Constitution-in-Exile. This can readily be seen in the comparisons of Lochner and NFIB. The rhetorical club of Lochner is used as an enforcement device within the constitutional interpretive community, one used to bring dissenters back in line with the dominant law professors’ view of matters. Because of its membership in the anticanon, no community member wants to be accused of using Lochnerian arguments even “under a different guise.” But different groups within the interpretive community may disagree as to the scope of the Lochner taboo. They see the meaning of Lochner differently because they possess wider or narrower gestalts—dynamic or frozen. To supporters of the Dynamic New Deal Settlement, for example, all formal limitations on congressional power are Lochnerian because there is no place for such limitations in their constitutional worldview. On the other hand, the Frozen New Deal Settlement has space for constitutionally protected individual liberties which are not revivals of substantive due process.

The disagreement here is not readily susceptible to solution by argument because it arises from opposing visions and understandings of the same canon and anticanon rather than from adherence to different sets of constitutional propositions. Barnett says that the law professors do not understand the New Federalism, but I believe that it is more accurate to say that they do accept the

320. See id. at 49.
321. See supra note 317 and accompanying text.
322. Solum, supra note 319, at 51.
323. Id. at 52 (quoting Randy Barnett, “This Far and No Farther”: Baselines and the Individual Insurance Mandate, Volokh Conspiracy (Jan. 22, 2012, 3:00 PM), http://volokh.com/2012/01/22/this-far-and-no-farther-baselines-and-the-individual-insurance-mandate/).
324. The phrase was applied to Lochner by James Fleming. See James E. Fleming, Fidelity, Basic Liberties and the Specter of Lochner, 41 Wm. & Mary L. Rev. 147, 173 (1999).
325. See, e.g., Smith, supra note 303 (“But because the objections to the individual mandate, though couched in federalism terms, have very little to do with federalism at all, it is difficult to see them as anything other than Lochner under a different guise.”).
New Federalism. They may not feel that they need to do so. After all, the Dynamic New Deal Settlement is but one vote away from constitutional recognition by a Supreme Court majority and “this far, but no farther” is a purely defensive position and not an affirmative constitutional theory. Current precedent supports an individual anti-commandeering liberty, I argue here, but time will tell whether or not this precedent is durable. Perhaps this is the ultimate teaching of the New Deal Settlement.

V. CONCLUSION

Constitutionality is in the eye of the beholder, but it lies in precedent, too. This article closes here with a few thoughts on the relation between the two in the context of the individual mandate debate. It attempts to link intuition and precedent through connections of canon, gestalt and underlying principle in search of the strongest, most plausible, multi-dimensional account of the unconstitutionality of the individual mandate in commerce power/federalism terms. In the course of this search, we have also sorted through doctrines and distinctions raised by the disputants (e.g., economic mandates, activity/inactivity, and commandeering) to evaluate their clarity and cogency. The final result is an assertion of a Tenth Amendment “no commandeering the people” individual liberty which complements the commerce power and federalism arguments of Chief Justice Roberts and the four joint dissenters in NFIB and which does not fall prey to the ghost of Lochner.
**TURNING THE TABLES:**
**IS IT TIME FOR PROFESSORS TO STOP FIGHTING THE PRESENCE OF STUDENTS’ TECHNOLOGY IN THE CLASSROOM AND INSTEAD USE IT TO ENHANCE STUDENT LEARNING?**

*Joni Larson*

Students who attend law school have a common goal of earning a Juris Doctorate by obtaining the requisite number of credits and, if required, a sufficiently high grade point average. Professors are facilitators of this goal, shepherding countless numbers of students through required and elective classes by introducing them to statutory or common law provisions, case law, hypothetical problems, and eventually testing the students on what they have learned with a final exam.

If the professors have been teaching long enough, they will have witnessed changes in their students. Not in their students’ objectives, but in how they go about achieving them. Rather than taking notes with paper and pencil, students type them into a laptop computer or tablet or smart phone. They surf the web, order new shoes, check email, and text friends during class while recording the lecture. Instead of reading assigned cases, they use Google to locate summaries. Instead of parsing through statutory language, picking it apart to find the relevant elements, they find a succinct breakdown on Wikipedia, already done for them.

With the growing prevalence of technology in students’ lives, the differences we see between current students and those from prior years are broader and of potentially greater impact than any differences seen in the past. Without a doubt, today’s law student learns in an environment that is vastly different than that of students ten or even five years ago.

The prevalence of technology in students’ lives in higher education and law school specifically has generated a lot of discussion. Topics include everything from whether these students learn differently, to the impact of the presence of their technology in the classroom, to whether students’ tendencies to multi-task on their various electronic devices results in less learning. While the discussion raises interesting issues, it should not distract us from two facts. First, technology is ever-present and that fact is unlikely to change. Second, the professor has technology available for use in the classroom as well. Instead of fighting its presence, the professor might embrace and use it. Students exist and will practice in a digital world. Is there any reason why they cannot learn the law with the digital world as a backdrop?

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I. TODAY’S STUDENTS: BABY BOOMERS, GENERATION X, GENERATION Y, NET GENERATION, DIGITAL NATIVES, MILLENIALS

Pop culture has developed categories for our population and similarly, our students. The categories are based loosely on when the student was born and assign traits that appear to apply generally to the generation as a whole.

Summary of Common Labels

<table>
<thead>
<tr>
<th>Generation</th>
<th>Age Group</th>
</tr>
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<tbody>
<tr>
<td>Baby Boomers</td>
<td>Born between 1946 and 1964</td>
</tr>
<tr>
<td>Generation X</td>
<td>Born between 1965 and 1982</td>
</tr>
<tr>
<td>Generation Y (Net Generation or Digital Natives</td>
<td>Born between 1982 and 1994</td>
</tr>
<tr>
<td>or Millennials)</td>
<td></td>
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**Baby Boomers and Generation X.** Students enrolled in law school from the Baby Boomer Generation or Generation X, while not brought up surrounded by technology, were introduced to technology along the way. It was not part of their learning experience growing up, but they find themselves immersed in a world full of technology.

**Generation Y.** Generation Y students (sometimes called the Net Generation, Digital Generation, or Millennials) differ from prior generations in that they grew up surrounded by technology. It has always been part of their world. Whether or not due to the presence of technology, there is a fairly common group of traits associated with these students.

The first trait involves how they co-exist with technology. From early on, they were “plugged in” with a variety of electronic devices. They are accustomed to the convenience of digital technologies. These students often are

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3. Berk, supra note 1, at 4-5.

4. Id.

associated with having breadth of coverage, but no depth, as they skim through online content, following links to tangential information and rarely completely reading an entire article.  

The second trait deals with how they interact with information. Given the easy access they have to information, they prefer receiving information quickly and processing it rapidly. They expect to have control over when they learn, how they learn, and the learning process itself. Technology serves as an enabler for learning. It is noteworthy that the largest percentage of distance-education college students are those students who are already on campus.  

Generation Y students learn from a wide variety of media and will seek out media that delivers what they want to learn. They must be constantly connected, one-on-one, with the content. Their previous learning experience is unlikely to have come through books, but rather visual learning. Having grown up easily and actively finding information on the internet, they are not interested in passively receiving information from a professor.  

The third trait involves their learning preferences. While these students value education, they prefer actively learning through interaction. They learn better by doing than by being told. More specifically, they choose to use technology as their preferred method of learning. This means they have a low tolerance for traditional lectures.  

They are accustomed to the convenience of digital technologies, and that access has informed the educational process they expect. They expect an active learning experience with which they can engage, such as hands-on, kinesthetic, experiential, or inquiry-based learning.
There are plenty who chafe at the generalizations made about Generation Y, noting that not all students have the same access to technology, or comfort level with it. And not all educators agree that higher education must be altered to meet the changing traits of Generation Y. Some argue Generation Y’s use of technology negatively impacts their learning habits, keeping them from developing critical thinking skills. Students’ propensity for multi-tasking during class has often been cited as a detractor from the learning experience. However, “such worries may be more a function of educators’ beliefs and assumptions about learning, springing from their own learning styles, than a reflection of Net Generation practices and beliefs.”

Regardless of what generational-group labels are created in the future, it is unlikely lines will be drawn any longer around the presence or absence of technology in students’ lives. Technology has permanently settled around students in higher education and other factors will emerge that more meaningfully separate them from subsequent generations. For educators, this means technology is part-and-parcel of the student’s learning experience. Professors are left wondering whether they need to make changes in their classrooms.

The law school faculty, having been molded mostly from generations several removed from that of the students’, may feel uncomfortable with the idea of technology. Many struggle with the question of whether to alter the classroom to account for the presence and prevalence of students’ technology. Some professors have focused on the intrusive presence of technology in the classroom and how to restrict its impact. Few have focused on how they, as professors,
could use technology to make the students’ learning experience better, making it more effective and similar to what they will encounter in practice.

II. WHAT ARE WE TRYING TO TEACH?

Of course, students need to know the law, everything from terminology and rules to formulas and case holdings. Arguably, any student could memorize a series of rules or formulas or case holdings. But, as repeatedly has been noted by the American Bar Association (ABA) and potential employers alike, mere memorization is not enough. Learning must go further and encompass skills acquisition.

*Competencies.* In its standards, the ABA includes a list of skills students need to acquire, labeling them as competencies. They include:

(a) Knowledge and understanding of substantive and procedural law;

(b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;

(c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and

(d) Other professional skills needed for competent and ethical participation as a member of the legal profession.

Similarly, the *Report and Recommendations of the American Bar Association Task Force on the Future of Legal Education* provides a conclusion on skills and competencies:

A given law school can have multiple purposes. But the core purpose common to all law schools is to prepare individuals to provide legal and related services in a professionally responsible fashion. This elementary fact is often minimized. The calls for more attention to skills training, experiential learning, and the development of practice-related competencies have been heard and many law schools have expanded practice-preparation opportunities for students. Yet, there is need to do much more. The balance between doctrinal instruction and

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focused preparation for the delivery of legal services needs to shift still further toward developing the competencies and professionalism required of people who will deliver services to clients.

In Changing Markets Create Opportunities: Emphasizing the Competencies Legal Employers Use in Hiring New Lawyers (Including Professional Formation/Professionalism), Neil W. Hamilton compiled results of surveys of large and small firms, county attorneys, and legal aid offices to determine the competencies the employers are looking for. The top five competencies across the groups include:

- Integrity/honesty/trustworthiness
- Good judgment/common sense/problem solving
- Analytical skills: identifying legal issues from facts, applying the law, and drawing conclusions
- Initiative/ambition/drive/strong work ethic
- Effective written/oral communication skills

Finally, Marjorie Shultz and Sheldon Zedeck created 26 Factors in Effective Lawyering. They include:

- Analysis and Reasoning
- Creativity/Innovation
- Problem Solving
- Practical Judgment
- Providing Advice & Counsel & Building Relationships with Clients
- Finding and Using Facts
- Researching the Law
- Speaking
- Writing
- Listening
- Influencing & Advocating
- Questioning & Interviewing
- Negotiation Skills
- Strategic Planning
- Organizing and Managing (Own) Work
- Organizing and Managing Others
- Evaluation, Development, and Mentoring
- Developing Relationships within the Legal Profession
- Networking and Business Development
- Community Involvement and Service
- Integrity & Honesty
- Stress Management
- Passion & Engagement
- Diligence
- Self-Development
- Able to See the World Through the Eyes of Others

29. Id. at 3.
31. Id.
Without a doubt, skills are vital to success in the legal field.33

Taxonomy. A taxonomy “is a classification scheme that orders objects or phenomena hierarchically. That is, terms at the top of the taxonomy are more general, inclusive, or complex, subsuming terms at a lower level.”34 Students must attain lower level intellectual behaviors before they can move to higher level intellectual behaviors.35 Bloom’s Taxonomy of Cognitive Objectives36 describes a range of cognitive behaviors (that we might label “skills”) that begin with knowledge and the most basic comprehension. It then moves to more complicated and comprehensive behaviors that require recall or use of that knowledge.37 Accordingly, the taxonomy can help us understand how students begin with content learning, progress to application of the knowledge, and finish by acquiring skills.38

The traditional method of law school instruction, lecture and use of the Socratic Method, is not designed to impart higher-level skills to the students. If overlaid on the taxonomy, it would settle around the first, second, or third level. These levels deal with basic knowledge acquisition, comprehension, and application. Traditional methods are not designed to move students to the higher levels of the taxonomy.

Bloom’s taxonomy levels, arranged from highest to lowest, are as follows:39

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34. DAVID H. JONASSEN & BARBARA L. GRABOWSKI, HANDBOOK OF INDIVIDUAL DIFFERENCES, LEARNING & INSTRUCTION 6 (1993).
35. Id.
37. Others have modified, updated, or expanded Benjamin Bloom’s Taxonomy. See generally LORIN W. ANDERSON & DAVID R. KRATHWOHL, A TAXONOMY FOR LEARNING, TEACHING, AND ASSESSING: A REVISION OF BLOOM’S TAXONOMY OF EDUCATIONAL OBJECTIVES (2001).
38. BLOOM, supra note 36, at 38-43.
39. Id.; JONASSEN & GRABOWSKI, supra note 34, at 7-9.
III. HOW DOES TECHNOLOGY FIT IN?

Technology fits into the taxonomy as a tool to be used to help students achieve a higher level.\textsuperscript{40} Technology can be used in an intentional and informed manner to support and promote the expected knowledge or skills the student should gain at each level. But please note that technology is never intended to be a replacement or substitute for good teaching.\textsuperscript{41}

\textit{A. Knowledge}

First, students must master the most basic concepts of the subject matter, such as terminology.\textsuperscript{42} This is true irrespective of the law school course. Each subject matter area has its own technical underpinnings, and students must learn these rules prior to being able to develop any skills using the information.

Most often, the student obtains this core information by reading the assigned material and listening to the lecture that follows. Any student who fails to grasp

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\textsuperscript{40} Of course, if the professor has no desire to alter his teaching method from mostly lecture and use of the Socratic Method, it is unlikely he will be interested in exploring either the benefits of using the taxonomy as a method for helping the students acquire skills or the use of technology as part of the skills-development process.

\textsuperscript{41} See Nevid, \textit{supra} note 5.

\textsuperscript{42} See BLOOM, \textit{supra} note 36, at 62-88.
the rules or concepts (whether due to a failure to read or understand the assignment), will be left behind when the professor moves to the next level. However, to the extent the professor only lectures on the material, the students will remain at this lowest level, or at least not be guided to the next level.43

A lot has been written on how students learn, including many informative and comprehensive articles addressing learning styles. Students have their own strengths and preferences in how they receive and process information, believing some methods more effective than others.44 Even within the concept of learning styles, there are a variety of methods for characterizing and organizing them.45 There is also a significant body of work on adapting instruction to accommodate different learning preference to improve outcomes.46 Some research has been done on the influence that learning styles have on the use of technology.47 This information can provide the backdrop to the use of technology for different taxonomy levels.

Because the first level objective is for students to acquire the basic knowledge of the subject matter, technology can easily play a role. Generation Y students do best when they interact with the material as often as possible48 and on their own time schedule.49 The professor can use technology to create these opportunities.

43. Students enrolled in upper level seminars, simulation courses, and clinics likely already obtained the basic knowledge and comprehension of a particular subject matter and can apply the information. In such situations, a professor can move directly to analysis and higher levels on the taxonomy.


46. Jonassen & Grabowski, supra note 34, at 28.

47. See Franzoni and Assar, supra note 44, at 779. See generally Nauman Saeed, Yun Yang & Suku Simnapan, Emerging Web Technologies in Higher Education: A Case of Incorporating Blogs, Podcasts and Social Bookmarks in a Web Programming Course Based on Students’ Learning Styles and Technology Preferences, 12 EDUC. TECH. & SOC’Y 98, 106 (2009) (“Learning styles of today’s learners are flexible enough to experience varying technologies and their technology preferences are not limited to a particular tool.”).

48. See Oblinger & Oblinger, supra note 1, at 2.13.

49. Berk, supra note 1, at 10.
For example, the professor could create pre-recorded presentations students could view for assistance in understanding the more difficult definitions, concepts, or rules. The presentations should not be viewed as a substitute for an entire lecture, or even large sections of a lecture. To the contrary, each should convey one rule or definition or concept. Accordingly, each should be short, specific, and concise—ideally five minutes or less. A professor who has taught a course for a number of years knows in which areas students have difficulties. Likewise, he understands in which areas the students will need to spend a little more time.

From the perspective of the student, a pre-recorded presentation would give them the opportunity to immediately jump from the textbook to the presentation if they are confused by material in the textbook. In the presentation, they likely will hear the information presented in a slightly different way or in a different context, allowing them to see the information from a new or different angle, helping them to comprehend the concept or rule. Moreover, they could view the brief presentation as many times as needed to absorb the necessary information.

By making pre-recorded presentations available, the focus of learning shifts from the professor to the student, arguably giving each student more control over when they learn, what they learn, and how well they learn. In addition, it gives students the ability to better understand content without having to wait for a lecture or the opportunity to ask questions. Instead, questions can be answered when they arise. Moreover, the learning can happen without the stress that often occurs in the classroom. In sum, students can be actively involved in the learning process.

By the time the students get to class, each could have worked through any confusion or, at a minimum, specifically identified the area in which they still have a question. Class time could be devoted to presenting the material in new or different contexts, allowing the students to more fully understand the parameters of the concept, rule, or definition. More specifically, the professor could use


51. There is an abundance of literature on the benefits of “flipped” classrooms, a method of instruction where the core content is provided outside the classroom so class time can be dedicated to other purposes. The organization is considered “flipped” because the core content, usually provided during class time, is provided outside of class and what is traditionally thought of as “homework,” or application of the material, occurs during class time. See Tina Rosenberg, In Flipped Classrooms, A Method for Mastery, OPINIONATOR (Oct. 23, 2013), http://opinionator.blogs.nytimes.com/?s=A+Method+for+Mastery; NOORA HAMDAN, PATRICK E. MCKNIGHT, KATHERINE MCKNIGHT & KARI M. ARFSTROM, A REVIEW OF FLIPPED LEARNING (2013), available at http://www.flippedlearning.org/cms/lib07/VA01923112/Centricity/Doma in/41/LitReview_FlippedLearning.pdf. See also the Flipped Learning Network at www.flippedlearning.org.

