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HOW SHOULD WE UNDERSTAND, DEVELOP, AND ALLOCATE REGULATORY AUTHORITY?

WHAT DO WE MEAN when we say that law "regulates" an activity? Although this might at first appear to be an abstract question, it is an immensely practical one as well. Laws against burglary prevent theft, but so do locked doors. Speed limits encourage safe driving, but so does automobile design. International law limits the reach of state power, but so do policy interests. When a society chooses to control behavior through law rather than through some other means, it makes a series of choices, many of them implicit. Just how contingent those choices are—and the meaning those choices carry—becomes apparent only when one considers the alternatives to legal regulation of activity.

Tom Nachbar first confronted these questions years before he began law school, when he was a young systems analyst designing computer systems for manufacturing. This activity did not start with computer programming; it started, more fundamentally, with mapping the process a business used, analyzing whether that process was optimal, and only then codifying that business process into computer software. This type of holistic system design allowed the business to decide which process was the best and then enshrine that decision in computer code that would control the behavior of the business's employees—to literally codify the preferred process. Just a few days into law school, in Contracts, Nachbar discovered the same was true for law: Parties could make their own law (a "private law") to regulate their shared conduct. With that realization, Nachbar began a career studying how law is used (and by whom) to shape and control behavior.

When Nachbar was a recent law school graduate, the relationship between law and systems design was the subject of widespread debate. Computer system design could (and must) include not only purely technical considerations, but social, moral, and political ones as well. The Internet was designed for technical reasons (reflecting political ones: the threat of nuclear war) as a fault-tolerant network—one that required no centralized control structure. That technical design decision had profound political ramifications, as it became clear that no one (and especially no government) "controlled" the Internet. At the same time, anyone who could successfully propagate a piece of computer code could, through that code, achieve some degree of social or political control through the Internet. In the heady days of the first Internet boom, many recognized the way in which changing technologies had altered the balance between technologists and governments (that, as Lawrence Lessig put it, "code is law"), and some argued that governments would lose control over "cyberspace" and with it, a fair amount of "real" space as well.

As would be the case with most of his scholarship, Nachbar's response was to push back against such sweeping claims and challenge dominant thinking. His initial interest in Internet regulation prompted his first major paper, "Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character," 85 *Minn. L. Rev.* 215 (2000). Turning the then-conventional paradigm on its head, he suggested that, far from losing their power, governments could use the Internet to spread their regulatory influence beyond their borders. Nachbar's interest in Internet regulation would eventually evolve into a broader interest beyond what marks effective regulation, and focus on the nature of regulatory power. He explored what it means to regulate, and how controlling behavior through state regulation is different than controlling behavior through other means. Soon after he joined the Law School faculty in 2001, these questions came to a head in the field of intellectual property, when several constitutional challenges were mounted against revisions to the Copyright Act. Nachbar devoted his first years as a scholar to the question of regulatory choice (constitutional or statutory; congressional or judicial) in copyright before expanding his research to the fields of communications law and antitrust, areas of law that reflect the same types of regulatory choice. In the process, he developed a deep scholarship in the intellectual and constitutional history of trade regulation. That work continues today with his

paper "The Rationality of Rational Basis Review," 102 *Va. L. Rev.* (forthcoming 2016), which deals with the same constitutional questions of regulatory choice on a general scale.

Although happily ensconced in academia, Nachbar also felt a strong pull toward public service. Moved in part by the nation's response to the September 11 attacks (and with the U.S. Army Judge Advocate General's Legal Center and School next door to the Law School serving as a reminder of the legal-military connection), Nachbar joined the U.S. Army Reserve in the fall of 2005 as a judge advocate. He did not envision finding a strong connection to his teaching and scholarship, but it turned out that the Army had a regulatory problem of its own: helping to establish the "rule of law" in Iraq and Afghanistan in the days following coalition invasions of both countries. Nachbar's work in that area would require a much more practical approach (the primary guidance he received regarding his first Army publication was that it must fit into the cargo pocket of the Army combat uniform), but one that touched upon the same fundamental issues of the role of law and regulation in society.

THE CONSTITUTION AND REGULATION

In January of 1999, Eric Eldred and a number of publishers filed a constitutional challenge to the Sonny Bono Copyright Term Extension Act of 1998, which had (as the name suggests) extended copyright terms. The statute did not just extend terms generally, but it did so in previously existing works. Eldred complained that term extension in existing works violated a limitation in the Patent and Copyright Clause of the Constitution, which gave the power to Congress to grant copyrights for "limited Times." This was hardly the first time Congress had done so; Congress had extended copyright terms several times since the founding, and each time it had applied the extension to existing works. But this was the first time there was a serious constitutional challenge to such an extension, and agreement was widespread among most intellectual property scholars that such an extension was both bad policy (for giving authors a longer copyright term without getting anything in return) and unconstitutional. The former argument was advanced based on the economics of copyright; the latter on the history of intellectual property regulation, a history pre-dating the Constitution itself.

Recognizing that the dominant thinking was based on a story about copyright, Nachbar wanted to know if that story was true. He set out to

write one paper on the topic and wrote five. Many historical legal giants (from Coke to Mansfield) had suggested that copyright (and patents) were different than most regulation because of the ability to use them to grant "monopolies," which were generally abhorrent to the common law and to all right-thinking people as demonstrated by two seventeenth-century precedents: *Darcy v. Allen*, a common-law case outlawing a royal playing card monopoly, and the Statute of Monopolies, which had reputedly outlawed monopolies in England. Claims about the significance of those precedents depended on context, though, and Nachbar provided that context in a series of papers starting with "Constructing Copyright's Mythology," 6 *Green Bag 2d* 37 (2002), which used the example of Noah Webster's campaign to have copyright laws promulgated in a series of states prior to the adoption of the Federal Constitution to demonstrate that the current conceptions of copyright were just that: current. The sequential adoption of copyright laws (and their application to Webster's previously published dictionary) demonstrated just how contingent modern claims about copyright actually are. In "Judicial Review and the Quest to Keep Copyright Pure," 2 *J. Telecom. High Tech. L.* 33 (2003), Nachbar showed that attempts to judicially protect a "pure" form of copyright—essentially what the *Eldred* litigants were seeking—were less an attempt to protect any fundamental understanding of copyright than an attempt to shift the venue for making copyright policy from the legislature to the judiciary. In essence, the *Eldred* plaintiffs were making an institutional argument about the proper locus of copyright policy, and Nachbar sought to refute that institutional claim on institutional grounds based in constitutional law while demonstrating that arguments for giving judges more of a role in making copyright policy were historically contingent ones. To do so, Nachbar pointed out how one of the most fundamental, judicially created tenets of U.S. copyright law—the prohibition against copyright in facts—was itself largely a modern invention rather than a historical part of copyright. The Court, as it turned out, was a poor guardian of "pure" copyright. What Nachbar's research revealed was that most of the historical and constitutional claims being made about copyright and copyright policymaking were largely the product of modern thinking superimposed on history. The Court agreed, citing Nachbar in both its decision upholding copyright term extension in *Eldred* itself and again nine years later in *Golan v. Holder*, when deciding a similar constitutional challenge.

Having focused on the specific question of copyright, Nachbar ex-

panded his work into a broader inquiry about the constitutional nature of trade regulation. In "Intellectual Property and Constitutional Norms," 104 *Colum. L. Rev.* 272 (2004), he addressed a question suggested but not decided by the *Eldred* litigation: whether Congress could avoid the "limited Times" language of the Patent and Copyright Clause by relying on its commerce power as an alternative source of power. Nachbar determined the question was again one of institutional and constitutional choice rather than anything specific to intellectual property, and that question had been answered by a series of cases about the taxing power dating from the early twentieth century. In "Mercantilism, Monopoly, and the Politics of Regulation," 91 *Va. L. Rev.* 1313 (2005), Nachbar deconstructed historical claims about *Darcy v. Allen* and the Statute of Monopolies by closely examining the history of both events and revealing that neither reflected a broad rejection of monopolies but rather were part of a broader political struggle between Parliament and Crown over revenue and regulatory design, not trade policy. A "monopoly" (or in the parlance of modern intellectual property, an "exclusive right") provides the same type of exclusive regulatory authority enjoyed by government, and the history shows that monopolies were frequently granted (and opposed) as delegations of royal authority rather than merely as the product of rent-seeking, as many have claimed. In both papers, Nachbar combined rigorous historical research with modern public choice theory to provide a deeper understanding about the role of legislatures in regulating trade. Although legislatures are (and have always been) subject to the influences of public choice, judicially imposed constitutional limits on legislatures' ability to regulate trade are (and were) a cure worse than the disease. It is a role that courts have avoided, the high-sounding claims of judicial proponents such as Coke notwithstanding.