52. Paula Lustbader, Teach in Context: Responding to Diverse Student Voices Helps All Students Learn, 48 J. LEGAL EDUC. 402, 412 (1998).
class time to assist students in moving from the one level of the taxonomy to the next.

Of course, knowledge or content learning can be achieved prior to class only if the student actually reviews the presentations before class. Note that this expectation is no different than the expectation the student will read the assigned material prior to class. Just as there is no certainty the student will read the assigned material, there is no guaranty the student will watch the pre-recorded material prior to class. Noteworthy, the rate of student use of the presentations will increase if the professor does not cover the pre-recorded content in class, disincentivizing students from spending time prior to class learning material. The repetition of the material during class usually happens if the professor falls into the trap of believing the students will understand the material only if they hear it from him, in class, and continues to cover the material as part of the lecture. Moreover, in that case, no class time is saved for other purposes.

A second digital tool available to the professor is online quizzes, made available to the students to test their foundational knowledge. How many times has a professor heard a student say that they understand the material only to have the student apply the material to a problem in class and, in doing so, demonstrate that they do not, in fact, understand the material? To be fair to the student, until they are asked to use what they believe they know, there is no way for them to know if there is a flaw in their perceived knowledge. An online quiz would give the student the opportunity to test their knowledge on the most basic concepts, rules, and definitions and eliminate any gaps or misunderstandings prior to class. The quiz could be taken at a time when the student feels they are prepared, and feedback would be immediate. Finally, if the quiz is required to be taken prior to class, the quiz results will allow the professor to assess whether the students have learned the information necessary to move to the next level of the taxonomy.

B. Comprehension

At the second level, students must be able to apply what they have learned or memorized, at the most basic level. Comprehension is facilitated by practice and participation. The more the students interact with the material, the more

53. There are many free websites that can be used to administer online quizzes that are automatically scored.
55. Requiring completion of quizzes to sit for the exam or tying the student’s grade to success on the quizzes is an additional method for encouraging students to learn the basic subject matter information when it is presented, as opposed to just before the final exam.
56. See Bloom, supra note 36, at 89-119.
they understand.\textsuperscript{58} Note that, at this stage, the students are not expected to determine which rules are applicable. It should be made obvious to them that the rules set forth in the materials are the rules on which they are being tested.

The objective is for the professor to give the students a variety of ways to interact with the terminology, rules, and definitions so they can build a foundation for application of the material. Armed with this foundational knowledge, class time can be used to expand into other areas, or possibly on moving upward on the taxonomy.

As with learning styles, there is a hefty body of work addressing presentation methods and the impact of presentation methods on learning styles,\textsuperscript{59} theories of instruction,\textsuperscript{60} learning strategies,\textsuperscript{61} teaching strategies,\textsuperscript{62} and best practices.\textsuperscript{63} This information can be useful when considering how to best assist students in developing the most basic understanding of the material.

In addition, there is a wealth of information about how adult students learn that can inform the structure or presentation of the substantive material. For example:

\begin{quote}

\textsuperscript{58} Id.


\textsuperscript{62} Franzoni & Assar, supra note 44, at 15-29 (“Teaching strategies (TS) are the elements given to the students by the teachers to facilitate a deeper understanding of the information.”); Lustbader, Teach in Context: Responding to Diverse Student Voices Helps All Students Learn, supra note 52, at 402; Steven I. Friedland, How We Teach: A Survey of Teaching Techniques in American Law Schools, 20 SEATTLE U. L. REV. 1, 1-3 (1996).

\end{quote}
• Repetition strengthens connections in the brain; 64
• The more an idea is used correctly, the more the student acquires a skill to complete the same process; 65
• Students learn best when they take responsibility for their own education; 66
• Students who are actively involved in the learning process learn better; 67 and
• “Initial learning is enhanced when students have a framework to contextualize initial understanding, a motivation to learn, and opportunities to transfer initial understanding to broader problems.” 68

From the perspective of technology, videos presenting a variety of scenarios in which the students must determine if a rule, formula, definition, etc., will or will not apply can be used to help establish the focus or limitations of a rule. 69 The rule should be clearly identified; what changes is the situation in which it is being applied.

A professor likely will have a good idea of different factual scenarios in which the rule could be tested. It may seem that hypothetical questions built into the textbook serve this function. But, changing the medium in which the (sometimes same) question is presented creates a new challenge, or a new opportunity for learning, for the student. (If you doubt this, give it a try.) In addition, pre-recorded videos made available to the students in advance of class give the students plenty of opportunity to view and consider the scenarios, all on their own timeline.

While the initial planning for any such presentations might be time consuming, once developed, the presentations could be used for future classes. If a number of presentations are developed, they could be rotated through the classes and modified as needed.

Online quizzes could be used for the students to test their comprehension of the material. These quizzes would be more challenging than those merely testing

64. JENSEN, supra note 57, at 38-42.
65. Id. at 38-39.
69. There is an abundance of literature on the benefits of “flipped” classrooms, a method of instruction where the core content is provided outside the classroom so class time can be dedicated to other purposes. Class time is dedicated to what is traditionally thought of as “homework” application of the material. See Rosenberg, supra note 51; Hamdan et al., supra note 51, at 13.
a student’s basic knowledge. These quizzes would be used to determine if the student can make inferences, generalizations, or extrapolations from the material and apply the rules in a variety of contexts.

C. Application

The application level requires the student to use the knowledge and information in a new situation.\textsuperscript{70} Previously, they were given the factual information and the rules and asked to apply the rules to the facts. At this stage, the student must determine what factual information is relevant, determine what rule is applicable, and work through the analysis on their own. This is a difficult step for the student. It is one thing for them to determine whether an identified rule applies to a given factual situation. It is quite another for them to look at a factual situation and determine, from all the rules they know, which specific rule applies. Accordingly, at this point, the role of the professor is to help the students identify which rule applies in a specific situation.

Professors often expect students to arrive in their seats with this skill at their fingertips, simply from having read the assigned material. Unfortunately, oftentimes this is not the case. A professor who presents the class with a hypothetical and hears silence in response is often frustrated, claiming the students lack the necessary critical thinking skills. A lack of critical thinking skills is not a new complaint.\textsuperscript{71} The silence does make sense, however, if viewed in the context of the taxonomy. The student must have mastery over the prerequisite or underlying knowledge and comprehend the foundational information to be able to move effectively into analysis.\textsuperscript{72} Noteworthy, if the students have not acquired this underlying knowledge, they benefit little from instruction.\textsuperscript{73}

It is at this point that students should begin to actively construct their own understanding and knowledge through experience and reflection.\textsuperscript{74} Constructivism is the learning theory in which learners internalize knowledge.\textsuperscript{75} One of the attributes of constructivism is its focus on “preparing the learner to problem solve in ambiguous situations.”\textsuperscript{76} To the extent the information is being interpreted for them (\textit{i.e.}, such as in a teacher-centered classroom where much of the information is transmitted by lecture), the professor generates little interaction and little opportunity for the students to construct knowledge. In addition, the students are less likely to be engaged.\textsuperscript{77}

\textsuperscript{70} See \textsc{Bloom}, \textit{supra} note 36, at 120-143.
\textsuperscript{71} Berk, \textit{supra} note 1, at 9; Oblinger & Hawkins, \textit{supra} note 21, at 12-13.
\textsuperscript{72} \textsc{Jonassen & Grabowski}, \textit{supra} note 34, at 419.
\textsuperscript{73} \textit{Id}.
\textsuperscript{74} Beyers, \textit{supra} note 1, at 218-227; Lustbader, \textit{Teach in Context: Responding to Diverse Student Voices Helps All Students Learn}, \textit{supra} note 52, at 402.
\textsuperscript{75} See Schwartz, \textit{supra} note 60, at 379-382.
\textsuperscript{76} Beyers, \textit{supra} note 1, at 218-227.
\textsuperscript{77} \textit{Id}. 
A professor who has been teaching for many terms has built up a contextual web into which information is placed. Students, especially those with little to no exposure to legal concepts or real-life experiences to which they might apply legal concepts, do not have this web around which they can structure the new information. They may know rules or concepts that are loosely connected, but lack any meaningful way to understand them as part of a larger, subject-matter picture, much less understand how they will see them in practice.

Each student arrives with differing skills, backgrounds, hobbies, responsibilities, and life experiences and must build knowledge around those experiences. Each must develop ways of connecting the newly-presented information to knowledge or experiences already in their memory. Thus, the richer the learning environment, the easier it will be for the student to attach meaning to new learning experiences, building his own web of understanding.

So, where does technology fit? At this stage, creating opportunities for active learning starts to build this framework. Information learned through active discussion is generally retained better than material learned through lecture. And, students from Generation Y have demonstrated a preference for participating in the learning process, as opposed to being passive learners. Moving from a professor-centered classroom to student-centered learning is not a new concept. For those who want to make the shift from rule learning and memorization to skills-based learning, this change in focus is a necessary precondition.

The professor can create an opportunity for active learning by sending the students an email or text 15 minutes prior to class with a problem that needs to be solved. To be an effective learning tool, the problem has to be sufficiently specific and focused enough to be easily conveyed through electronic medium and able to be resolved through use a specific rule of law. Recall that, at this stage, the students are just beginning to determine which rule should be applied, and that is where the difficulty should be placed. What better way to get the

78. Lustbader, Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students, supra note 61, at 321 (“As experts, law teachers have internalized so much of the information and process that they are not consciously aware of all that goes into their analysis.”).


80. Beyers, supra note 1, at 218-227.

81. See Hess, Principle 3: Good Practice Encourages Active Learning, supra note 66, at 407. See also Hess, Listening to Our Students: Obstructing and Enhancing Learning in Law School, supra note 79, at 943.

82. See Boyle, supra note 61, at 5.

83. See Don Berrett, Professors’ Place in the Classroom is Shifting to the Side, THE CHRONICLE OF HIGHER EDUC. (November 13, 2014), http://chronicle.com/article/Professors-Place-in-the/149975/.

84. For a further discussion on student-centered learning, see generally Boyle, supra note 61, at 5.
students engaged and thinking about the material than have them talking about it as they walk in the door. Class would begin, not with a lecture, but with a vibrant discussion of which rule could be applied to the problem presented and why. Moreover, the professor might have just given them a reason to learn and apply a specific rule (and learned why other rules are not applicable).

As students communicate easily with their classmates, a student could be made responsible for creating hypotheticals and making them available prior to class online. The hypotheticals would then be the basis for class discussion. To create an effective and useful hypothetical, the student must have an understanding of the key parts of a particular area of law and how a slight change to a fact could alter the analysis or result. In class, discussion might include the facts of the hypothetical, their effect on the analysis, and their role in uncovering the nuances of a particular rule.

Or, the students could be responsible for preparing a wiki. A wiki is an electronic document that all students can have access to and edit. Students (rotating through the students in class or via pre-determined groups) would be assigned primary responsibility for creating or adding to the document, summarizing the material for the day in sufficient detail that a student who was not in class could follow what was covered. Once completed by the initial author(s), the document can be edited by other students, continually edited until the material is clear. When applicable, the document can explore the connection between the material presented in one class to that of other classes.

This group effort at organizing and summarizing the material will bring to light any misconceptions or misunderstandings about the material and allow them to be corrected. Moreover, it not only gives the students an opportunity to work collaboratively, but allows them to interact with the knowledge, interact with others who believe they also have knowledge, and resolve issues that might arise when there is a disagreement about the knowledge. This level of working with others to work through conflict and reach consensus arguably is at the core of a successful legal practice, and, therefore, a skill well worth developing.

The students could also operate a blog, with some posting questions and others being responsible for posting responses. What better way to test the

85. See Berk, supra note 1, at 12. See also Barnes, Marateo & Ferris, supra note 1, at 4-5 (indicating that Generation Y students are accustomed to group work and prefer to work in groups than work alone).

86. Wikipidia is likely the most famous wiki.

87. Students learn more when they interact with each other. Berk, supra note 1, at 12; Oblinger & Oblinger, supra note 1, at 2.7.


89. See Saeed, Yang & Sinnappan, supra note 47, at 98-109; Barnes, Marateo & Ferris, supra note 1, at 4.
students’ understanding of the material than have them respond to questions requiring its application?\(^9^0\)

Finally, the students could collaborate and build an online outline of the class using Mindjet, a “mind mapping software”.\(^9^1\)

**D. Analysis**

At this level, the student must parse through information, determine which parts are the most important, see the relationship between the various parts, and understand the organization and structure of the information.\(^9^2\) Of course, only those students who have mastered the lower levels will be able to begin to “put it all together,” finding ways in which the information relates, and begin seeing patterns or structures not apparent before.

At this level, information learned over several class periods must be viewed as connected and interconnected. Arguably, it is at this stage that students really begin to demonstrate critical thinking skills. Critical thinking is “a way of thinking, and a set of skills, that encourages an informed, aware, systemic, considered and logical approach to deciding” how to approach and solve a problem.\(^9^3\) It results in conclusions that are logically valid and able to be substantiated or supported by the law.\(^9^4\)

A student who truly understands how material is connected can explain the connections. So, why not challenge them to do so? Current technology makes creating a short video incredibly easy. Small groups of students (not more than two to three) could be assigned to develop a short (2-3 minute) movie explaining a legal concept that connects several classes of material. The goal should be a presentation sufficiently clear and of sufficient quality to post on a law firm website. These movies could be the foundation for a series of videos students could access to better understand (or test their knowledge of) a particular area of law, in the same way students now access YouTube videos to learn how to change the battery in their car key fob. Students who undertake such a project will find it harder to accomplish than they anticipated, but a valuable learning experience.

Or, the students could create a prezi presentation on inter-connected topics.\(^9^5\)

To properly construct a prezi, the students must have a clear idea of how the concepts interact and how they are interconnected. Moving well beyond what can be accomplished with a linear power point presentation, a prezi allows both those creating the presentation and those viewing them to drill down further and

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90. Note that skills and experience can be gained by both the person asking the question as well as the person responding. To ask a good question, the student must understand the material.
92. See BLOOM, supra note 36, at 144-161.
94. Id.
further into very specific topics while also seeing how a variety of topics are interconnected. The zooming visual presentation may make the information easier to remember and allow connections between topics to solidify.

E. Synthesis

This is where things can really become fun. Synthesis requires the student to put the elements from different sources or rules together into a structure or pattern not clearly seen before.96 The student must be able to assimilate the information into a pattern of understanding. This means they must be given the opportunity to understand both the whole and the parts of the whole. The way students “deal effectively with vast amounts of new information and regular retaining is to learn for meaning.”97 Complex material is given meaning when embedded within a real experience.98 Moreover, optimal connections are made when the brain is challenged.99

It is time for the professor to challenge the students in just this way. One class or part of a class could be used to explore how the concepts from several classes interact. In other words, the professor can begin to help students see what these rules will look like from their law office chair.100 The rules can be integrated into practical learning experiences.101 With the prevalence of digital accessories, the possibilities for what this might look like are much broader than they have ever been in the past. Specifically, technology could be used by students to “acquire information by developing their own questions, systematically evaluating sources, and selecting evidence to support their answers.”102 Such assimilation exercises are often more difficult than they at first appear. While the end product may be a short document or even list, to create that product, the student must be able to synthesis all the potentially relevant law (including working through areas of law eventually deemed to be inapplicable), tease out facts that would be relevant to different potential outcomes, all while gaining the necessary factual information from a lay person who may not appreciate the relevance of different facts.

Have a colleague familiar with a fact pattern join the class via Skype or Google Chat. The colleague could give foundational background information, as

96. See Bloom, supra note 36, at 162-184.
99. The challenge must be an appropriate level and not qualify as a perceived threat, which causes the brain to function less effectively. Id. at 69.
100. Lustbader, Teach in Context: Responding to Diverse Student Voices Helps All Students Learn, supra note 52, at 402 (discussing context from the perspective of diverse and nontraditional students).
101. Id.
102. Barnes, Marateo & Ferris, supra note 1, at 4.
a client would. Then, the students would have an opportunity to ask questions, attempting to learn all they could that they believed to be relevant. To make the exercise more efficient (and focused), there could be either a limit on the total number of questions that could be asked or a requirement that an explanation be offered as to why the information was needed before the question could be asked. Or, after the background information has been given, the students could be broken into groups to develop the top five questions they want to ask and why. Those questions would then be asked of the client-colleague.103

In as little as 20 minutes the students could have a greater sense of how the information they are learning is to be used in practice. This level of understanding requires knowledge of which rules are applied and why and what facts need to be developed for a particular rule to be relevant. Moreover, by listening to the questions other students want to ask and the reasons why, they are seeing a different focus on the law and facts, perhaps expanding their understanding of the material.

F. Evaluation

At this stage, the students are ready to begin making judgments about solutions and methods for resolving a problem and which are the best solutions or methods.104 Often this stage incorporates policy reasoning and assimilation of entire areas of law.

The classroom time can create an environment in which the student becomes invested in his understanding of how the rules are applied. This can be done by making the knowledge relevant and compelling and by providing feedback about the student’s learning process.105 Knowledge should reach out across classroom borders, allowing the student to place issues in the full context in which they will arrive at their desk, i.e., not limited to one subject matter.

Actual problem solving and lawyering could be directly incorporated into classroom experience. Students, either individually or broken into small groups, could be given a problem to solve. They could be expected to get information from a client via text or email or Skype or Facebook (or any other electronic modality that seems appropriate). Law partners (i.e., professors) might request memos or information from the groups at any time. Finally, based on the questions the students ask of the “client” or documents the students request, either from the client or from the opposing party, the problem could develop any number of directions. If one larger problem is assigned among several students,

103. Of course, this exercise could be done with the professor playing the role of the client. However, it seems an independent third party provides an element of necessity and immediacy that rarely could be achieved by the professor in the classroom. The students are likely too familiar with the professor and the professor with the students to dig deep into new and novel areas. The element of the unknown and unpredictability seems to add immeasurable value.

104. See BLOOM, supra note 36, at 185-200.

105. See JENSEN, supra note 57, at 52-55.
the students would have to convene periodically to discuss each piece of the problem and understand how the pieces work together. The students could arrange their own meetings, whether in person or online. The professor could build into the problem the need to determine the best option for the client, based on the client’s circumstances, values, and objectives, and the recognition that the client’s “best option” may conflict with what the student might think the best solution is.

If the problem is a capstone problem, it could cover material from a variety of different subject matter areas. Or, even more complicated, one class could cover a multi-faceted problem with different groups tackling different parts of the problems. Without a doubt, such a component or capstone class would most closely simulate a working, legal practice and require the students to utilize critical thinking skills, resolve problems, and overcome roadblocks, whether they arise from the law or from the client. The professor can control the content and manage the flow of issues to give the students the best learning experience possible. At the conclusion of the class, if available, a judge may visit the classroom through Skype or Google Chat and give feedback on issues and solutions considered by the class.

IV. CONCLUSION

With technology at our fingertips and the need for better-trained students hitting the market place, we have an array of tools we can use to achieve that goal. There are many options, from small exercises carried out in the classroom to more comprehensive, consuming exercises that allow the students to learn a variety of skills, from critical thinking to collaboration to problem resolution.

Using the taxonomy as a platform for incorporating technology into the classroom has several side-benefits. First, it helps the students understand the learning process. It transitions the focus from teaching students the black letter law to helping them learn how to teach themselves the law and apply it. Second, it moves the students from learning how to read a case to understanding how to develop a client’s case in the context of the current state of the law (considering both statutes and case law). Finally, if given the right learning tools, the student can move from answering questions about a judge’s analysis as set forth in an opinion to laying out the logical thread of their position before a judge.
A CASE FOR KENTUCKY’S STATE
RFRA IN ITS CURRENT FORM

Elizabeth Long*

“The ACLU supported the Religious Freedom Restoration Act’s (RFRA) passage [in 1993] because it didn’t believe the Constitution, as newly interpreted [in Employment Division v. Smith] by the Supreme Court, would protect people such as Iknoor Singh, whose religious expression does not harm anyone else. But we can no longer support the law in its current form. For more than 15 years, we have been concerned about how the RFRA could be used to discriminate against others. As the events of the past couple years amply illustrate, our fears were well-founded. While the RFRA may serve as a shield to protect Singh, it is now often used as a sword to discriminate against women, gay and transgender people and others. Efforts of this nature will likely only increase should the Supreme Court rule—as is expected—that same-sex couples have the freedom to marry.”

- - Louise Melling, Deputy Legal Director of the American Civil Liberties Union.1

INTRODUCTION

As we now know, our highest court has spoken. One day after Melling’s statement above, the Supreme Court of the United States, in Obergefell v. Hodges, ruled that same sex couples do have the constitutional right to marry.2 As a result, debate over RFRA is heating up again.

The Religious Freedom Restoration Act, commonly referred to as “RFRA,” is a federal law that was enacted “in order to provide very broad protection for religious liberty.”3 It essentially provides that government cannot intrude on a person’s religious liberty unless it can prove a compelling interest in imposing that burden and do so in the least restrictive way.4 A compelling interest and least restrictive means are the two key ingredients of “strict scrutiny.”5 Thus,

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5. Strict scrutiny is the most stringent standard of judicial review that United States courts use. It is part of the hierarchy of standards that courts use to weigh the government’s interest
RFRA provides a standard of review for courts to employ when deciding free exercise of religion cases. Shortly after the Supreme Court held the federal RFRA unconstitutional as applied to the states, states began enacting their own “mini RFRAs,” which generally mirror the federal law.

It has been about eighteen years since the first state RFRAs were enacted, about two years since Kentucky’s was enacted, and about a year since the American Civil Liberties Union (ACLU) publicly announced its withdrawal of support for the federal RFRA.

Though state RFRAs have been on the books for more than eighteen years, with the momentum surrounding Obergefell, they have been thrust into the spotlight again as critics label them “a license to discriminate” against the LGBT community. Gay rights groups argue that the only reason state legislators are jumping on the RFRA bandwagon is based on a “desire to put a firewall around people who want nothing to do with gay weddings.” As states that have recently enacted their own RFRAs amidst the gay rights movement’s momentum, Kentucky and Indiana are no exception to this particular criticism.

But while Indiana’s Governor recently made Indiana history when he signed a bill preventing the state’s RFRA from overriding anti-discrimination laws, including ones based on sexual orientation, Kentucky’s RFRA remains intact— with no “civil rights carve-out.” We are left to ask: which state is right?

This article’s purpose is to take a pause and a step back in order to wade through the mess that RFRA has become. Part I provides background on against a constitutional right or principle. The lesser standards are rational basis review and exacting or intermediate scrutiny. These standards are used to test statutes and government action at all levels of government within the United States. To pass strict scrutiny, the law or policy must be justified by a compelling governmental interest and the law or policy must be narrowly tailored to achieve that goal or interest.


10. Marriage equality is only the second new RFRA battlefield. Contraception-abortion was the first, and the Supreme Court held in 2014 that a contraceptives mandate, as applied to for-profit closely held corporations, substantially burdened the exercise of religion, for purposes of RFRA. See generally Burwell v. Hobby Lobby Stores, Inc. 134 S. Ct. 2751 (2014).


12. Id.

13. See id.

Kentucky’s and Indiana’s RFRA and the contention surrounding them. Part II will then analyze RFRA’s original purpose, highlighting its origins and a case study of where the law served as a “shield.” This section will also discuss the special nature of religion as it applies to the social contract and our nation’s history. Part III will seek to clarify what strict scrutiny actually means in free exercise claims and why this is important when analyzing those “sword” cases. Finally, Part IV will propose what should happen with state RFRAs, particularly Kentucky’s, moving forward and suggest that a carve-out—particularly a civil rights carve-out—is not necessary at this time, but that if there were to be one, a carve-out to the carve-out is needed.

I. THE DEBATE SURROUNDING RECENT RFRAS

A. The Passage of Kentucky’s RFRA

The RFRA debate in Kentucky started when House Bill 279 made its debut two years ago. Kentucky’s Bill included the “strict scrutiny” test—RFRA’s hallmark. Now codified in Kentucky Revised Statutes, section 446.350, the statute provides:

Government shall not substantially burden a person’s freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A “Burden” shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.

Thus, in order for government to infringe on an individual’s religious freedoms, it has to have a compelling government interest and the “fit” between that interest and the means used to achieve it (the law) must be as narrowly drawn as possible. In other words, even if the law serves a compelling government interest, if there are other means that would achieve that interest and are less restrictive on the free exercise of religion, the law will not survive strict scrutiny and the government loses. With such a high bar for the government set, RFRAs would seem to be a useful tool for minority groups in combating religious discrimination.

17. See id.
18. See id.
As indicated, however, Melling suggests that RFRA is now simply used to justify unlawful discrimination in the name of religion.\textsuperscript{19} Indeed, critics echoed Melling’s recent sentiments surrounding the passage of Kentucky’s RFRA—critics who feared it was only being passed with the ulterior motive of making same sex discrimination easier.\textsuperscript{20} These critics view RFRA as a way to get around fairness ordinances, which might be the only protections for the gay, lesbian and transgender community.\textsuperscript{21} Even religious leaders have shared in the criticism stating that the law verges on “religious fascism.”\textsuperscript{22}

Though the national ACLU initially supported the federal RFRA, the ACLU of Kentucky opposed Kentucky’s RFRA from the outset (perhaps because of its more recent passage).\textsuperscript{23} The group fears the Act could undermine civil rights legislation by allowing a religious individual to claim an exception from any law that prohibits discrimination.\textsuperscript{24} On the other side of the coin are people like Reverend Patrick Delahanty of Louisville who voiced his support for the enactment of Kentucky’s RFRA.\textsuperscript{25} “I want the state to meet the highest bar in its ability to interfere with one’s religion,” he said.\textsuperscript{26} Supporters of RFRA also argue that the laws do not create anything new.\textsuperscript{27} Rather, they are meant to enforce the religious freedom rights state constitutions and the federal Constitution guarantee, but are becoming overlooked.\textsuperscript{28} Despite the mixed bag of reactions to Kentucky’s House Bill 279, and contrary to Governor Beshear’s veto, it passed by a landslide.\textsuperscript{29}

\textbf{B. Indiana’s RFRA and Its 180° Turn}

The most recent and hotly debated RFRA, however, has been Indiana’s, which was just passed last year.\textsuperscript{30} It is worth looking at the roller coaster of events surrounding Indiana’s RFRA as they provide not only insight into the most recent concerns regarding RFRA, but also how one state initially chose not to act but then ultimately acted on those concerns.\textsuperscript{31}

\begin{enumerate}
\item Melling, \textit{supra} note 1.
\item Brammer & Musgrave, \textit{supra} note 15.
\item \textit{Id.} (see Senator Kathy Stein).
\item See \textit{id.} (see Reverend Nancy Jo Kemper of Lexington, Kentucky).
\item \textit{Id.}
\item Brammer & Musgrave, \textit{supra} note 15.
\item \textit{Id.}
\item \textit{Id.}
\item See \textit{Guo, supra} note 14.
\item \textit{Id.}
\item Brammer & Musgrave, \textit{supra} note 15 (noting that the vote was 79-15 in the House was 79-15 and in 32-6 in the Senate, and that almost all of the legislators siding with the Governor were from urban areas or were minorities).
\item \textit{Guo, supra} note 14.
\item See \textit{id.}
\end{enumerate}
On March 26, 2015, Indiana’s Governor, Mike Pence, signed Senate Bill 101 (Indiana’s RFRA) into law. An overwhelming majority vote of 40-10 approved its passing. A clause extended the new religious freedom protections to corporations, and another clause allowed the protections to be used in lawsuits between private parties.

However, the law’s signing was met with widespread criticism and thousands protested against its policy. Waving signs reading “No hate in our state” and carrying rainbow flags, a crowd of at least 2,000 people, including elected officials, rallied. That same day, Angie’s List, Inc. halted its business plans to expand in Indiana. Its CEO noted, “Angie’s List is open to all and discriminates against none and we are hugely disappointed in what this bill represents.”

The Republican mayor of Indianapolis called on the legislature to repeal the law, or add explicit protections for sexual orientation and gender identity, but Pence repeatedly defended the bill, including an appearance on ABC News, stating that the bill was not about discrimination.

However, on April 2, 2015, Governor Pence was singing a different tune. He stated, “[l]ast week [we] passed [RFRA,] raising the judicial standard . . . when government action intrudes upon . . . religious liberty . . . and I was pleased to sign it.” He continued, “[o]ver the past week this law has become a subject of great misunderstanding and controversy . . . . However we got here, we are where we are, and it is important that our state take action . . . .”

The Governor clarified that the new judicial standard “would not create a license to discriminate or to deny services to any individual as its critics have alleged.” He explained that the new RFRA legislation “enhances protections for every church, non-profit religious organization . . . in the review of


34. Guo, supra note 14.


36. Id.

37. Id.


40. Id.

41. Id.

42. Id.
government action where . . . religious liberty is infringed,” and also “enhances protection in religious liberty cases for . . . individuals and businesses in conscience decisions that do not involve provision of goods and services, employment and housing.”\textsuperscript{43}

The Governor then signed a bill that would prevent Indiana’s RFRA “from punching holes in anti-discrimination laws of all stripes.”\textsuperscript{44} The term “sexual orientation” will appear in Indiana’s statutes for the first time—and for the first time, legislators have enacted protections for gay people, “even if it is to protect them from a law designed to protect religious people.”\textsuperscript{45}

Governor Pence, however, recognized what might forever be a debate between believers and nonbelievers when he said, “[t]here will be some who think this legislation goes too far and some who think it does not go far enough, but … I believe resolving this controversy and making clear that every person feels welcome and respected in our state is best for Indiana.”\textsuperscript{46}

II. RFRA THEN AND RFRA NOW

“The argument over what Pence has thus signed becomes not only intellectual, but visceral, vitriolic, and ugly. Both sides dig in, because each thinks the other is flatly wrong—in their hearts, and on the facts. And the debate rages on, sometimes spiraling to a place so far away from the law itself.”\textsuperscript{47}

With all the recent furor surrounding RFRA, it is easy to lose sight of why the law was even enacted in the first place. Thus, this section summarizes the lead-up to the federal RFRA’s enactment and clarifies its oft-misunderstood “strict scrutiny” standard, using a case study of RFRA as a “shield.” Because RFRA is centered on protecting religious liberties, this section takes a much further step back and highlights the role of religion in our nation’s history. It also examines case studies where people like Melling criticize the RFRA as an inappropriate “sword.”

A. The “Sherbert Test”

RFRA came on the scene as a direct result of the Supreme Court decision in Employment Division v. Smith.\textsuperscript{48} But before Smith, the Court used the “Sherbert

\textsuperscript{43} Id.
\textsuperscript{44} Guo, supra note 14.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{48} See generally 494 U.S. 872 (1990).
Test,” which set forth a strict scrutiny standard in free exercise cases for nearly thirty years.49

Adell Sherbert, a member of the Seventh-day Adventist Church, worked as a textile-mill operator.50 Two years after her conversion to that faith, her employer switched from a five-day to a six-day workweek, including Saturdays.51 Ms. Sherbert’s religious belief, however, forbade working on Saturdays.52 Accordingly, she refused to work that day and was fired.53 Sherbert could not find any other work and applied for unemployment compensation.54 Her claim was denied, even though the state’s ineligibility provisions exempted anyone, whether religious or not, “for good cause.”55 A state trial court and the South Carolina Supreme Court affirmed the Employment Security Commission’s decision.56

The Supreme Court, however, reversed the decision of the Commission and lower courts, finding that, as applied, the government’s denial of Sherbert’s claim was an unconstitutional burden on the free exercise of her religion.57 The majority opinion effectively created the Sherbert Test, determining whether government action runs afoul of the Free Exercise Clause. Under the Sherbert Test, a plaintiff claiming that a state or federal law burdened his or her right to the free exercise of religion had to prove two elements: (1) his or her beliefs were sincerely held, and (2) the law in question impermissibly burdened the plaintiff’s religious practices based on his or her aforementioned religious beliefs.58

Sherbert sought an exception to a state law that provides for unemployment compensation.59 The burden then shifted to the state to prove that this regulation of religious conduct represented the least restrictive means possible for furthering a compelling state interest.60 The state did not meet that burden because there was no compelling government interest behind its denial of Sherbert’s proposed

50. Id. at 399, n.1.
51. Id. at 399.
52. Id.
53. Id.
54. Id. at 399-400.
55. Sherbert, 347 U.S. at 401.
56. Id.
57. Id. at 402, 412.
59. Sherbert, 374 U.S. at 399-400.
60. Id. at 399, 403; see also id. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945) (“We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant’s First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.”) (internal quotations omitted).
exception to the law. Additionally, the law had a “fit” issue because the means were not narrowly tailored.

Thus, the standard of review that came out of Sherbert was strict scrutiny. Government had to have a compelling government interest in denying the exception for a religious practice, and the government’s law had to be narrowly tailored to achieve its interest.

B. Employment Division v. Smith

Thirty-seven years after Sherbert, however, Smith cast aside the strict scrutiny model for the Free Exercise Clause. Smith held that burdens on religion no longer needed a compelling justification, as long as the laws in question were neutral and generally applicable. In Smith, the plaintiffs were denied unemployment compensation benefits under an Oregon statute because they had been fired after using the drug peyote. The plaintiffs alleged the disqualification unconstitutionally prohibited their free exercise of religion as their use of peyote was part of a religious ceremony at the Native American Church. Smith presented a classic case in which a religious believer wanted an exception from a law that burdened his religious practices.

Unlike in Sherbert, the Court did not grant the religious exception. But what made Smith such a landmark case was that rather than applying the existing Sherbert doctrine, the Court—to the surprise of many—discarded it. In its place, a new standard was announced: the Court held that the state need not show a compelling government interest so long as the law in question is “neutral and of general applicability.” Smith did not completely define the meaning of

61. Id. at 407 (“The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might . . . dilute the unemployment compensation fund [and] hinder the scheduling by employers of necessary Saturday work.”).
62. Id. at 407 (stating that even if a compelling government interest were found, “it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.”).
63. See infra note 128 (discussing how the years between were not those of unmitigated triumph for religious rights. Indeed, in many Supreme Court cases, the government won for a variety of reasons).
66. Id. at 874.
67. Id.
68. Id. at 890.
69. See infra notes 128-32 and accompanying text (explaining how J. O’Connor thought the rejection of the exemption survived Sherbert).
71. Smith, 494 U.S. at 878-79.
neutrality or general applicability, but it did make clear that the new default standard of review in free exercise cases was that of rational basis. As a result, judicially mandated religious exceptions are now themselves exceptional.