Intellectual property has a common historical origin with both antitrust and communications law—all three systems have historically been used to allocate regulatory authority. Just as the "exclusive rights" of intellectual property can effectuate a regulatory delegation, antitrust and the law of common carriage similarly address the relationship between private firms and state regulation of the economy. Like recipients of exclusive rights under the old English system, common carriers, including operators of communications infrastructure, have been charged with a "public" function. In "The Public Network," 17 *CommLaw Conspectus* 67 (2008), Nachbar explored the nature and justifications for imposing additional obligations on businesses "affected with a public

interest," like railroads, grain elevators, and communications providers. The dominant narrative is that public interest obligations are imposed by virtue of the market power that many "natural monopolies" (such as railroads) enjoy. Relying again on historical perspectives, Nachbar's research revealed that monopoly was neither a necessary nor a sufficient condition for imposing such obligations, undermining many arguments for and against imposing common carriage obligations on many service providers, with particular salience for the Internet service providers potentially subject to "network neutrality" regulation by the FCC. During this period he co-authored (with colleague Glen Robinson) the casebook *Communications Regulation* (West, 2008).

"The Antitrust Constitution," 99 *Iowa L. Rev.* 57 (2013), explored further the allocation of regulatory power between public and private entities, situating the antitrust laws as a statutory converse to the constitutional state action doctrine: a statutory prohibition on private regulation of markets that works hand-in-hand with constitutional limitations on public regulation of markets. Modern thinking on antitrust is focused entirely on the economic effects of competitor conduct, but the antitrust laws have historically reflected a much broader purpose. Although such a "political" purpose for the antitrust laws has been lost in the post-Chicago School era of antitrust, it was front-and-center in early Supreme Court antitrust cases such as *United States v. Socony-Vacuum Oil Co.* and *Fashion Originators Guild of America v. FTC*. The public/private distinction underlying those antitrust cases was also the motivating force behind constitutional cases like *Schechter Poultry* and *Carter v. Carter Coal*, a connection between constitutional law (which is understood to regulate the state) and antitrust (which is understood to regulate private conduct) that has been forgotten by many.

Nachbar's work on the nature and meaning of regulation continues with his latest work, "The Rationality of Rational Basis Review," which is excerpted here. In that paper, he considers the Supreme Court's "rational basis test," which requires that all legislation have a rational relationship to a legitimate governmental interest. The test is well-known to, if not necessarily beloved of, constitutional law students since the 1960s. Many have suggested the test is not really a test at all, but the Court's invocation of "rationality" as the standard it applies carries with it particular weight as appealing not to the Justices' political preferences but rather to some objective understanding of rationality. Closer examination, though, reveals that the Court only applies a very limited

understanding of rationality—a utilitarian, instrumental one. Doing so ignores other forms of rationality, including "value-rational" acts that carry significant political meaning, with far-reaching consequences for both the Court and litigants.

REGULATION AS COUNTERINSURGENCY

If law is the exclusive province of the state, what does that mean for a state that is unable to maintain the rule of law?

That question has been presented many times in the wake of armed conflict. Recently, coalition forces found themselves confronting this concern when they faced an insurgency following the invasions of Iraq and Afghanistan. The question was doubly important because law was necessary not only for the normal operation of the state but also for responding to the insurgency itself. The legitimacy of both countries was being challenged from within, and the very legitimacy being challenged was one of the tools necessary to deal with that challenge. Coalition military commanders, lacking the resources or knowledge to help establish a criminal justice system to try and punish insurgents, turned to the closest lawyers they had: their military judge advocates.

Although he entered the military expecting to practice law rather than publish, in the spring of 2007, Nachbar (then a recently minted first lieutenant in the U.S. Army) was asked to help draft a handbook for those judge advocates, who had not received training in establishing domestic, civilian criminal justice systems. The effort drew upon expertise from a variety of agencies and non-governmental organizations and resulted in the first *Rule of Law Handbook: A Practitioners' Guide for Judge Advocates*. The handbook, as its title suggests, was designed for practitioners, but it addressed one of the most abstract concepts in law: What is the "rule of law"? The chapter Nachbar drafted eventually became his first paper on the topic: "Defining the Rule of Law Problem" (2009); it attempted to boil down centuries of highly contested legal thinking into a bullet list defining "the rule of law" for judge advocates in the field.[1] The *Handbook* has continued in multiple editions, the latest in 2015.

1 The seven-point list: 1) The state monopolizes the use of force in the resolution of disputes. 2) Individuals are secure in their persons and property. 3) The state is itself bound by law and does not act arbitrarily. 4) The law can be readily determined and is stable enough to allow individuals to plan their affairs. 5) Individuals have meaningful access to an effective and impartial legal system. 6) The state protects basic human rights and fundamental freedoms. 7) Individuals rely on the existence of legal institutions and the content of law in the conduct of their daily lives.

The counterinsurgency operations in both Iraq and Afghanistan raise a host of both practical and theoretical questions. What role does law have in counterinsurgency? How does a state build its legitimacy when its power to regulate is challenged? Is it appropriate to use law as a means (as opposed to a regulator) of armed conflict like counterinsurgency?