C. RFRA as a “Shield”

Three years later, Congress fired back with the federal RFRA, a statute designed to restore the law of the Free Exercise Clause on the eve of Smith. The original federal RFRA provided, in part, that the Smith opinion “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.” Congress also explicitly identified that the purpose of the statute was “to restore the compelling interest test” that the Supreme Court had used in prior cases including Sherbert and to ensure the compelling interest standard’s “application in all cases where free exercise of religion is substantially burdened.” But what does this statutory language look like in real life? To understand what Melling indicates was RFRA’s original “shield” function, we can turn to the story of Iknoor Singh—the individual mentioned at the outset of this article.

Singh, a rising junior at Hofstra University and an adherent of the Sikh faith, had long dreamed of serving his country. In accordance with his religion, Singh does not cut his hair or beard, and he tucks his unshorn hair under a turban. He wanted to enroll in the Army’s Reserve Officers’ Training Corps.
(“ROTC”) program at his university, but his religious practices did not comply with Army uniform or Army grooming standards. 81

Singh sought a religious accommodation that would have enabled him to enroll in ROTC with his articles of faith intact, but the Army denied the request. 82 The Army stated that a religious accommodation is denied when it has an “adverse impact on readiness, unit cohesion, standards, health, safety or discipline.” 83

But the Army regularly allows beards because of skin sensitivity to shaving, lets Jewish men wear yarmulkes, 84 and lets women wear their hair long. 85 So, the ACLU filed suit, charging the Army with violating Singh’s religious freedom. 86 The ACLU filed their claim under the federal RFRA. 87

In June of last year, a federal court ruled that Singh must be allowed the opportunity to serve with his hair, beard and turban intact because they pose no harm to the Army’s mission and no danger to others. 88 The court held that the Army’s refusal to accommodate an enrollee’s faith amounted to a substantial burden under RFRA; the Army failed to demonstrate that its refusal furthered its compelling interest in maintaining unit cohesion and discipline; and the Army failed to demonstrate that its refusal was the least restrictive means of furthering its interest. 89

Singh’s story can be juxtaposed against that of Simcha Goldman, who, like Singh, is a member of a minority faith (Judaism), but, unlike Singh, lost his religious exception battle against the Army. 90 Mr. Goldman did not have the protection of RFRA (like Singh did) when he faced the Supreme Court in 1986. While the Army now allows its members to wear yarmulkes, this was not always the case.

Dr. Goldman was a member of the Army, and he is also an Orthodox Jew. 91 Accordingly, he sought to wear his yarmulke outdoors and indoors, to be faithful to an omnipresent God. 92 The Army however did not allow Mr. Goldman to wear his yarmulke—indoors or outdoors. The reason the Army gave, and the reason the Supreme Court majority followed, centered on a “visibility” test. If people could see the religious garb, the Army banned it. According to the Army and the Court, to allow a yarmulke would inevitably allow a Rastafarian’s dreadlocks, a Sikh’s turban, and a Satchidananda Ashram-Integral Yogi’s saffron

81. Id.
82. Id.
83. Id. at 81.
84. See infra notes 90-99 and accompanying text.
86. Id. at 78.
87. Id. at 74-75.
88. Id. at 101-103.
89. Id. at 103.
91. Id. at 504-05.
92. Id. at 513 (Brennan, J. dissenting).
robe. Such a "rag-tag band of soldiers" would detract from a standard of uniformity in Army members' appearances as well as the public's confidence in their soldiers. Additionally, "uniformity" also related to how the Army's regulations applied evenhandedly across the board to all religions—Jewish man and Rastafarian alike. We would not want to favor one religion over the other and so the visibility test is good – again, according to the Army and the Court in 1986.

Justice Brennan, in his dissent, however, noted one important observation: implicit in Justice Stevens' concurrence and the Government's arguments was a "fairness concern." Not favoring one religion over the other through such an "evenhanded" rule meant as between the Jewish man and the Sikh man. It did not apply as between the Christian man and the Jewish man—nor the Christian man and the Sikh man for that matter. Indeed, though a soldier could not wear a yarmulke, the Army's own dress code allowed men to wear up to three rings and one identification bracelet of "neat and conservative," but nonuniform, design. Such guidelines inevitably favor the Christian man. As Justice Brennan noted, "the visibility test permits only individuals whose outer garments and grooming are indistinguishable from those of mainstream Christians to fulfill their religious duties."

Furthermore, if the Army was concerned about a neat appearance, Dr. Goldman was willing to wear any color and style of yarmulke the Army thought best to comport with its uniform. In response to the "parade of horribles" involving dreadlocks and saffron robes, as Justice Brennan pointed out, "a reviewing court could legitimately give deference to dress and grooming rules that have a reasoned basis in, for example, functional utility, health and safety considerations, and the goal of a polished, professional appearance." In sum, the Army's purported interest should not have outweighed Dr. Goldman's religious interest. Moreover, the Army and the Court did not initially place Dr. Goldman's minority faith on an equal footing with the majority faith, an offense that could have been cured through a RFRA protection.

A natural favoritism toward the majority religion is further illustrated through “Sunday closing laws.” Even in Sherbert, the Court supported Sunday

93. Id. at 519-20.
94. Id. at 512 (Stevens, J. concurring) ("The interest in uniformity, however, has a dimension that is of still greater importance for me. It is the interest in uniform treatment for the members of all religious faiths.")
95. Id. at 521 (Brennan, J. dissenting).
97. Id. at 520.
98. Id.
99. Id. at 519-20.
closing laws, stating there is a “strong state interest” in “providing one uniform
day of rest for all workers,” which could be achieved “only by declaring Sunday
to be that day of rest.” 101 But how does such a law affect a Seventh-day
Adventist whose religion requires her to rest on Saturday? If she wants to close
her business on Saturdays, but Sunday closing laws rule her state, she loses two
days of business productivity, while the Christian business owner loses only one.
Because her beliefs are “alien to the majority of our society”, though protected by
the First Amendment, they could “easily be trod upon under the guise of ‘police’
or ‘health’ regulations reflecting the majority’s views.” 102

Thus, RFRA serves as a protective shield for individuals of minority
religions, like Singh and Goldman, and the Seventh-day Adventist.

D. But Why Protect Religious Freedom in the First Place?

There is an assumption that “human beings are equal before they are
free, and that state authority is assumed to be legitimate so long as it
does not violate canons of equality. Given the importance of equality,
there is a presumption against differential treatment. Exceptions for
religiously motivated conduct are, thus, presumptively questionable,
and so long as the state’s authoritative demands conform to principles
of formal equality, they should be equally enforced against all without
regard to religious difference.” 103

Having established that the purpose behind RFRA is to protect individuals
like Singh by reinstating a strict scrutiny test, the next question becomes: why
should laws affecting religion be afforded strict scrutiny review in the first place?

One commentator, Cole Durham, has explained how “the social contract
model has powerful implications for why religious freedom is accorded a
distinctive place in the pantheon of constitutional liberties, and why the
heightened protections afforded religious exercise by state RFRA’s are
legitimate.” 104 Professor Durham suggests that if we look to the social contract,
we might have answers to RFRA criticisms. Underlying RFRA criticism is an
implicit assumption, an assumption based on “an equalitarian paradigm,” which
provides that “human beings are equal before they are free.” 105 In other words,
equality is put above all else—even liberty in a sense. Thus, laws are presumed
legitimate so long as they “do not violate canons of equality.” 106 Given this
elevated nature of equality, “there is a presumption against differential treatment.

Rev. 729 (1960).
102. Id. at 411 (Douglas, J. concurring).
103. W. Cole Durham, Jr., State RFRA’s and the Scope of Free Exercise Protection, 32 U.C.
104. Id.
105. Id.
106. Id.
Exceptions for religiously motivated conduct are, thus, presumptively questionable and so long as the state’s authoritative demands conform to principles of . . . equality, they should be equally enforced against all without regard to religious difference.”107

Rather than just using this equalitarian paradigm in assessing the legitimacy of a law like RFRA, Professor Durham suggests using a “social contractarian picture” as well, being vigilant of the “liberty paradigm.”108 The essence of this is captured in Madison’s Memorial and Remonstrance:

We hold it for a fundamental and undeniable truth, that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence. The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man’s right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.109

Madison’s analysis “suggests several features of religious obligation that require civil society to accord it special respect and latitude.”110 When one enters or forms a civil society, several things become apparent.111 Those carrying religious obligations with them place those obligations before all other obligations.112 These obligations “do not emanate from social sovereignty; they have a source that transcends civil society.”113 Though nonbelievers may not

107. Id.
108. See id. at 675.
110. Id. at 668.
111. Id.
112. See id.
113. Id.
understand or agree with the beliefs of sincere religious believers, they can understand and reason with individuals who have such obligations that take such precedence.114

As Madison noted, because religious obligations become more important “both in order of time and of priority,” to any other obligations, people holding them would not enter into a society unless they can somehow be assured these obligations would not at all times be violated.115 “At least part of the fallacy of the equalitarian paradigm is that it either disputes or does not take seriously the possibility of prior religious commitments and their implication for the meaning of social and legal bonds.”116 When considering the social contract and the predisposition of humans to carry their highly-guarded religious values into that contract, however, one can see how perhaps a “liberty paradigm” should be elevated over an equalitarian one, or at least considered alongside of it.

Professor Durham provides a practical example to illustrate what a burden to religion looks like using an “equalitarian paradigm” versus looking at it under a “liberty paradigm”:

Assume a student is a member of a Jewish denomination that asks male adherents to wear a yarmulke, although not all of them do. If a dress code at school prohibits headgear, there is an obvious conflict between the state rule and the religiously motivated action of wearing a yarmulke. In order for the Jewish boy to attend school and obey his conscience at the same time, an exception is necessary. A Catholic boy at the same school needs no exception because no rule conflict with his religious decision to wear a cross. The equality being sought after is the right to participate in state institutions without offending the respective religious beliefs. In order to achieve this equality, the Jewish boy will need an exception from the dress code, whereas the Catholic boy will not. Under a liberty paradigm, the yarmulke would be allowed as a matter of religious freedom. Under the equality paradigm, the yarmulke would be prohibited because headgear is prohibited for all.117

This example is compatible with Singh’s story we saw earlier. The law (RFRA) is in place to shield the Jewish adherent from a government law that poses a significant infringement on his practicing of his faith. Thus, it is still in accordance with RFRA’s “original shield purpose.” More important to the issue, though, is that it exposes the flaw of embracing only an equalitarian paradigm. This equalitarian train of thought—implicit though it may be—is generally what RFRA dissenters follow.118

114. See id. at 668-69.
115. See Durham, supra note 103, at 669.
116. Id. at 669-70.
117. Id. at 672-73.
118. See id.
Justice O’Connor’s concurrence in Smith further illustrates the danger of embracing an equalitarian paradigm only. She stated, “the essence of a free exercise claim is relief from a [government] burden on religious practices or beliefs, whether the burden is imposed directly . . . or indirectly through laws that . . . make abandonment of one’s own religion or conformity to the religious beliefs of others the price of an equal place in the civil community.”

When we consider the social contract and use a liberty paradigm, however, in analyzing RFRA, it might be more understandable why religion should be in a sort of class of its own. It is not that granting exceptions for religion is privileging religion; it is recognizing that religion carries with it a pre-established system of beliefs—beliefs that might permeate every aspect of the believer’s life. As one commentator has observed, “bans on practices central to a faith are equivalent to a ban on adherents. Meaningful religious liberty requires allowing people to practice their faith, not just to believe it.” Thus, when there is a law, and alternatives exist so that the government can still achieve its interest—or, when the interest is not stronger than allowing for an exception, yet the law is prevailing anyways—protections, like RFRA, are needed.

III. THE MISUNDERSTOOD NATURE OF FREE EXERCISE STRICT SCRUTINY

Perhaps due to the confusing nature of the First Amendment’s religious clauses jurisprudence, some commentary surrounding the strict scrutiny analysis has become messy. It seems many articles that discuss strict scrutiny fail to point out that the strict scrutiny is to be applied to the exception. Thus, the question should be: does the government have a compelling government interest in denying the religious adherent an exception? This is different from strict scrutiny in Equal Protection jurisprudence, where the government has the burden of justifying its differential treatment of groups or “classes” of persons by showing that the classification is necessary to achieve a compelling government interest. This indeed is a high bar for the government as few interests rose to the level of compelling. Indeed, the compelling government interests in equal protection cases were so few, strict scrutiny in this realm was termed “fatal in fact,” meaning, time and again, the government would lose.

120. Id. at 890 (emphasis added).
123. See id. at 12-13 (noting that it seemed perhaps an emergency time of war was the only interest that was compelling).
124. See id. at 8.
With Free Exercise, on the other hand, “strict scrutiny” has provided plenty of wins for the government. For example, in *United States v. Lee*, Amish employers did not want to comply with a law that mandated they collect social security tax from their employees, which was then to be sent to the government. The Court ruled against the Amish employers, holding that “not all burdens on religion are unconstitutional. [Rather] [t]he state may justify a limitation on religious liberty [when] it is essential to accomplish an overriding governmental interest.” Thus, there was a compelling government interest in having a government safety net of sorts, and the only way to have that was if employers collect this tax; thus, the Amish did not get an exception.

A. Why We Should Look to Justice O’Connor’s Concurrence in *Smith*

Justice O’Connor cited many more examples of where a compelling government interest was found in the face of free exercise claims. She, in fact, was able to reach the same result (that being a win for the government) as the *Smith* majority, but rather than using the majority’s new “neutral and general applicability” standard in assessing whether the government’s law was valid, she used strict scrutiny. If the Court followed Justice O’Connor’s logic, there would have been no need to go against thirty-year precedent. She wrote,

> [n] In my view, today’s holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation’s fundamental commitment to individual religious liberty . . . [The Court] interprets the Clause to permit the government to prohibit, without justification, conduct mandated by an individual’s religious beliefs, so long as that prohibition is generally applicable . . . But a law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person’s free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is

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127. *Id.* at 257.

128. *See* *Emp’t Div. v. Smith*, 494 U.S. 872, 896 (1990) (O’Connor, J. concurring) (“Moreover, in each of the other cases cited by the Court to support its categorical rule . . . we rejected the particular constitutional claims before us only after carefully weighing the competing interests.”). *See* *Prince v. Massachusetts*, 321 U.S. 158, 171 (1944) (noting that a state interest in regulating children’s activities justifies denial of religious exemption from child labor laws); *Braunfeld v. Brown*, 366 U.S. 599, 608-09 (1961) (plurality opinion) (pointing out that state interest in uniform day of rest justifies denial of religious exemption from Sunday closing law); *Gillette v. United States*, 401 U.S. 437, 461 (1971) (observing that state interest in military affairs justifies denial of religious exemption from conscription laws and that we rejected the free exercise claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place).

barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons.130

Applying strict scrutiny in Smith, Justice O’Connor recognized the critical question to be whether granting a religious exception to the peyote users from the state’s general criminal prohibition would “unduly interfere with fulfillment of the governmental interest.”131 Ultimately, after weighing the competing interests, Justice O’Connor found a compelling government interest with narrowly tailored means:

Although the question is close, I would conclude that uniform application of Oregon’s criminal prohibition is essential to accomplish its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance. Oregon’s criminal prohibition represents that State’s judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous. Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them.132

In sum, if we compare the government interest to the religious practice—in a balancing sense—by asking: is there a compelling government interest in denying the exception, RFRA might seem less daunting and strict scrutiny can be better understood. Simply put, the compelling interest part of free exercise strict scrutiny can be understood as a “balancing test with the thumb on the scale in favor of protecting constitutional rights.”133 Essentially, does the government interest outweigh the religious interest? And as history has provided, many times, it might.134

Indeed, the government still could have won in the case that triggered Kentucky’s RFRA, even if strict scrutiny had been used.

130. Id. at 891, 894-95.
131. Id. at 905.
132. Id.
133. Laycock, supra note 121, at 151-52.
134. The popular perception that most laws subjected to a strict scrutiny standard are struck down because it is “fatal in fact” should be put into context. As one legal scholar notes in an empirical study of strict scrutiny decisions in the federal courts: in the area of religious liberty, laws that burden religious liberty survived strict scrutiny review in nearly 60% of cases. However, a discrepancy was found in the type of religious liberty claim, with most claims for exception from law failing and no allegedly discriminatory laws surviving. See Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 794-97, 815 (2006).
B. The Kentucky Case that Prompted Kentucky’s RFRA

In 2012, Jacob Gingerich, Emanuel Yoder, and Levi Zookand—three men of the Amish faith—decided they would rather be put in jail than use orange reflector triangles on their buggies, which Kentucky law required.135 The men argued the law unconstitutionally interfered with their ability to practice their religious beliefs. As Amish men, they are required to be “plain,” which is counter to a bright display of the trinity, a symbol they do not adopt.136

Kentucky did not have a Religious Freedom Restoration Act at this time and thus Smith was still the law—indeed, the Kentucky Supreme Court used a rational basis standard of review to decide the men’s case and affirmed their convictions.

But, in keeping with the spirit of Justice O’Connor’s concurrence, let’s look at the same scene only this time, let’s assume Kentucky did have a RFRA on the books and Justice Mary C. Noble used a strict scrutiny standard of review.

Justice Noble: What is your compelling government interest Kentucky?

Kentucky: We want to protect our citizens when on the streets.

Justice Noble: And is your law narrowly tailored to meet that interest?

Kentucky: Well, yes, actually, it is. We are not requiring the people to use large flashing lights, electronic in nature or anything like that. We are simply requiring that bright color reflective tape be used to increase visibility of vehicles both night and day. The triangle provides a distinct shape, which helps visibility.

Justice Noble: The Amish men want an exception to this rule and propose that alternatives exist: they want to use gray reflective tape . . .

Kentucky: That only provides a protective warning at night, and we want warning for both day and night.

Justice Noble: Okay, Kentucky, you win.

Of course, the interchange would not go quite like that, but it illustrates in a simple manner how strict scrutiny works in free exercise cases. Kentucky does in fact have a compelling government interest here and it is stronger than the Amish men’s religious practice. The state did not want to diminish the Amish faith. They simply required that everyone abide by reasonable street safety laws if they choose to use the public roads.

136. Id.
Thus, when using strict scrutiny in the proper balancing manner, one can see, even in the case that triggered Kentucky’s RFRA, that strict scrutiny does not mean automatic loss for the government. This should be encouraging to those who believe that RFRA is a license to discriminate. And, at the same time, it is important to have a RFRA in effect to aid people like Iknoor Singh. RFRA gave Singh a tool—a shield—and the government’s interests simply did not stack up to his religious beliefs. Thus, an exception was properly granted.

C. But What About RFRA as an “Inappropriate Sword”?

The case of Elane Photography v. Willock epitomizes the “RFRA as a sword” sentiment. It is the case many RFRA opponents cite when they declare RFRA a “license to discriminate.”

Elaine Huguenin, a New Mexico photographer who follows the Christian faith, refused on religious grounds to photograph the wedding of a lesbian couple. She was thereafter the target of a discrimination complaint in the New Mexico Human Rights Commission. In seeking review of the agency order against her, the photographer raised a defense under the New Mexico RFRA. The New Mexico Supreme Court rejected the photographer’s federal constitutional defenses on the merits, and it ruled that the state RFRA did not apply to litigation between private parties.

The case raises the question of whether RFRAs, state and Federal, apply in suits between private parties involving public accommodations and the offering of goods and services—a question that has become judicially and legislatively important over the past several years. Indeed, Elane Photography played a central role in the recent debate over whether to expand Arizona’s religious liberty law. One Arizona lawmaker plainly stated that the bill was a response to cases like Elane Photography, where an anti-gay business owner was “punished for their religious beliefs.”

140. Id. at 60.
141. Id. at 76.
142. See id. at 63-76.
143. Id. at 76-77.
144. See, e.g., Shruti Chaganti, Note, Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs, 99 VA. L. REV. 343, 343-44 (2013). Even when courts held that RFRA did apply in such actions, however, the Act never generated a good defense to federal anti-discrimination claims. The ministerial exception did all of the defensive work in these cases. Id. at 345-48.
145. See Millhiser, supra note 138.
146. Id.
Though this issue is playing out in the court of public opinion, it just might be too soon to tell whether RFRA has any damaging effects in actual case law. As will be pointed out in the next section, RFRA has not in fact played too big a role in actual court decisions.\footnote{147. See generally infra notes 150-60 and accompanying text.} Moreover, although the defendants in \textit{Elane Photography} made a religious liberty argument in the lower court, they did not bring this claim to the Supreme Court.\footnote{148. See Millhiser, supra note 138 (explaining they argued that complying with New Mexico’s ban on anti-gay discrimination would require them to express messages that conflict with their religious beliefs in violation of the First Amendment’s free speech guarantees).} Instead, they argued that complying with New Mexico’s ban on anti-gay discrimination would require them to express messages that conflict with their religious beliefs in violation of the First Amendment’s free speech guarantees.\footnote{149. Id.} Thus, it is ungrounded to claim RFRA should be abandoned or abolished because of some adverse effect it is having on anti-discrimination claims because it is simply too soon to tell.

\textit{D. A Kentucky Case Study}

Even when we look at a recent Kentucky case involving a RFRA claim, it becomes evident that other First Amendment considerations (such as compelled speech) play a role. Thus, we are left to wonder, would the case’s outcome be different if the RFRA claim had been removed? Just last year, a Kentucky court in Lexington ruled on a case involving a t-shirt printer where RFRA was used as a defense.\footnote{150. See generally Hands on Originals, Inc. v. Lexington-Fayette Urban Cnty. Human Rights Comm’n, No. 14-CI-04474, slip op. (Fayette Cir. Ct. April 27, 2015), http://www.adfmedia.org/files/HandsOnOriginalsDecision.pdf.}

Blaine Adamson of Hands on Originals ("HOO"), a Lexington, Kentucky based t-shirt printing shop, declined to print expressive shirts promoting the Lexington Pride Festival, hosted by the Gay and Lesbian Services Organization ("GLSO") because he did not want to convey the messages printed on the shirts.\footnote{151. Id. at 2-6.} He offered to connect the organization to another printer that would produce the shirts for the same price that he would have charged, but he refused to do the printing himself. Unsatisfied, GLSO filed a complaint with the Lexington-Fayette Urban County Human Rights Commission and alleged illegal discrimination.\footnote{152. See id. at 1-2.}

In the opinion, Judge Ishmael recognized Kentucky’s RFRA as being applicable to the case in the sense that a business could use RFRA post-\textit{Hobby Lobby}.ootnote{153. Id. (citing Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2755 (2014) (holding that a for-profit corporation is a “person” who can “exercise religion” within the meaning of RFRA)).} Judge Ishmael also found that the owner’s sincerely held religious beliefs motivated HOO and its owner’s exercise of religion and that the
Commission’s Order substantially burdened those religious beliefs.\textsuperscript{154} The Commission’s burdensome action was its Order against HOO that required them to print shirts that convey messages contrary to their faith.\textsuperscript{155} When discussing the compelling government interest standard, Judge Ishmael cited to \textit{Sherbert}. However, the court did not deeply discuss strict scrutiny because the Commission had not even attempted to prove a compelling government interest in imposing its consequences upon HOO and its owners.\textsuperscript{156}

The case also contained freedom of speech and freedom of association claims.\textsuperscript{157} Indeed, the argument that Anderson should not be compelled to engage in speech he does not agree with would seem to be more on point. And the court might have considered this claim more in granting Anderson the win. The court did not rule that it would have been okay for HOO to discriminate against the individuals of GLSO themselves.\textsuperscript{158} Rather, it was concerned with the \textit{message} that ran directly against Mr. Adamson’s and HOO’s values, and printing this message would have furthered something in which they did not believe.\textsuperscript{159} The court noted that “it is their constitutional right to hold dearly and to not be compelled to be part of an advocacy message opposed to their sincerely held Christian beliefs.”\textsuperscript{160}

Adamson’s attorneys at Alliance Defending Freedom said that the court’s ruling was an important acknowledgement that business owners have a right to exercise their religious beliefs at work.\textsuperscript{161} This sentiment without the context of compelled speech considerations might add fuel to the RFRA critics’ fire, though. It should be kept in mind that while this case involved a RFRA claim, the power of that claim, especially in Kentucky courts, remains unclear because the case seems to be grounded in compelled speech, rather than RFRA. It is too soon to attack RFRA as a “sword” because support for such an attack is lacking.\textsuperscript{162}

\begin{itemize}
\item \textsuperscript{154} Id.
\item \textsuperscript{155} See id.
\item \textsuperscript{156} \textit{Hands on Originals, Inc.}, slip op. at 15.
\item \textsuperscript{157} See id.
\item \textsuperscript{158} See id.
\item \textsuperscript{159} See id.
\item \textsuperscript{160} Id.
\item \textsuperscript{162} See also \textit{Our Savior Evangelical Lutheran Church v. Saville}, 922 N.E.2d 1143 (Ill. App. Ct. 2009) (holding in part that a city ordinance did not violate the Illinois Religious Freedom Restoration Act). However, this particular decision would have been decided identically under the First Amendment, and it is one of only four cases in which RFRA has made a dispositive difference. See Ira C. Lupu, \textit{Hobby Lobby and the Dubious Enterprise of Religious Exemptions}, 38 \textsc{Harv. J. L. & Gender} 35, 70 (2015).
\end{itemize}
IV. WHAT SHOULD BE DONE WITH RFRA MOVING FORWARD

At least one commentator reasons that Kentucky’s RFRA would be strengthened if it allowed for “carve-out” civil rights laws. The argument is that if Kentucky adopts a carve-out like Texas (and now we should probably include “and Indiana” here), then RFRA critics’ concerns will be allayed. This is unwise and unnecessary for the following reasons. First, it is precisely because RFRA has not been a “monstrous threat” to nor a “savior” for religious freedom that it should be left alone; state RFRA’s in general have not had much influence in case law to date. Second, when we clean out the misconceptions revolving around RFRA—particularly in the context of what strict scrutiny means—we can see that RFRA might be something that is unnecessarily feared. Third, punching holes in RFRA here and there devalue its original purpose, which could actually have an adverse consequence to nonbelievers. Fourth, there is a self-limiting character to religious freedom. That being said, if the Kentucky legislature were to create a broad civil rights carve-out from the state RFRA, then it should be in the form of explicit exceptions to the carve-out to cover the situations where faith-based discrimination is protected against civil rights laws.

A. RFRA and its Anti-Climactic Results

Approximately five years ago, Christopher Lund wrote an article looking at the effect of state RFRA’s. He found that “there is reason to doubt whether these state-level religious liberty provisions truly provide meaningful protections for religious believers.” Though some states at that time had seen significant state RFRA litigation and there had been some important victories, many state RFRA’s seemed “to exist almost entirely on the books.”

Another legal scholar’s more recent inquiry into the effect of state RFRA’s “shows a superficial appearance of greater success for religious liberty

163. See Jennifer A. Pekman, The Kentucky Religious Freedom Act: Neither a Savior for the Free Exercise of Religion nor a Monstrous Threat to Civil Rights, 103 Ky. L.J. 127, 128 (2015) (“[T]he Kentucky legislature should add a carve-out to the statute that stipulates that it does not in any way diminish the civil rights protections provided for under local ordinances and state law.”).
164. Id.; see also TEX. REV. CIV. STAT. ANN. § 110.011 (West 2015).
165. Pekman, supra note 163, at 138 (“[A]mending the statute to include a carve-out for civil rights legislation, which would effectively shield civil rights from any encroachment by the Act . . . will help to allay the concerns of those opposed to the legislation and ensure that it is not used as a mechanism to infringe upon the civil rights of others.”).
166. See infra notes 189-193 and accompanying text.
167. Lund, supra note 64.
168. Id. at 467. His data included the following: Sixteen states may have state RFRA’s, but claims under them are exceedingly rare. Lexis and Westlaw searches show that four states have never decided even a single case under their state RFRA’s. Six other states have decided only one or two cases apiece. That is more than half of state RFRA’s right there. And when state RFRA claims have been brought, they rarely win. In most jurisdictions, plaintiffs have not won a single state RFRA case litigated to judgment. Id. (internal citations omitted).
169. Id.
claims.” 170 This study shows that results in state RFRA cases “do not indicate any significant jurisprudential shift.” 171 Further, in all the state RFRA decisions since Professor Lund wrote on the subject, the state RFRA probably made a dispositive difference in four at most. 172 A Pennsylvania case, Chosen 300 Ministries, Inc. v. City of Philadelphia, involved a program of food sharing for the homeless, and the state’s RFRA protected the program against the City of Philadelphia’s prohibition on feeding programs in municipal parks. 173 A Tennessee case, Johnson v. Levy, sustained a RFRA-based objection to an autopsy on an executed prisoner. 174 Moreover, no state or federal court has ever held that RFRA generally entitles religious business owners to refuse service to gay people. 175 Thus, it would seem that critics’ knee-jerk reactions to RFRA might indeed be untrue or wildly exaggerated.

Meanwhile, the original, principled basis for enacting state RFRA laws still exists, and state RFRA laws certainly may be of value to religious individuals or institutions in occasional varied circumstances. “There is no well-organized storyline here that can be easily understood and valued.” 176 In other words, the areas where state RFRA laws provide needed protection do not fall into any easy-to-define regulatory category. 178 RFRA as a tool to avoid antidiscrimination laws is the narrative of the day, but this does not discount the reasons for its original enactment in the 1990s.

B. RFRA Misconceptions

Even still, courts “grossly misunderstand, and improperly heighten, the threshold requirement of a substantial burden on religious exercise.” 179 Professor Lund found that courts “regularly equate the strict scrutiny imposed by state RFRA laws with rational basis review, sometimes quite explicitly—as if they lack the most basic understanding of what these state RFRA laws are trying to do.” 180

170 Lupu, supra note 162, at 69.
171 Id. at 71.
173 Id. at 70 (citing Chosen 300 Ministries, Inc., 2012 WL 3235317, at *15).
174 Id. at 70 (citing Johnson, 2010 WL 119288, at *1, *4-5).
177 Id.
178 Id.
179 Id.
180 Id.
Furthermore, as this article has demonstrated, strict scrutiny is not something that the courts or even RFRA opponents should necessarily fear. There are many times in the Supreme Court’s jurisprudence where a “compelling government interest” was indeed met for the government and the individual’s freedom to practice his or her religion failed in light of competing societal and government interests.\(^\text{181}\) While strict scrutiny in equal protection cases seems “fatal in fact” for the government, the same does not hold true in freedom of religious exercise cases.\(^\text{182}\)

Moreover, if the overarching purpose is indeed to balance competing interests, rather than creating RFRA carve-outs, perhaps subjecting RFRA to a case-by-case basis review is the most logical thing to do at this point in time. RFRA’s form of protection is not a direct mandate to allow for religious exceptions. Rather it simply provides a level of scrutiny for a court to follow on a case-by-case basis. As Justice O’Connor noted in Smith, “[e]ven if, as an empirical matter, a government’s [laws] might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim.”\(^\text{183}\)

C. Exceptions until there is Nothing Left and the Danger that Means for All

A “proliferation of exceptions threatens the underlying policy of RFRA, which is to subject all claims to the same standard and decide the compelling-interest issue on a case-by-case basis.”\(^\text{184}\) The plethora of exceptions throughout the states ranges from not including driver’s license photos in the RFRA protection after a Muslim women refused to remove her veil for her driver’s license photo,\(^\text{185}\) to, as mentioned, entirely excluding civil rights laws.\(^\text{186}\)

Creating a carve-out here and a carve-out there could be harmful to both believers and non-believers, depending on your religious baseline. As Professor Laycock has explained:

> The relevant discrimination is treating people differently because of their different answers to religious questions. Suppose we say that your right to conscientious objection to government demands on your behavior is protected—subject to compelling interest exception—if you attribute your conscientious obligation to the teaching of a religion, but

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\(^\text{181}\) See Durham, supra note 103, at 678.  
\(^\text{182}\) Id.; see also Laycock, supra note 121, at 168 (explaining that “[t]he same standard of very strong justification that is fatal in most cases of discrimination or censorship of speech is not so frequently fatal when applied to conduct, precisely because conduct is more likely to cause harm”).  
\(^\text{184}\) Laycock, supra note 121, at 156-57.  
\(^\text{186}\) TEX. REV. CIV. STAT. ANN. § 110.011 (West 2015); MO. ANN. STAT. § 1.307.2 (West 2016).
the claim of conscience is unprotected if you doubt or deny the existence of God and attribute your claim of conscience to the equality of all humans. That is discrimination on the basis of belief about religion. We would protect claims of conscience, and we should protect all beliefs about god—not only those beliefs that affirm God’s existence. We should protect the moral commitments of religious believers, and we should also protect the moral commitments of nonbelievers when those commitments are held with religious intensity.\(^{187}\) . . . If nonbelievers use their emerging influence among elites to beat back regulatory exemptions for believers—if out of envy or hostility they destroy the right to act on one’s religious beliefs—they will move into a hollowed out circle of tolerance that has no protection for claims of conscience—not for believers and not for nonbelievers either.\(^{188}\)

To illustrate, if we were to apply this thought to Elane Photography, it might cause one to pause in their RFRA criticisms. Elane Photography might very well have been a compelled speech case, but it seems these concerns were either overlooked or ignored. Additionally, RFRA was dismissed as inapplicable to the case. Right or wrong in her beliefs, Ms. Huguenin was forced into an association as a private business owner due to a “law of general applicability.”

**D. Religious Freedom Limits**

The limitations of religious exceptions are another reason RFRA should not be feared so much. Religious freedom in and of itself can be self-limiting.\(^{189}\) As Professor Durham explains, “[i]t is as though religious freedom is elastic, but elastic with a drawback. As you try to expand the scope of its coverage it becomes attenuated at the edges, and simultaneously grows thinner (and weaker) even in more central domains of its coverage.”\(^ {190}\) In other words, if religious liberty claims sweep too broadly, it is very likely that most reasonable people would agree that secular concerns trump religious claims.\(^ {191}\) A broad sweep would include protecting religious convictions that are contrary to the public interest, for example, those that are contrary to public health and the criminal laws of the land.\(^ {192}\)

Similarly, Justice O’Connor noted, “[t]o say that a person’s right to free exercise has been burdened, of course, does not mean that he has an absolute

\(^{187}\) Laycock, *supra* note, 121, at 170-71.

\(^{188}\) *Id.* at 175-76.

\(^{189}\) Durham, *supra* note 103, at 676.

\(^{190}\) *Id.* at 676.

\(^{191}\) See *id.* at 676 (citing United States v. Kuch, 288 F. Supp. 439, 445 (D.D.C. 1968) (holding that the Religion Clause did not exempt member of Neo-American Church from compliance with drug laws)).

\(^{192}\) See generally *Kuch*, 288 F. Supp. at 445 (holding that Religion Clause did not exempt member of Neo-American Church from compliance with drug laws).
right to engage in the conduct. Under our established . . . jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute." Thus, there are limits when it comes to free exercise claims. Accordingly, we should be more restrained in our treatment of RFRA as it does not include unlimited religious protection.

E. Carve-Outs to Carve-Outs

If a broad civil rights carve-out from the state RFRA is created, there should be explicit exceptions to the carve-out to cover the situations where faith-based discrimination is protected against civil rights laws.

People in favor of carve-outs propose them because they reason RFRA laws are unlikely to provide expansive protections in employment or public accommodation contexts. Thus, in light of all of the worries and fears concerning RFRA as a “license to discriminate,” such a carve-out would quiet these concerns. However, because such a carve-out could eliminate too many RFRA claims, at least a “carve-out to the carve-out” is necessary. To avoid the same outcome Elane Photography produced, there should be an explicit carve-out for exceptions based on speech.