Nachbar tackled these and other questions in a series of papers in 2012 and 2013: "Counterinsurgency, Legitimacy, and the Rule of Law," *Parameters*, Spring 2012, 27-38; "The Use of Law in Counterinsurgency," 213 *Mil. L. Rev.* 140 (2012); and "The U.S. Military's Role in Rule of Law Development," a book chapter in *Promoting the Rule of Law: A Practitioner's Guide to Key Issues and Developments* 143 (ABA Section of International Law, 2013). The questions appealed to the same sensibilities that drew Nachbar to his work on regulation generally: What does it mean, both for the state and for the people, to say that a state regulates through law? Analysis of successful (and unsuccessful) practices reveals some consistency. Those seeking to build the legitimacy of a state under pressure are most successful when they focus on the process of legal adjudication, not its substance. Conceptions of fair process are far more widely held, and are less likely to stoke partisan divides already present in a country subject to insurgency, than major substantive reforms. Applying that approach to the specific problem of counterinsurgency, Nachbar described four ways in which law can be used in counterinsurgency to simultaneously defeat insurgents and build legitimacy for a state subject to insurgency. A marriage of high theory to practice, this branch of Nachbar's work provides concrete, substantive guidance for practitioners and policymakers seeking not only to carry out counterinsurgency operations, but also to train for them.

In the fall of 2012, Nachbar (then a captain) was asked to put some of his research into practice, deploying to Jerusalem and the West Bank as legal advisor and security justice program manager to the Office of the U.S. Security Coordinator for Israel and the Palestinian Authority, a U.S. three-star military officer who reports directly to the secretary of state. During his deployment, Nachbar worked with uniformed Palestinian lawyers to help them build the capacity of the Palestinian security justice apparatus, which handles cases originating in the Palestinian Security Forces. Although outside the context of counterinsurgency, the experience drew heavily on the research he conducted on Iraq and Afghanistan, where the same kind of institutional questions (how to train and organize new justice institutions during a period of turmoil) animated coalition programs. Again, Nachbar saw how decisions (both explicit and latent) about the development and allocation of regulatory authority, within and outside of the law, were often as important as the substantive development of legal rules.

CONCLUSION

Whether in the halls of the Law School in Charlottesville or the streets of Ramallah, Nachbar has remained inspired by a fundamental set of questions: What does it mean to say that a society is governed by law? What is it that sets law apart and how does regulating through law change a society? What kinds of institutions and social understandings are necessary for a society governed by law? The answers to these questions take many forms and are found in a variety of places, from the detailed provisions of the Copyright Act to the legislative history of the English Parliament to the rules of engagement for armed forces battling insurgents. There may be no single answer to many of these questions, but the questions are still worth asking.

EXCERPTS

CONSTRUCTING COPYRIGHT'S MYTHOLOGY

6 *Green Bag 2d* 37 (2002)

From 1782 through 1786, a small group of authors successfully lobbied twelve of the thirteen States to adopt America's first general copyright laws. An important member of that group was Noah Webster.

While Webster was active in matters of policy and government, his efforts on behalf of copyright were not those of a disinterested citizen. Webster was motivated by his desire to secure copyright protection for his three-volume text, the *Grammatical Institute*. In 1782, while working on revisions to the first volume, Webster visited Philadelphia and on the way planned to petition the legislatures of Pennsylvania and New Jersey to adopt general copyright laws. He followed up his trip by drafting a memorial to the General Assembly of Connecticut with a proposal for a private bill granting him the copyright in his recently completed *The American Instructor*, the book that eventually became the first two volumes of the *Grammatical Institute*. The request was presented too late in the session to be acted upon, and before he could submit a new petition, Webster's need for a private bill was superseded in 1783 by Connecticut's adoption, at the behest of others, of a general copyright statute. He made the same request of the New York Legislature in early 1783 (with the book now called the *American Spelling Book and Grammar*).

By the end of 1783, six States had adopted general copyright laws. At the same time, another politically active author, Joel Barlow, obtained from the Continental Congress a resolution calling for the adoption of copyright legislation by each of the States. By the end of 1784, the number was up to eight. Although Webster's accomplishments were profound, it's not at all clear that the adoption of general copyright laws in these early States is among his achievements. Others were working toward the same end, several States adopted copyright in direct response to the congressional resolution (with which Webster was not involved), and the most comprehensive account we have of Webster's influence is from Webster himself, who was hardly bashful in his self-promotion.