Policy-wise, this approach could be beneficial to provide clarity to a generic state RFRA. It would also allow a state to adopt a RFRA to protect religious liberty in all of the situations that do not involve discrimination in violation of civil rights laws.

V. CONCLUSION

It should be continually kept in mind that regulatory exceptions are an essential part of meaningful religious liberty. “The right to believe a religion is hollow without the right to practice the religion; it leaves committed believers subject to persecution for exercising their religion.” Current RFRA attacks are unpersuasive because they fail to take into consideration the lack of precedent that would give merit to the “license to discriminate” label. While Smith is still good law, it is used to eliminate exceptions for minority faiths, and this is where RFRA steps in to do important work—it protects minority faiths in places of what the majority wants. It should be left with the courts to decide what to do.

194. A carve-out to a law is essentially an exception to that law. Here, if there is a broad civil rights carve-out to a particular state’s RFRA, then the RFRA would have no effect on that state’s civil rights laws.
195. See id.; see also Pekman, supra note 165, at 138.
196. See id.
197. Id.
198. See supra note 121, at 176.
199. Id.
with RFRA moving forward rather than jumping on the bandwagon and calling for carve-outs.
MORGAN v. GETTER AND THE GUARDIAN AD LITEM’S EVOLVING ROLE IN KENTUCKY CHILD CUSTODY DISPUTES

Brenden J. Sullivan*

ABSTRACT

The multi-faceted roles of Guardians ad Litem in Kentucky child custody disputes was considered by the Kentucky Supreme Court in Morgan v. Getter, which held that, rather than being entirely client-driven attorneys or investigative instruments of the court, Guardians ad Litem are appointed to serve as best interest attorneys for their child clients in contested child custody proceedings. Despite the Court’s attempt to clarify the role of Guardians ad Litem in child custody proceedings, Morgan v. Getter did not provide trial courts with readily distinguishable functions to be served by Guardians ad Litem, Friends of the Court, and court-appointed investigators respectively. Kentucky would benefit from well-articulated guidelines that clearly state the roles of Guardians ad Litem, Friends of the Court, and de facto Friends of the Court so that the separate, yet often overlapping, duties that each appointee serves are apparent to the courts, practitioners, and parties involved in child custody proceedings, rather than family courts trying to define the scope of appointee involvement on a case-by-case basis.

This article will examine Kentucky case law, statutes, rules, and regulations to show that, while Morgan v. Getter has helped to protect the privacy interests of child clients by holding that Guardians ad Litem are ethically immune to cross-examination, it subsequently did not inform lower courts on how to delineate between the duties of attorneys for children and those of court-appointed evaluators in proceedings already underway. A survey of family law in other jurisdictions that similarly define Guardians ad Litem and Friends of the Court shows how Kentucky courts may distinguish each agent to consistently implement the Getter holding.

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2. Getter, 441 S.W.3d at 114 (citing FCRPP 6(2)(c)):

[U]nlike the [court-appointed] investigator the GAL is the child’s agent and is responsible, as is counsel for the parties, for making motions, for introducing evidence, and for advancing evidence-based arguments on the child’s behalf. The GAL should not file reports, testify; make recommendations, or otherwise put his own or her own credibility at issue.
I. INTRODUCTION

“A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation . . . This contributes to the trust that is the hallmark of the client-lawyer relationship.”

The legal representation of Kentucky’s children is undergoing a period of change in which trial courts and family law practitioners are scrutinizing the respective roles of court-appointed entities in child custody proceedings. This note provides an overview and analysis of child representation in Kentucky, focusing on the role Guardians ad Litem play as they represent children’s best interests in child custody proceedings. After reviewing the history of legal representation for children, this note analyzes how the Kentucky Supreme Court’s holding in Morgan v. Getter, in which the Court made it clear that Guardians ad Litem serve as counsel, not court investigators or any other de facto Friends of the Court, impacted the Guardian ad Litem’s role in Kentucky custody disputes. Getter is significant because it established precedent for the Guardian ad Litem’s ethical immunity to testifying at trial due to the attorney-client relationship, in contrast to court-appointed investigators and other de facto Friends of the Court, who are examinable witnesses. Part II provides the background of children’s constitutional rights, including their right to have Courts consider their liberty interests, and a brief history of the legal representation of children. Part III covers the traditional roles played by Guardians ad Litem, Friends of the Court, and court investigators as court-appointed entities in child custody proceedings in Kentucky. Part IV discusses Getter’s impact on recent Kentucky child custody case law. Part V discusses questions that Getter left unresolved about the roles of Guardians ad Litem and offers answers to those questions.

II. BACKGROUND

A. Children’s Rights

The American legal system has only recently recognized that children have due process rights and should be entitled to independent representation in court. These rights were first recognized in In re Gault, a case involving a juvenile delinquent. The Supreme Court held that children facing charges were just as entitled as adults to “a meaningful opportunity to be heard,” and a right to have
counsel, independent from their parents, defend their interests. The Supreme Court further clarified that the protections afforded to adults under the Constitution equally protected children.

B. Legal Representation for Children

As case law grew, children gained further recognition of their fundamental constitutional right to representation in proceedings beyond the realm of delinquency offenses. Many states give their courts statutory authority to appoint attorneys known as Guardians ad Litem to serve as legal counsel for children’s interests, which was prompted by the Child Abuse Prevention and Treatment Act of 1974. Children are appointed representation because they are considered wards with no legal capacity to take action on their own. Unlike the traditional guardian, Guardians ad Litem only represents the child’s legal interests for the duration of pending suits. In states like Kentucky, Guardians ad Litem are attorneys appointed to present the best interest of their child clients to the appointing authority and to represent those children throughout the legal proceeding.

Guardians ad Litem are frequently appointed to advocate for a child’s interest in family court proceedings. The Supreme Court held in *Ford v. Ford* that the appointment of independent counsel may be necessary to represent the interests of children separately from the interests of their parents. Rather than being mere

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8. Id. at 36.
9. Id. at 13.
11. 42 U.S.C. §§ 5101-5116 (2012) (requiring states to appoint Guardians ad Litem for children in domestic abuse or neglect proceedings. In order for a state to qualify for grants under the Child Abuse Prevention and Treatment Act, a Guardian ad Litem must be appointed to represent a child in any dependency, neglect, and abuse action).
12. See, e.g., *Leavitt v. City of Bangor*, 41 Me. 458, 459 (Me. 1856) (identifying the next friend of the court as legal representative of minor children and relating the position to that of Guardian ad Litem). Guardians ad Litem are similar to next friends of the children, who proceed on the behalf of their child clients because the law recognizes children as having diminished capacity due to their age. Next friends and Guardians ad Litem differ in that Guardians ad Litem are court-appointed to defend a minor child’s interest and next friends are appointed to file suit in the interest of their wards.
15. See *MICH. COMP. LAWS ANN.* § 722.24(2) (West, 2016) (“If, at any time in the proceeding, the court determines that the child’s best interests are inadequately represented, the court may appoint a lawyer-guardian ad litem to represent the child.”); see also *MO. ANN. STAT.* § 452.423(1) (West, 2016).
marital assets, children now have a recognized interest in representation during dissolution of marriage and child custody proceedings.\textsuperscript{17}

In \textit{Ford v. Ford}, the Supreme Court further recognized children have a fundamental interest in maintaining their family unit.\textsuperscript{18} Many state statutes mandate that children’s interests in maintaining the family unit must direct any changes to their custody.\textsuperscript{19} The Supreme Court, citing Virginia law, held that a child’s well-being must always be the controlling factor in child custody determinations.\textsuperscript{20} A court must first examine the child’s interest in living with either of their parents. This interest is measured by factors including quality of nurturing, school conditions, and parent finances.\textsuperscript{21} In Kentucky, parent fitness is weighed against the child’s wellbeing to determine the custodial rights of the parties involved.\textsuperscript{22} A court will only consider the parent or guardian’s interest in custody after determining the child’s best interest.\textsuperscript{23}

States have varying statutes and court precedents regarding children’s rights and interests in child custody proceedings.\textsuperscript{24} Jurisdictions not only vary on the role that Guardians ad Litem are permitted to play in custody disputes; variations also exist in the duties Guardians ad Litem owe their clients, the court, and other parties to the suit.\textsuperscript{25} Some jurisdictions look to the child’s express interests as the driving force behind child representation.\textsuperscript{26} Other states, including Kentucky,

\begin{thebibliography}{99}
\bibitem{footnote17} See, e.g., Bashare v. Bashare, 685 S.W.2d 579, 581 (Mo. Ct. App. 1985); see also Kahre v. Kahre, 916 P.2d 1355, 1362 (Okla. 1995) (demonstrating the children’s interests in their own custody are independent from the interests of their parents).
\bibitem{footnote18} \textit{Ford}, 371 U.S. at 193 (“[T]he question of custody, so vital to a child’s happiness and well-being, frequently cannot be left to the discretion of the parents.”); see Stanley v. Illinois, 405 U.S. 645, 651 (1972) (“The integrity of the family unit” is paramount and “has found protection in the Due Process Clause of the Fourteenth Amendment . . . the Equal Protection Clause of the Fourteenth Amendment . . . and the Ninth Amendment.”); see also Santosky v. Kramer, 455 U.S. 745, 758 (1982) (holding interests in family relationships are fundamental liberty interests).
\bibitem{footnote19} \textit{Ford}, 371 U.S. at 193.
\bibitem{footnote20} \textit{Id.} at 189.
\bibitem{footnote21} \textit{Id.}
\bibitem{footnote22} Van Wey v. Van Wey, 656 S.W.2d 731, 735 (Ky. 1983) (stating that involuntary termination of parental rights only occurs if parental ineptitude impedes upon the child’s welfare).
\bibitem{footnote23} \textit{Ford}, 371 U.S. at 193 (citing Mullen v. Mullen, 49 S.E.2d 349, 354 (1948)) (“[W]e have established the rule that the welfare of the infant is the primary, paramount, and controlling consideration of the court in all controversies between parents over the custody of their minor children. All other matters are subordinate.”).
\bibitem{footnote24} See, e.g., FLA. STAT. ANN. § 61.404 (2009) (West, 2016) (stating that a Guardian ad Litem is to serve as a court investigator for the child’s welfare and not as a legal advocate in the custody proceeding).
\bibitem{footnote25} See, e.g., P.K.C.G. v. M.K.G., 793 So. 2d 669, 674 (Miss. Ct. App. 2001) (holding Guardians ad Litem have the duty to assist their minor clients to understand court proceedings and serve as independent advocates to the proceeding); see also Meeker v. Kercher, 782 F.2d 153, 155 (10th Cir. 1986) (holding Guardians ad Litem have the duty to promote and protect the best interests of their child clients).
\bibitem{footnote26} 750 ILL. COMP. STAT. ANN. §§ 506(a)(1)-3 (West, 2016) (stating that courts in proceedings involving children may appoint an attorney to serve either as client-directed child’s attorney, Guardian ad Litem, or child representative. Child representatives in Illinois act as best interest attorneys akin to Kentucky Guardians ad Litem, whereas Guardians ad Litem in Illinois
have come to adopt the best interests standard for advocacy in divorce and child custody actions.27 Express interest representation refers to attorneys who are driven by the wishes of their child clients, which means whether or not the children wish to be with either parent.28

III. COURT-APPOINTED ENTITIES IN KENTUCKY

CHILD CUSTODY PROCEEDINGS

A. Guardians ad Litem

The Kentucky Supreme Court outlined the traditional role of Guardians ad Litem in Kentucky child custody proceedings in 1952.29 Kentucky borrowed from the Civil Code of Practice, holding that children possess due process rights to have their interests defended by Guardians ad Litem.30 Guardians ad Litem must be practicing attorneys in the court’s jurisdiction.31 Black v. Wiedeman defined Guardians ad Litem in Kentucky as attorneys for children, representing the express wishes of their child clients akin to the client-directed representation of adult clients.32

An alternative form of child advocacy became recognized in Kentucky, known as the best interest attorney.33 As the rights of children became more

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27. Getter, 441 S.W.3d at 118.
29. Wiedeman, 254 S.W.2d at 346 (“No judgment shall be rendered against an infant” until the Guardian ad Litem has made a defense on the child client’s behalf. The case states that “[a] Guardian ad Litem must be a regular, practicing attorney of the court; . . . it shall be [the Guardian ad Litem’s] duty to attend properly to the preparation of the case; and in an ordinary action he may cause as many witnesses to be subpoenaed as he may think proper.”).
30. Id.
31. Id. at 346.
32. Id. at 346.
and best interest attorney. A child’s attorney is “a lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due to an adult client,” while a best interest attorney is “a lawyer who provides independent legal services for purpose of protecting a child’s best interests, without being bound by the child’s directives or objectives.”

34. KY. REV. STAT. ANN. § 403.270(2) (West, 2016) (stating that the best interests of the child controls a custody determination); compare 910 KY. ADMIN. REGS. 2:040 § 1(2) (2015) (“‘Best interest’ means a course of action that maximizes what is best for a ward and that includes consideration of the least intrusive, most normalizing, and least restrictive course of action possible given the needs of a ward,”) with 910 KY. ADMIN. REGS. 2:040 § 1(2)(11) (2015) (“Guardian ad Litem’ means a guardian appointed to represent the interests of a person with respect to a single action in litigation.”).

35. See, e.g., State ex rel. Children Youth, Families Dep’t In Matter of Esperanza M., 955 P.2d 204 (N.M. Ct. App. 1998) (holding Guardians ad Litem may present the wishes of the child to court when they differ from their best interest determinations, but the Guardians ad Litem must also advise courts of their own recommendations).

36. See, e.g., In re Marriage of Barnhouse 765 P.2d 610, 612 (Colo. Ct. App. 1988) (even when the child’s wishes conflict with the Guardian ad Litem’s opinion on what would be the child’s best interests, the Guardian ad Litem is encouraged to present his or her independent beliefs so long as the Guardian ad Litem makes the court aware that the child’s wishes differ from his or her own); see SCR 3.130(1.14) (“When a client’s ability to make adequately considered decisions in connection with the representation is impaired, whether because of [minority] age, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”); see also SCR 3.130(1.14) Supreme Court Commentary (1) (“When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects . . . Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”).

37. SCR 3.130(1.6)(a) (“A lawyer shall not reveal information relating to the representation of a client[.]”); SCR 3.130(3.7)(a) (“A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness[.]”).

38. KY. REV. STAT. ANN. § 403.270(2)(b) (West, 2016).
significant person in the child’s life; the child’s adjustment to home, school, and community life; the overall health of all persons involved in the case; evidence of domestic violence; any care the child received from a de facto custodian; the reason why the child was placed with a de facto custodian; and whether the child was placed with a de facto custodian for wellbeing of the child or parent under various circumstances. The factors listed in Kentucky’s statutes are a non-conclusive list; however, courts must consider these factors in light of each child’s well-being on a case-by-case basis.

The Kentucky Family Court Rules allow for the appointment of a Guardian ad Litem to represent the interests of children in “vehemently contested domestic custody and visitation matters.” Guardian ad Litem appointment is discretionary in custody disputes and may be brought before the court either by a party’s motion or by the court’s appointment order sua sponte. Generally, the Guardian ad Litem in Kentucky is a court-appointed attorney who is charged with advocating for the best interests of his or her minor child client. Such advocacy involves the typical process of discovery; the Guardian ad Litem is given statutory authority to compel deposition and subpoena witnesses on behalf of the child client’s best interests. The Guardian ad Litem is bound by the duties to explain court proceedings to the child client on a level of the child’s understanding, and to zealously advocate for the child’s point of view, among the other factors of the best interests test. If the child’s wishes are in conflict with the Guardian ad Litem’s best interests evaluation, the Guardian ad Litem is still charged with presenting the child’s wishes to the court, though the Guardian ad Litem’s recommendation may differ.

As practicing attorneys, Guardians ad Litem maintain a general rule of privilege with their child clients, in which the clients may refuse to disclose

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39. KY. REV. STAT. ANN. § 403.270(2) (West, 2016).
40. Id. (“The court shall consider all relevant factors . . . .” (emphasis added).
41. Hazard Coal Corp v. Knight, 325 S.W.3d 290 (Ky. 2010) (citing FCRPP 6(2)) (per FCRPP 6(1), the Kentucky Family Court Rules of Procedure and Practice are incorporated into Kentucky’s civil rules); see also KY. REV. STAT. ANN. § 403.130(1) (West, 2016) (“The Rules of Civil Procedure apply to all proceedings under this chapter . . . .”).
42. See, e.g., COLO. REV. STAT. ANN. § 14-10-116 (West, 2016) (whereas, appointment of Guardians ad Litem is mandatory for children in dependency, neglect, and abuse cases, courts have discretion to appoint attorneys to represent best interests of children in custody disputes following the dissolution of marriage).
43. KY. REV. STAT. ANN. § 387.305(2) (West, 2016).
44. KY. REV. STAT. ANN. § 387.305(3) (West, 2016).
45. Van Wey, 656 S.W.2d at 733; SCR 3.130(1.3) (“A lawyer shall act with reasonable diligence and promptness in representing a client.”); see, e.g., D.K.L. v. Hall, 652 So. 2d 184, 188 (Miss. 1995) (holding Guardians ad Litem have an affirmative duty to zealously represent the best interests of their child clients).
46. See, e.g., In re Marriage of Barnhouse, 765 P.2d 610, 612 (Colo. Ct. App. 1988) (holding that even when a Guardian ad Litem’s opinion on a child’s best interest differs from the child’s express wishes, the Guardian ad Litem should report both the best interest finding and the child’s express wishes).
confidential communications at trial and may require their lawyers to refuse disclosure as well.\textsuperscript{47} Attorney-client privilege encourages clients to be honest and fully inform their attorneys of the facts so that their attorneys may then provide more effective counsel.\textsuperscript{48} A Guardian ad Litem, or any attorney, who releases private information concerning his clients is in breach of his fiduciary responsibilities.\textsuperscript{49}

But, notwithstanding the general rules of privilege and confidentiality, the rules of professional responsibility may permit disclosure without attorney liability for breach of his fiduciary duty.\textsuperscript{50} Exceptions to privilege within the attorney-client relationship include communications concerning documents to the validity of which the child’s lawyer has attested.\textsuperscript{51} Additionally, a lawyer may be exempt from the duty of confidentiality when disclosure of private information is required to comply with a court order mandating that the information be subject to examination.\textsuperscript{52} Likewise, a Guardian ad Litem who is compelled by court order to release confidential information regarding the child client may be protected from liability by the rules of evidence, even if the court’s order is ethically improper.\textsuperscript{53}

According to the U.S. Supreme Court, advocates and others who are, “integral parts of the judicial process are entitled to absolute immunity” from damages liability within the scope of their service.\textsuperscript{54} As court-appointed legal representatives of their clients, Guardians ad Litem in Kentucky are entitled to such absolute immunity because their position makes them an integral part of the family court judicial process.\textsuperscript{55} Guardians ad Litem are tasked with zealous

\textsuperscript{47} KRE 503 (“Lawyer-client privilege . . . (b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client: (1) Between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; . . . (3) By the client or a representative of the client or the client’s lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; (4) Between representatives of the client or between the client and a representative of the client; or (5) Among lawyers and their representatives representing the same client.”).