Of the five copyright laggards—Delaware, Georgia, New York, North Carolina, and Virginia—four were in the southern half of the country. The Grammatical Institute was a success in the north, leading Webster to consider publishing it in the south. In 1785 and 1786, Webster toured the southern States, visiting state legislatures to make the argument for copyright in person. The trip was a success; by the end of 1786 twelve of the thirteen States had adopted general copyright laws, with Delaware the lone holdout. There is little doubt that, in these States, Webster's lobbying was critical.

Webster's approach was methodical; he went from State to State, gradually expanding the geographic reach of American copyright law and with it the geographic reach of the *Grammatical Institute*'s publication. It was in this way that statutory copyright protection became part of the American legal landscape, so much so that a specific provision authorizing Congress to grant exclusive rights in writings was included in the Constitution, and, early in its tenure, Congress passed the first national copyright statute.

The 1790 copyright act granted a fourteen-year initial copyright term with an additional fourteen-year renewal option. Thirty-six years later, Webster sought the assistance of his cousin, Daniel Webster, in having the term of federal copyright extended to perpetuity. Congressman Webster declined, perhaps recognizing the constitutional barrier to a perpetual grant. But five years after that, William Ellsworth, representative from Connecticut and Noah's son-in-law, reported an overhaul of the 1790 copyright act that included an extension of the initial term of copyright from fourteen to twenty-eight years. When the bill stalled in the House, Noah returned to his tried-and-true approach: He traveled to Washington and lobbied Congress himself.

And so began a long tradition of authors asking Congress for extensions of the copyright term for their previously published works. In 1906, Mark Twain, among others, appeared before Congress to testify in favor of extending the then-forty-two-year copyright term to a term of life-plus-fifty years. Twain got an extension, but not the one he wanted. Congress extended—to both new and

existing works—the duration of the renewal term by an additional fourteen years, bringing the total term up to fifty-six years. There it stood until 1962, when Congress started periodically granting short extensions in anticipation of copyright's overhaul in the 1976 Copyright Act. And it was in 1976 that, after receiving testimony from a number of authors and composers, Congress finally granted Twain's request of a life-plus-fifty-year term, a term that was applied to both new and existing works.

Thus, Congress's hearings in 1995 on the twenty-year extension for both new and existing works that eventually became the Sonny Bono Copyright Term Extension Act of 1998 (CTEA) were nothing new. They were the continuation of a tradition—started by the father of American copyright himself—of copyright holders seeking from Congress an increase to the duration of their existing copyrights. When one considers Congress's long tradition of granting such extensions, some of the scholarly criticisms of the CTEA—for example that the CTEA is "a recent response to intense interest group pressure, which might have suppressed [Congress's] historic constitutional good sense in the intellectual property context"—are likely as mistaken in their condemnation of modern Congresses as they are in their romanticization of past ones.

But the 1831, 1909, and 1976 extensions of the copyright term in existing works were never the subject of a Supreme Court case challenging their constitutionality. On October 9, 2002, after this issue went to press but before its publication, the Supreme Court heard oral argument in *Eldred v. Ashcroft*, a case raising just such a challenge. In support of their various arguments, the petitioners in *Eldred* claim that an extension of the copyright term for an existing work cannot "promote the Progress of Science and useful Arts," as is required by the language of the Copyright Clause. That contention reflects a theory that has become dominant over the last half of the 20th century: that the primary purpose of copyright is not to enrich authors but rather to give them an incentive to create works of authorship, which in turn increases society's well-being. The ultimate goal of copyright under this theory is not to vindicate any natural right the author may have to compensation for the product of his labor but rather to further society's interest in the creation of new works. Thus construed, copyright should be given only as a *quid pro quo*—an exchange for the author's contribution to society. To grant

exclusive rights without demanding something in return would further the author's interests, but not society's. Any exclusive rights granted by Congress, the *Eldred* petitioners argue, "must promote 'creative activity' to satisfy the limits of the constitution."

I would like to focus on a problem that I think is evidenced by the form of the arguments advanced by the *Eldred* petitioners: It is the danger inherent in relying on broad assertions about the essential features of copyright and its central place in the Framers' vision of government, a problem readily demonstrated by returning to the two great copyright-related accomplishments of Noah Webster.

Webster's more famous lobbying effort, the pursuit of state copyright protection prior to the adoption of the Constitution, was motivated by the desire to obtain protection for a single work: his three-volume text, the *Grammatical Institute*. Volume I of the *Grammatical Institute*, a speller, was first offered for sale in Connecticut in October 1783; the second volume, a grammar, appeared in March 1784; and the third volume, a reader, was published in February 1785. But Webster's quest for state copyright protection spanned a period of approximately four years, from the Fall of 1782 to the Spring of 1786. By October 1783, when the first volume of the *Institute* was published, only four States, Connecticut, Massachusetts, Maryland, and New Jersey, had copyright laws. The rest of the twelve States to enact copyright laws did so gradually until New York, the last State to adopt a general copyright law, did so on April 29, 1786. If copyright may only be given as an incentive to create, how could Webster have received copyright protection for the first volume of the *Grammatical Institute* in the States that adopted copyright laws after October of 1783?