\textsuperscript{49} KRE 503(b); CR 93.04(1)(a) (“However, no party shall be required to furnish any statement (written or taped) protected by the attorney-client privilege or work product rule.”).

\textsuperscript{50} SCR 3.130(1.6) (“Lawyers shall not reveal a client’s information held in confidence unless the client gives express consent, it is necessary to carry out the advocacy, or disclosure is permitted by other factors within SCR 3.130(1.6)(b), such as compliance with a court order.”).

\textsuperscript{51} CR 93.04(1)(d)(4) (There is no privilege under this rule “[a]s to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness.”).

\textsuperscript{52} SCR 3.130(1.6)(b)(4) (“A lawyer may reveal information relating to the representation of the client...to comply with other law or a court order.”).

\textsuperscript{53} KRE 510 (“Privileged matter disclosed under compulsion or without opportunity to claim privilege. A claim of privilege is not defeated by a disclosure that was: (1) Compelled erroneously; or (2) Made without opportunity to claim the privilege.”).

\textsuperscript{54} Briscoe v LaHue, 460 U.S. 325, 335 (1983).

\textsuperscript{55} Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984).
representation of the best interests of their child clients, encompassing all aspects of their clients’ lives; therefore, they need to be able to function according to judicial order without worrying about intimidation suits being filed against them by disgruntled parents or guardians.\textsuperscript{56} Guardians ad Litem serve quasi-judicial roles as court-appointees and are entitled to quasi-judicial immunity in the service of children’s best interests, which is also a public interest.\textsuperscript{57}

\textit{B. Friends of the Court}

Another option for courts in child custody proceedings is to appoint Friends of the Court, in lieu of or in addition to Guardians ad Litem.\textsuperscript{58} The Friend of the Court is a product of legislative intent.\textsuperscript{59} Friends of the Court, who must be attorneys, are appointed as court delegates in order to “investigate the child’s and the parents’ situations, to file a report summarizing his or her findings, and to make recommendations as to the outcome of the proceeding[.]”\textsuperscript{60} Friends of the Court provide family courts with evaluations of the best interests of children involved in contested custody disputes.\textsuperscript{61}

Friends of the Court are similar to court-appointed special advocates (“CASAs”) in dependency, neglect, and abuse proceedings; they serve as advisors to the court, examining the living situations of children and recommending what actions the court should take to most effectively serve the children’s best interests.\textsuperscript{62} Similar to cases where a CASA is appointed, the Guardian ad Litem becomes client-directed, court-appointed counsel for the child and the Friend of the Court would take over the role of best interests.

\textsuperscript{56} Id. \\
\textsuperscript{57} See, e.g., Short v. Short, 730 F. Supp. 1037, 1039 (D. Colo. 1990). \\
\textsuperscript{58} Ky. Rev. Stat. Ann. § 403.090(4) (West, 2016); see Ky. Rev. Stat. Ann. § 403.090(2) (West, 2016) (stating that a court may also appoint Friends of the Court to procure the payment of overdue child support in divorce and child custody actions). \\
\textsuperscript{59} Getter, S.W.3d, at 103; see FCRPP 6(2)(f) (The Kentucky Family Court Rules of Practice and Procedure specifically allow for the appointment of Friends of the Court and other court investigators). \\
\textsuperscript{60} Ky. Rev. Stat. Ann. § 403.090(1) (West, 2016) (the reference in Ky. Rev. Stat. § 403.090(1) to the “fiscal court” is likely holdover language from the 1946 legislative action when Kentucky’s courts were administered county-by-county and operated on fee-based funding. It enabled the fiscal courts of each county to fund appointment of friends of the court in child custody proceedings within the county’s court system. The judicial article of 1978 abolished the county court system, replacing it with the current statewide, state-run circuit court system to be funded directly by the state. However, the “fiscal court” language of the statute remains unchanged). \\
\textsuperscript{61} Ky. Rev. Stat. Ann. § 403.090(4) (West, 2016) (“[T]he friend of the court...shall make such investigation as will enable the friend of the court to ascertain the facts and circumstances that will affect the rights and interests of the children.”) \\
representation to the court. Friends of the Court are subject to the appointing court’s authority and serve on behalf of the courts in upholding the legal standard of the best interests of children in child custody proceedings.

Friends of the Court examine various aspects of the lives of children and their parents to analyze and proffer recommendations to the courts that follow the best interests standard. Unlike Guardians ad Litem, who are not obligated to testify because they are attorneys representing child clients in the proceedings, Friends of the Court are open to examination as expert witnesses regarding the credibility of their custody determinations.

While Friends of the Court are open to cross-examination as expert investigators for courts, they also possess quasi-judicial immunity as an integral part of the child custody judicial process. Friends of the Court serve as arms of the state and should therefore be immune to suit. Accordingly, rulings based on recommendations from Friends of the Court are typically upheld and Friends of the Court tend to be granted motions to dismiss complaints made against them for failure to state valid claims. Even when Friends of the Court err in their findings, they still maintain quasi-judicial immunity within the scope of their employment.

C. Court Investigators as de facto Friends of the Court

In addition to the ability to appoint Guardians ad Litem and Friends of the Court, family courts may also appoint investigators and other de facto Friends of

63. Getter, 441 S.W.3d at 111; Dhawan v. Naumchenko, No. 2014-CA-000088-MR, 2015 WL 3533214, at *3 (Ky. Ct. App. June 5, 2015) (remanded to clarify the Guardian ad Litem’s role. If the Guardian ad Litem was acting as a friend of the court rather than a Guardian ad Litem, then the mother may move to have the Guardian ad Litem cross-examined regarding her recommendations). In such cases, the Guardian ad Litem is permitted to serve as the child’s client-directed attorney while a Friend of the Court may be appointed to fact-find and report to the court concerning the child’s best interests.

64. KY. REV. STAT. ANN. § 403.090(1) (West, 2016).
65. KY. REV. STAT. ANN. § 403.090(4) (West, 2016).
66. KY. REV. STAT. ANN. § 403.290(2) (West, 2016); Getter, 441 S.W.3d at 119.
the Court during child custody proceedings. Unlike Guardians ad Litem and Friends of the Court, these investigators need not be attorneys. Court investigators analyze the custodial arrangements of children and report their findings to the courts. Investigator reports give courts insight into the current living conditions of children so judges can make advised best interest determinations. While forming their reports, investigators may consult any person with knowledge of the custodial arrangements and can refer children for professional physical and psychological diagnoses. Investigators submit their findings to the courts, and the courts must send copies of these findings to all parties and their respective counsel. Before hearings take place, court clerks must mail the investigator reports to counsel and to any parties not represented by counsel.

Similarly, investigators must make their investigative files and court-ordered physician evaluations open to all parties to the child custody proceeding. These files include such information as the names of all persons questioned by investigators and the data investigators used to make their best interest determinations for the courts. The parties have a statutory right to call these de facto Friends of the Court for cross-examination so that the parties have fair opportunity to confront their investigations, where these investigators must provide testimony regarding what information they gathered during the proceeding and how they analyzed the validity and weight of such information in making their custodial determinations. In addition, people consulted by these investigators regarding the best interest determinations for children involved in the custody proceeding may be called for cross-examination. Like Friends of the Court and Guardians ad Litem, de facto Friend of the Court investigators may also have quasi-judicial immunity for actions performed within the scope of their employment as integral components of the family court system.

71. KY. REV. STAT. ANN. § 403.300(1) (West, 2016).
72. KY. REV. STAT. ANN. § 403.300(1) (West, 2016) (there is no mention of status requirements for agents to serve as court investigators, who may be social workers, psychologists, or other evaluators).
73. KY. REV. STAT. ANN. § 403.300(1) (West, 2016).
74. Id.
75. KY. REV. STAT. ANN. § 403.300(2) (West, 2016).
76. KY. REV. STAT. ANN. § 403.300(3) (West, 2016).
77. Id.
78. Id.
79. Id.
80. KY. REV. STAT. ANN. § 403.300(3) (West, 2016) ("Any party to the proceeding may call the investigator and any person whom he has consulted for cross-examination prior to the hearing.").
81. Id.
IV. MORGAN v. GETTER

In Morgan v. Getter, a child’s mother argued that her due process rights to examine evidence put against her were violated when the trial court refused her motion to examine the Guardian ad Litem and his report.\(^{83}\) Though other court-ordered reports are subject to examination, the Guardian ad Litem was serving as an attorney, and, in order to abide by the Rules of Professional Conduct, could not be ordered to testify or be cross-examined regarding his report.\(^{84}\) The Guardian ad Litem had attorney-client privilege and work-product privilege like any other attorney, which include protections against disclosing a client’s confidential information and against having to testify in a case where the attorney serves as counsel.\(^{85}\)

However, it was recognized that, although the Family Court Rules of Practice and Procedure authorized the trial court to appoint a Guardian ad Litem in child custody proceedings, the role of such a Guardian ad Litem was vague.\(^{86}\) As a case of first impression, the Court of Appeals examined how other jurisdictions treat Guardians ad Litem and recommended the Supreme Court make a ruling to better define the Guardian ad Litem’s role.\(^{87}\)

The trial court in Getter granted the Guardian ad Litem the power to analyze the case for the court.\(^{88}\) The Kentucky Supreme Court determined that the Guardian ad Litem was made a court-appointed investigator when the trial court ordered the Guardian ad Litem to provide a report, as if the Guardian ad Litem had been appointed as a de facto Friend of the Court.\(^{89}\) The due process rights of parties to cross-examine expert witnesses and the rights of any party to cross-examine a court investigator were recognized by Kentucky’s General Assembly.\(^{90}\)

Although the trial court’s decision was affirmed on appeal, the mother successfully contended that the trial court had impeded upon her ability to fully and fairly litigate the custody issue because her fundamental due process rights to examine the Guardian ad Litem and the Guardian ad Litem’s report were


\(^{84}\) Id.

\(^{85}\) SCR 3.130(3.7) (stating that attorneys may only act as both advocate and witness at trial when: “(1) The testimony relates to an uncontested issue; (2) The testimony relates to the nature and value of legal services; or (3) Disqualification of the lawyer would work substantial hardship on the client.”).


\(^{87}\) Id. at 7 (citing FCRPP 6(2)).

\(^{88}\) Getter, 441 S.W.3d at 96.

\(^{89}\) Id. at 119 (citing KY. REV. STAT. ANN. § 403.300(1) (West, 2016) (“The court may order an investigation and report concerning custodial arrangements for the child. The investigation and report may be made by the friend of the court or such other agency as the court may select.”) (emphasis added).

\(^{90}\) FCRPP 6(2); KY. REV. STAT. ANN. § 403.300(1) (West, 2016).
violated.91 Therefore, the Kentucky Supreme Court held that when a Guardian ad Litem is improperly instructed by the trial court to file a report recommending the court’s course of action, the parties to the case are entitled to examine both the report and the Guardian ad Litem.92 Prohibiting the parties from cross-examining information within a Guardian ad Litem’s investigative report violates the due process rights of said parties.93

The Kentucky Supreme Court clarified the role of Guardians ad Litem in child custody proceedings as lawyers for children’s best interests rather than investigators.94 Guardians ad Litem should depose witnesses and promulgate evidence before the courts in order to enter evidence according to the Rules of Professional Conduct, not by submitting reports.95 Attorneys should not serve as investigative bodies, make recommendations, or testify.96 When the Guardian ad Litem in Getter, who was serving as an advocate for the child client’s best interests, then followed the court’s order and filed a report recommending a child custody modification, the Kentucky Supreme Court held that Kentucky statutory law should have allowed the Guardian ad Litem to be duly cross-examined as an expert witness.97 When a Guardian ad Litem’s report is accepted as evidence, the law requires that the parties be allowed to examine those findings and the opportunity to challenge any adverse reports of the fact-finder according to their constitutional due process rights.98

Entering Guardian ad Litem reports into the record without permitting the parties to examine them may erroneously permit hearsay to be entered as evidence.99 Courts violate the rights of the parties to fully test the validity of opposing evidence by allowing it to be entered without permitting examination, and then substantially relying on the opinions of Guardians ad Litem in their

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91. KY. REV. STAT. ANN. § 403.300(1) (West, 2016) (parents or de facto custodians may request that the trial court order a friend of the court or other agency to conduct an investigation and report concerning custodial arrangements); see also KY. REV. STAT. ANN. § 403.300(3) (West, 2016) (“Any party to the proceeding may call the investigator and any person whom he has consulted for cross-examination.”).
92. Getter, 441 S.W.3d at 111.
93. KY. REV. STAT. ANN. § 403.300(1) (West, 2016).
94. Getter, 441 S.W.3d at 117.
95. Id.
97. KY. REV. STAT. ANN. § 403.290(2) (West, 2016); KY. REV. STAT. ANN. § 403.300(3) (West, 2016); KRE 706.
98. KY. REV. STAT. ANN. § 403.290(2) (West, 2016) ("Counsel may examine as a witness any professional personnel consulted by the court.").
99. Brief of Law Professors Amy Halbrook, John Bickers, Jamie Abrams, and Anibal Lebron as Amici Curiae, at 2-3, Morgan v. Getter, No. 2013-SC-000196-DE (Ky. Aug. 15, 2013) (citing Morgan v. Getter, No. 2012-CA-000655-ME, WL 645717 at 2 (Ky. Ct. App. Feb. 22, 2013) (the trial court ordered the Guardian ad Litem to file a written report, which was considered in the court’s decision to award custody to the father, but the trial court did not permit the Guardian ad Litem to be cross-examined because he was serving as counsel for the child).
conclusions. However, it is ethically problematic for attorneys representing the best interests of their child clients to also be ordered to testify about information they received from their child clients in confidence. Therefore, courts should strike such reports from the record and cease to require Guardians ad Litem to serve as court investigators.

Kentucky family courts that have implemented the Getter ruling have recognized the probable ethical and evidentiary issues with Guardians ad Litem playing the dual roles of attorneys and court-appointed investigators. Getter altered the functionality of Guardians ad Litem within Kentucky family courts; judges and practitioners alike are grappling with how to separate the former investigative reporting aspect the courts improperly imposed upon Guardians ad Litem from their established role as attorneys in child custody proceedings. According to the Kentucky Supreme Court, courts must balance the child client’s interest against the respective interests of the opposing parties to determine whether a Guardian ad Litem is subject to cross-examination.

Following the Getter ruling, the Kentucky Court of Appeals began reversing trial courts in cases such as Hoskins v. Hoskins where courts erroneously appointed Guardians ad Litem to serve hybrid roles of advocate-investigators. Trial courts had been ordering Guardians ad Litem to file investigative reports like de facto Friends of the Court, and their court orders were broadly citing Guardians ad Litem’s recommendations as evidence, rather than specifying the evidence they used to make child custody determinations.