The answer is a simple one that any copyright lawyer who has been in practice for more than 26 years would immediately know: American copyright statutes, both state and federal, have traditionally based copyright not on a work's creation but rather on its publication. The place that publication has held in statutory copyright—beginning with the English precursor to American copyright, the Statute of Anne—is so strong that one commentator has even argued that the 1976 Act may be unconstitutional because it protects works upon their creation.

Thus Webster's post-creation odyssey to obtain copyright protection. The date of the creation of Webster's works was irrelevant to

the early copyright statutes. In capital-strapped early America, it was publication, not creation, that drove both the economic and regulatory realities of copyright. The modern tendency to focus on creation as the object of copyright also ignores the high value the framing generation placed on books as focal points for an independent American culture; that value was served not so much by the creative content of any particular book as by the wide dissemination of American books of any kind.

Indeed, the state copyright laws being enacted at roughly the same time as the framing of Constitution call the ubiquity of the *quid pro quo* theory of copyright—as an exchange for either creation or publication—into doubt. In the state acts, authors' natural rights are mentioned as frequently as society's benefit as the justification for protection. We'll likely never know what model the Framers had in mind for copyright because neither view of copyright was exclusively or even dominantly held at the time of the framing.

But one thing is for certain: The scope of copyright protection existing at the time of the framing is inconsistent with claims that copyright "must promote 'creative activity'" in order to be valid. The requirement that a work even be creative was not settled until the 1990s. Any attempt to locate with the Framers the proposition that copyright may be given only as a reward to creativity is an exercise in revisionist history; the central place that creativity occupies in copyright is a feature of modern copyright law.

COUNTERINSURGENCY, LEGITIMACY, AND THE RULE OF LAW

***Parameters: The U.S. Army War College Quarterly,* Spring 2012**

Law features more prominently in warfare today than in any time in memory. Stories about the legality of detaining "unlawful combatants" or "unprivileged belligerents" in Guantanamo Bay are in the headlines weekly. Questions of venue, a question usually considered to one of the most technical questions in legal procedure, have reached the American popular consciousness in the form of debates

over whether to try suspected terrorists in civilian courts or military commissions. The current set of conflicts may prove to be the most heavily litigated in human history.

The current conflicts have seen an even greater expansion of law's role in war, though: law as a *means* of warfare. Law's ascendance as a means of warfare is tied to the ascendance of counterinsurgency as a form of warfare.

A MODEL OF LEGITIMACY FOR COUNTERINSURGENCY

Like the problems faced by those attempting to define the "rule of law," the "legitimacy" question is essentially a problem of applied jurisprudence. As with any abstract concept, there are a number of possible definitions of legitimacy; the problem for counterinsurgents is to pick a model of legitimacy that informs thinking about counterinsurgency in a helpful way.

As a competition between competing claims to govern, insurgency necessarily has a strong ideological component. Any workable definition of legitimacy should therefore include the ideological basis underlying a particular government. As Herbert Kelman put it succinctly:

> [I]t is essential to the effective functioning of the nation-state that the basic tenets of its ideology be widely accepted within the population. This does not necessarily mean a well-articulated, highly structured acceptance of the ideology at a cognitive level. It does mean, however, that the average citizen is prepared to meet the expectations of the citizen role and to comply with the demands that the state makes upon him, even when this requires considerable personal sacrifice.

Of course, the nature of that ideological component is itself somewhat contingent. It may be an ideal (as were many of the claims of our own insurgency against the British) or it may represent a normative commitment to some other concept, such as religious, ethnic, or clan identity, all of which have been important in the current conflict in Afghanistan and Iraq. The point is not to identify any specific ideology that legitimacy must be tied to but rather to recognize the necessity of ideological narrative as a component of legitimacy. That may seem like an uncontroversial point, but it is not. Arguments to allow

government to devolve to warlordism, for instance, are arguments premised in a view of legitimacy limited to efficacy (or even consent) but devoid of concern over the ideological basis for rule. At some level, debates over whether to follow counterinsurgency or counterterrorism strategies in Afghanistan are about whether to include ideology as a component in our war effort.

Legitimacy is also important to counterinsurgents for its ability to generate compliance. A regime subject to an insurgency that is unable to secure compliance with its laws loses credibility, which further reduces compliance, devolving into a descending cycle. Consequently, a model of legitimacy for counterinsurgency must include compliance as both an objective and a component of that legitimacy.

But the problems faced by counterinsurgents—and the opportunity presented by the concept of legitimacy—go beyond mere compliance. A government facing an armed insurgency is asking its citizens to choose it as the governing authority; those choices have important, practical consequences for citizens, including consequences for social connections and even the possibility that members of the population will be asked to take up arms against (or suffer attacks from) insurgents. What counterinsurgents require is something more akin to commitment in order to induce not only credibility-enhancing compliance but a willingness to make personal sacrifices in support of the government. "In times of national crisis the state demands sacrifices from individual citizens that they would not normally make if they were acting purely in terms of their personal interests—at least their short-run interests."

Indeed, if given the choice, counterinsurgents would likely take commitment over compliance. Whether the legitimacy of the government is increased more by the credibility it gets through increased compliance or by a committed but disobedient populace is an empirical and culturally contingent matter. If the regime can claim what H.L.A. Hart called the "internal aspect"—a commitment to the government as the source of rules—the battle for legitimacy is largely won, even if most citizens frequently ignore the law. A regime is legitimate when it is viewed as such, not when people comply with its rules. Compliance is likely when the regime is viewed as legitimate, but it needn't be. For instance, the cultural practice in a particular country could be that national law is only enforced intermittently.

LAW'S CENTRAL ROLE IN LEGITIMACY

Unlike many other objects of development in counterinsurgency, law is central to the act of governing. Regulation by law is not only a necessary role of the state, it is one the state must engage in exclusively in order to maintain its claim as the legitimate government. In many places, trash collection (for instance) is a purely private activity conducted by contractors rather than the government. More importantly for counterinsurgents focused on legitimacy, even where the government operates services like trash disposal, a competing trash hauling company does not threaten the legitimacy of the government. The same is not true of regulation by law. Arresting, trying, and punishing criminals, is a function that separates governments from other actors. The same would be true of a parallel civil dispute resolution system operating outside the auspices of the state, such as is the case with Taliban in Afghanistan. Indeed, a monopoly on the use of force in the resolution of disputes is the essence of a government—a government that does not wield that power exclusively is likely a government in name only. What separates governments from other providers of goods and services is the ability to promulgate and enforce law, and so "rule of law" programs rightly claim a preeminent role in the contest for legitimacy that defines counterinsurgency. The state as a source of legal rules must not only provide material benefit to the population, it must do so well enough to displace its competitors.

THE RATIONALITY OF RATIONAL BASIS REVIEW

102 *Va. L. Rev.* (forthcoming 2016)

INTRINSIC RATIONALITY AND VALUE-RATIONAL ACTS

As the structure of rationality review suggests, law is commonly understood to be instrumental to some other end—a "social purpose." There is little argument for law for the sake of law—society adopts laws in order to serve some other end. But law doesn't serve rationality writ large; it serves a somewhat more specific, political rationality that supplies the social purposes for law. And if the legal system exists to serve social, political ends, legal rationality must at some level be

subject to the social purposes it serves.

A legal system inconsistent with social purpose would be irrational given that social purpose, but so long as the legal system is ordered according to reasons made cognizable by social purpose, it is intrinsically, if not instrumentally, rational. Max Weber accepted instrumental rationality as a form of "social action," but he also acknowledged another form of rationality, one unrelated to efficacy, in the form of "value-rational" acts:

> value-rational (wertrational), that is, determined by a conscious belief in the value for its own sake of some ethical, aesthetic, religion, or other form of behavior, independently of its prospects for success

Entirely outside the means-ends structure of instrumental rationality, value-rational acts are intrinsically rational social acts. The rationality of a value-rational act is not in "the achievement of a result ulterior to it, but in carrying out the specific type of action for its own sake." Weber posited that value-rational acts are rational by virtue of both their internal rationality (their systemization) and their reasoned connection to social purpose.

A POVERTY OF IDEAS AND A WEALTH OF REVIEW

The privileged place that instrumentalism has come to enjoy in the Supreme Court's approach to rationality review has major consequences for the constitutional order and for rationality review itself. Most directly, the Court's instrumentalist focus fails to adequately accommodate ends that are either difficult to state in instrumentalist terms, such as retributive justice or the regulation of morally charged institutions like marriage, or simply are not instrumentalist in the first place, such as value-rational acts. Instrumental rationality does not ignore value-rational reasoning, it affirmatively rejects it. From the perspective of instrumental rationality, "value-rationality is always irrational. Indeed, the more the value to which action is oriented is elevated to the status of an absolute value, the more 'irrational' in this sense the corresponding action is." If we think there is a sphere of legitimate social action that fits Weber's concept of value-rationality, then it will require a conscious commitment on the part of the Court to accommodate it within rationality review.