In Hoskins, a Guardian ad Litem was court-ordered to submit a report making a recommendation on child custody to the trial court, akin to the report submitted by the Guardian ad Litem in Getter. Similarly, the trial court generally followed the Guardian ad Litem’s recommendation that the court...
consider the child’s expressed wish for custody modification, without citing to specific evidence or allowing the parties to examine the report’s findings.\textsuperscript{107} Subsequently, following the new Getter precedent, the Kentucky Court of Appeals held the Guardian ad Litem report was wrongfully ordered by the trial court in Hoskins, as a Guardian ad Litem cannot serve as a witness or testify.\textsuperscript{108} The lower court had improperly used the Guardian ad Litem’s investigative report as its basis for making findings on a custody modification.\textsuperscript{109} Since the report was not made available to the parties for examination, it was deemed inadmissible by the Court of Appeals due to being erroneously withheld.\textsuperscript{110}

In a comparable case, Dhawan v. Naumchenko, a court-appointed Guardian ad Litem submitted a recommendation for custody modification to the trial court.\textsuperscript{111} In fact, the court’s order contained language to the effect that the Guardian ad Litem was charged with getting information from the child and reporting it to the court.\textsuperscript{112} On appeal, the appellate court concluded the Guardian ad Litem had served under the trial court’s order as an investigative reporter and was wrongfully granted immunity in violation of the parent’s due process rights to cross-examine the Guardian ad Litem and examine the Guardian ad Litem’s report, upon which the trial court relied heavily.\textsuperscript{113} A Guardian ad Litem in such a case is merely a de facto Friend of the Court mistakenly labeled by the court, and, as an investigative body rather than counsel to the involved child, such a mislabeled Guardian ad Litem is subject to cross-examination.\textsuperscript{114}

V. UNSOLVED QUESTIONS AND PROPOSED SOLUTIONS FOLLOWING GETTER

Confusion exists in Kentucky family law regarding the purposes Guardians ad Litem and Friends of the Court respectively serve in custody proceedings.\textsuperscript{115} The legislature shied away from articulating the Guardian ad Litem’s role in child custody proceedings and failed to outline the Guardian ad Litem’s specific duties, aside from the typical duty of zealous advocacy and the best interests

\begin{itemize}
\item \textsuperscript{107} Id. at *2-*3 (the Guardian ad Litem made her recommendation in her first report, but did not reiterate it in her second report to the court).
\item \textsuperscript{108} Id. at *6.
\item \textsuperscript{109} Id. at *10.
\item \textsuperscript{110} Id. at *11 (stating it was impossible for the Appellate Court to measure what degree the Guardian ad Litem’s report had wrongfully influenced the trial court’s decision).
\item \textsuperscript{111} Dhawan, No. 2014-CA-000088-MR, 2015 WL 3533214, at *1.
\item \textsuperscript{112} Id. at *2.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id. (citing Getter, 441 S.W.3d at 112).
\item \textsuperscript{115} Brief of Law Professors Amy Halbrook, John Bickers, Jamie Abrams, and Anibal Lebron as Amici Curiae, at 2-3; Morgan v. Getter, No. 2013-SC-000196-DE (Ky. Aug. 15, 2013); see also Getter, 441 S.W.3d at 97 ("[W]e recognize that the proper role of a GAL is a recurring issue of considerable public importance and, as explained more fully below, we exercise our discretion to address that issue in the context of this case.").
\end{itemize}
legal standard.\textsuperscript{116} Clarity from Kentucky’s General Assembly regarding the specific role Guardians ad Litem play in child custody disputes would alleviate confusion if Kentucky statutes were amended to clearly declare, like statutes in Michigan and other states, that Guardians ad Litem serve as attorneys for children and cannot be cross-examined.\textsuperscript{117} Additionally, although the Family Court Rules provide for appointment of Guardians ad Litem, they do not explain their duties or limitations.\textsuperscript{118} Amending the Family Court Rules to articulate the duties of Guardians ad Litem and differentiate them from court investigators would also give family law practitioners more insight into the Guardian ad Litem’s distinctive role as an attorney.

Prior to the Kentucky Supreme Court’s decision in \textit{Morgan v. Getter}, Kentucky courts primarily based child custody determinations in highly-contested divorce cases on reports Guardians ad Litem prepared under court order.\textsuperscript{119} For decades, Kentucky family courts have sometimes utilized Guardians ad Litem in a quasi-administrative role, in which Guardians ad Litem become investigative reporters when ordered to proffer recommendations on any potential changes to custody and enter their findings as evidence of record with the court.\textsuperscript{120} However, attorneys are obligated not to reveal confidential information relating to representation of their clients, and attorneys may not

\textsuperscript{116} KY. REV. STAT. ANN. § 387.305 (West, 2016) (pertaining to the appointment of Guardians ad Litem within the context of child custody determination. The scope of Guardian ad Litem advocacy is not mentioned in the statutes on Dissolution of Marriage and Child Custody).

\textsuperscript{117} See, e.g., MICH. COMP. STAT. ANN. § 722.22(c) (West, 2016); see also N.Y. FAMILY COURT LAW § 249 (Consol. 2015) (2010 Family Court Advisory and Rules Committee notes states that “[t]he attorney for the child is not a mental health professional, a mediator, a fiduciary or, most importantly, an arm of the court. The Commission reiterates that at all times during the proceeding, the attorney for the child is subject to the same rules of good lawyering and professional responsibility applicable to any attorney in a civil proceeding or action, and must represent the client within those bounds.”).

\textsuperscript{118} FCRPP 6(2)(e) (providing for appointment of Guardians ad Litem in child custody matters, but does not describe their duties to the court or client).


\textsuperscript{120} Getter, 441 S.W.3d at 111; see Am. Acad. of Matrimonial Lawyers, Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings, 13 J. 13 J. AM. ACAD. MATRIM. LAW 1 (1995) (jurisdictions differ not only on when to appoint Guardians ad Litem, but also on their minimum qualifications, training, compensation, and duties. In 1995, the American Academy of Matrimonial Law (“AAML”) published recommendations for clarifying the role of Guardians ad Litem in child custody proceedings, which included the standard that a Guardian ad Litem should advocate for the child’s best interests, but also advise the court when the child client disagrees with the Guardian ad Litem’s assessment of an appropriate custody determination); see also Amicus Curiae Brief on Behalf of the Kentucky Chapter of the Am. Acad. of Matrimonial Lawyers, at 1, Morgan v. Getter, No. 2013-SC-000196-DE (Ky. July 29, 2013) (in an attempt to create a single, defined role for the Guardian ad Litem in Kentucky, the Kentucky Administrative Office of the Courts (“AOC”) has hosted Guardian ad Litem training programs since 1999. However, because a lack of unity regarding the reasons to appoint Guardians ad Litem and their court-ordered roles have continued to exist in Kentucky’s family courts, professional family law organizations urged the Court to address this insufficiency in detail in its Getter holding).
represent parties in proceedings where the attorneys are likely to be necessary witnesses. When Guardians ad Litem present recommendations to the courts, it follows that the due process rights of the parents allow them to examine those findings and permit them the opportunity to challenge any adverse reports of the fact-finders.

Though courts commonly appoint a Guardian ad Litem in vehemently contested child custody and visitation matters rather than a Friend of the Court, a Guardian ad Litem is not a replacement for a Friend of the Court and has a decidedly different role. The Guardian ad Litem, who is always an attorney, is appointed to zealously participate in the proceeding as the child’s legal counsel, “to make opening and closing statements, to call and to cross-examine witnesses, to make evidentiary objections and other motions, and to further the child’s interests in expeditious, non-acrimonious proceedings.” Family courts may benefit from appointing Friends of the Court or de facto Friend of the Court investigators in addition to the appointment of Guardians ad Litem in child custody proceedings. This would have the effect of: (1) allowing courts to be informed by their own investigators of children’s best interests; (2) allowing the parties to the proceeding to confront the reports of those investigators for accuracy and credibility; and (3) maintaining the crucial role of Guardians ad Litem as legal counsel for children distinct from any court-appointed investigatory roles.

Kentucky is not the only state to have issues with conflicting roles of Guardians ad Litem or to have its Supreme Court urged to issue rulings to clarify their duties. There is a growing body of case law discussing the various aspects of the role of Guardians ad Litem, including filing petitions and appearing as witnesses. Some state statutes explicitly provide that Guardians ad Litem are to make recommendations to the court to consider in child custody determinations. In contrast, Kentucky and other states recognize the dichotomy and reject the notion of hybrid Guardians ad Litem-Friends of the Court. Only

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121. SCR 3.130(1.6)(a); SCR 3.130(3.7).
122. KY. REV. STAT. ANN. § 403.290(2) (West, 2016) (“Counsel may examine as a witness any professional personnel consulted by the court.”).
123. See FCRPP 6(2) (distinguishing appointment of Guardians ad Litem from appointment of custody evaluators and court investigators).
124. Getter, 441 S.W.3d at 111.
125. See, e.g., S.G. v. D.C., 13 So. 3d 269 (Miss. 2009) (holding that the court may not appoint a Guardian ad Litem to serve in the dual role of advisor to the court and lawyer for the child).
126. See, e.g., State ex rel. A.D., 6 P.3d 1137 (Utah Ct. App. 2000) (holding that Guardians ad Litem may not be compelled to testify and may not be called as an expert witness by fulfilling statutory responsibilities to make recommendations regarding child’s best interests).
127. See, e.g., N.H. REV. STAT. ANN. § 461-A:16 (West, 2016) (Guardians ad Litem are to render reports and recommendations to enable trial courts to make informed decisions regarding custody matters).
128. S.G. v. D.C., 13 So. 3d at 282; See also Clark v. Alexander, 953 P.2d 145, 153-54 (Wyo. 1998) (reversing a custody determination where the trial court erroneously admitted the Guardian ad Litem’s testimony as evidence).
a few states have statutorily remedied the ongoing confusion about to whom Guardians ad Litem owe their duties, where the legislatures in such states have clearly stated that Guardians ad Litem owe their duties to the minor children they are appointed to represent and not to the appointing authorities.129

There are jurisdictions that permit the cross-examination of Guardians ad Litem in violation of the Rules of Professional Conduct, claiming constitutional override.130 In other states, Guardians ad Litem are entitled to immunity from suit for damages arising from their performance within the duties of their court appointments.131 In light of the nationwide inconsistencies regarding Guardians ad Litem, national family law organizations have expressed interest in abolishing the practice of Guardian ad Litem appointment altogether.132

According to Kentucky statutes, Guardians ad Litem and Friends of the Court are similarly functioning entities. For instance, both Friends of the Court and Guardians ad Litem are court-appointed to the proceeding.133 Both entities have the power to cross-examine witnesses, file discovery, and are required to attend the taking of depositions.134 Additionally, both are designated as

129. See Mich. Comp. Laws Ann. § 712A.17d(1) (West, 2016) (“A lawyer-guardian ad litem’s duty is to the child, and not the court.”) (emphasis added); see also N.Y. Family Court Law § 249, supra note 136.

130. See, e.g., Ross v. Gadwah 131 N.H. 391, 395 (N.H. 1988) (holding that Guardians ad Litem are permitted to be cross-examined because not to allow so would violate the due process rights of parties to the proceeding).

131. See, e.g., Marr v. Me. Dep’t of Human Servs., 215 F. Supp. 2d 261, 264 (D. Me. 2002) (holding not only that Guardians ad Litem are ethically immune from cross-examination, but are also immune from tort claims where properly serving their court-appointed role as counsel for children).

132. Amicus Curiae Brief on Behalf of the Ky. Chapter of the Am. Acad. of Matrimonial Lawyers, at 3, Morgan v. Getter, No. 2013-SC-000196-DE (Ky. July 29, 2013) (The ABA and the National Conference of Commissioners on Uniform State Laws encourage the use of court-appointed professionals labeled “children’s representatives” in lieu of guardians ad litem because “the role of ‘Guardian ad Litem’ . . . is a venerable legal concept that has been stretched beyond legal recognition to serve fundamentally new functions as . . . evaluator, mediator, and advocate.”); see also id. at 9 (citing Am. Acad. of Matrimonial Lawyers, Representing Children, 22 J. Am. Acad. Mat. Law. 227, 234-39 (2009)) (“(1) ‘Counsel for the child’: A licensed member of the relevant state Bar assigned by the court to represent a minor who is the subject of the proceedings. The principal purpose of assigning such counsel is, to the maximum extent feasible in accordance with the applicable Rules of Professional Conduct, to further the traditional role of counsel and seek the litigation’s objectives as established by the client. Counsel for the child is presumptively the client’s agent and the client is the principal, and (2) ‘Court-Appointed Professionals other than counsel for the child: Any person, whether or not licensed to practice law, who is appointed in a contested custody or visitation case for the purpose of assisting the court in deciding the case.”).


representatives of children to parties in child custody proceedings. Though Friends of the Court are forbidden to serve as advocates for any party to a divorce proceeding, the General Assembly authorizes them to represent the children of parties to divorce actions.

Despite the resemblances, Guardians ad Litem and Friends of the Court are separate entities with conflicting appointment goals; the objectives of zealous advocacy and investigating as an arm of the court cannot be embodied by a single individual serving the best interests of children. While the court may promulgate evidence through investigators, investigative entities may not simultaneously serve as advocates in the proceedings because they must be available to testify. Guardians ad Litem are appointed for the express purpose of advocating for children as their clients under the best interests standard, whereas the legislature prohibits Friends of the Court from providing direct or indirect client representation.

According to statutory law, courts should appoint Friends of the Court to perform investigations as an instrument of the court and allow Guardians ad Litem to serve their child clients unhindered by the ethical dilemmas highlighted in Getter. While the court may promulgate evidence through investigators, investigative entities may not simultaneously serve as advocates in the proceedings because they must be available to testify. The Kentucky Family Rules of Practice and Procedure allow for appointment of either Guardians ad Litem or professional advisors to the court, explicitly distinguishing one entity’s role in custody proceedings from that of the other.

135. Getter, 441 S.W.3d at 104.
136. KY. REV. STAT. ANN. § 403.090(6) (West, 2016) (“The friend of the court shall not directly or indirectly represent any party to a divorce action except as herein authorized to represent the minor children of parties to a divorce action.”) (emphasis added).
137. Id. at 119.
138. KY. REV. STAT. ANN. § 403.300(4) (West, 2016) (permits courts to promulgate evidence through custodial evaluators who must be available to testify); see also Amicus Curiae Brief on Behalf of the Ky. Chapter of the Am. Acad. of Matrimonial Lawyers, at 2, Morgan v. Getter, No. 2013-SC-000196-DE (Ky. July 29, 2013) (citing FCRPP 3(4)(a)) (claiming that court-appointed investigators who assist the court in analysis of the case must file a report of their findings and are able to be subpoenaed and cross-examined, regardless of whether the trial court incorrectly labeled them as advocates).
140. Getter, 441 S.W.3d at 104 (citing KY. REV. STAT. ANN. § 403.090 (West, 2016)).
141. KY. REV. STAT. ANN. § 403.300(4) (West, 2016) (permitting courts to promulgate evidence through custodial evaluators who must be available to testify); see also Amicus Curiae Brief on Behalf of the Ky. Chapter of the Am. Acad. of Matrimonial Lawyers, at 2, Morgan v. Getter, No. 2013-SC-000196-DE (Ky. July 29, 2013) (citing FCRPP 3(4)(a)) (claiming that court-appointed investigators who assist the court in analysis of the case must file a report of their findings and are able to be subpoenaed and cross-examined, regardless of whether the trial court incorrectly labeled them as advocates).
142. Compare FCRPP 6(2)(c) with FCRPP 6(2)(f). The Supreme Court of Kentucky intentionally delineates the Guardian ad Litem as separate from being a court-appointed professional advisor. Elaboration of their respective duties in the Family Court Rules of Practice.
The Kentucky Supreme Court was correct to clarify that Guardians ad Litem in child custody proceedings are attorneys who are bound to maintain their client’s confidentiality and are thereby prohibited from testifying in those proceedings. However, the Court did not provide an adequate method for implementing the Getter holding in custody proceedings filed before Getter where lower courts erroneously recognized Guardians ad Litem as court investigators in a way which respects the rights of those children and their attorneys. Lawyers appointed as Guardians ad Litem should be free to zealously advocate for their client’s best interests without fear of being challenged as court investigators by the parties due to their vaguely-defined roles in pre-Getter appointment orders. Trial courts should clearly state in their appointment orders that Guardians ad Litem are serving as best interest attorneys for children and, as their clients, these attorneys are ethically prohibited from revealing confidential information they obtain from the children. Furthermore, attorneys for the parents who bring frivolous motions before the courts to compel Guardians ad Litem to testify, when the rules of professional conduct and the Kentucky Supreme Court clearly prohibit such testimony, should be reprimanded for purposefully delaying family court proceedings and needlessly increasing litigation costs.

VI. CONCLUSION

The best interests of children is the recognized standard by which family courts decide the outcomes of Kentucky child custody proceedings. Attorneys serving as Guardians ad Litem in such proceedings are appointed by statutory authority to represent the best interests of their child clients and must respect the ethical obligations all attorneys have towards their clients. Though the Kentucky Supreme Court intended Getter to clear up misconceptions among family courts regarding the roles of Guardians ad Litem, instead it is causing appellate courts to follow the Getter model, telling Guardians ad Litem who have acted simultaneously as attorneys and court investigators according to their and Procedure would help practitioners and family courts understand the Kentucky Guardian ad Litem serves as an attorney in family court proceedings and cannot serve as court advisor.

143. Getter, 441 S.W.3d at 114 (citing FCRPP 6(2)(e)). But see SCR 3.130(3.7)(a)(1)-(3) (providing exclusions to the rule against a lawyer serving as counsel if they are likely to be a necessary witness, such as when a lawyer’s testimony will merely establish an uncontested fact or the testimony will not cause substantial hardship to the lawyer’s client).

144. See SCR 3.130(3.1) and CR 11 (lawyers filing frivolous claims may face disciplinary sanctions from the Kentucky Bar Association as well as Rule 11 sanctions from the courts presiding); see also SCR 3.130(3.2) Supreme Commentary (“[I]t is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar.”) (The comment to Rule 3.130(3.2) of the Rules of the Supreme Court of Kentucky shows a lawyer who files frivolous claims before a tribunal solely for the purpose of delay or frustration may be deemed to have caused unreasonable delay, which would open the lawyer up to sanctions from the Kentucky Bar Association).
appointment orders they must betray the confidences of their child clients by revealing confidential information to the parties.

Instead of punishing children and their advocates, the Court of Appeals should require trial courts to base their findings of facts and law on evidence in the record that is examinable by the parties to avoid due process violations against the parents and permit Guardians ad Litem to maintain their duties to their child clients. Trial courts may appoint Friends of the Court or court investigators to provide the courts with facts and recommendations to use in their findings. In this way, parents constitutional rights will be respected by permitting them to cross-examine court investigators about their findings without diminishing the value children receive through independent legal representation by Guardians ad Litem or infringing on the rights such children possess as clients to have their secrets and confidences protected by their attorneys.