The Court's focus on utilitarian justifications also forces parties (and the Court) to re-state normative ends as utilitarian ones, leading either to the sort of contorted reasoning exhibited by treatise writers attempting to explain morals legislation in terms of nuisance or to intellectual dishonesty, or both, what Hans Linde called "a labyrinth of fictions." One can explain the prevention of animal cruelty in farming as encouraging the consumption of meat, but doing so deprives the law of both clarity and content. The tendency to shift away from normative justifications (and their problems) is likely to affect both legislators and the Court. Legislators, for their part, will be tempted to either misstate their normative ends as utilitarian ones or, more likely given the willingness of the Court to supply utilitarian ends in the absence of any stated legislative ends, simply provide no information at all about their ends. The Court, by focusing on the rational relationship of an act to a set of invented but uncontroversial utilitarian ends, can avoid difficult conversations about what are and are not legitimate governmental interests. That is problematic in its own right, since it obfuscates debate and makes it difficult to police the Court's reliance on principles with controversial constitutional meaning. But the consequences for the rationality of rationality review are doubly troubling. An approach to crediting ends driven by the desire to reach a particular outcome rather than by ordered reasoning renders rationality review inherently irrational.

INTRINSIC RATIONALITY, CONSTITUTIVE RULES, AND SOCIAL MEANING

Intrinsic rationality has the capacity of accommodating non-instrumental ends while retaining a commitment to rationality. What rationality review requires, then, is a better conception of how intrinsic rationality can operate legitimately in a legal system.

Intrinsic rationality is a prominent feature of rules that define a practice—what John Searle called "constitutive rules." A constitutive rule (as opposed to a "regulative" rule) defines and regulates new behaviors rather than regulating existing behaviors. The rules of chess, for instance, are constitutive rules, which both define the game of chess and regulate its play. Such rules may be instrumental to a principle outside the practice to which they apply, but they needn't be in order to be rational—chess is internally rational as chess although, Weber would press the distinction somewhat in cases of social acts,

in which the intrinsic rationality of the act must maintain some connection with social purpose more generally. Chess in which the victor summarily decapitates the loser would be irrational in practically any modern society because, even if a game is internally reasoned and ordered, the social purpose of games does not generally extend to the violent death of one of the players.

Law both regulates and defines behavior, and regulatory rules themselves can redefine behavior by what they express through the way they regulate—that is why imprisonment, for instance, redefines behavior in a different way than fines might. But law does not only alter social meaning as a matter of what it expresses—law can alter the social meaning of a practice by virtue of the change in the practice it brings about.

For example, a ban on smoking in restaurants can alter the social meaning of smoking in several ways. The existence of the ban can express social condemnation of smoking. The existence of ban can also provide information about the wisdom of smoking—that smoking is dangerous to both the smoker and those around him (much as warning labels do). But the banning of smoking also alters the social meaning of smoking by altering the geography of smoking. Merely providing smoking and non-smoking sections allows both smokers and non-smokers to coordinate their behavior and reinforce their preferences by segregating themselves from each other. An absolute ban goes even further, reinforcing the preferences of non-smokers and making smoking less apparent. Those of us who have lived through an era of increasing regulation of smoking might be likely to emphasize the expressive effects of smoking regulation, but today's children (at least those growing up in non-smoking households), who are growing up in a world in which smoking in restaurants is uncommon, may simply not witness smokers on a regular basis, making the behavior less available to them than if they had witnessed it frequently.

These examples demonstrate that rules can be instrumental to altering social meaning, but they needn't be in order to exhibit constitutive rationality. In the United States, it is illegal to "take" a bald eagle, the national symbol of the United States. Even if it were found that the statute did not have the effect of increasing the number of bald eagles, or that the statute was unnecessary because bald eagles are not in any serious danger from hunting, prohibiting the taking of bald eagles could exhibit constitutive if not instrumental rationality. The act of defining the bald eagle as outside the proper scope of hunting would be a constitutive, value-rational end of the statute.

Of course, many if not most provisions will have a mix of instrumental and constitutive ends. When Congress dropped the prohibition against homosexuals in the U.S. Armed Forces, it could have had a mix of instrumentalist and constitutive ends. At an instrumental level, Congress may have been seeking to make the armed forces a more effective fighting force by expanding the pool of potential servicemembers or by altering the culture of the armed forces to make them more open to diversity of all kinds. But dropping the exclusion also likely changed the social meaning of what it means to be both a servicemember and a homosexual in the United States. The question is whether one or the other of those ends is either constitutionally privileged or constitutionally prohibited.

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