

## RESTORING NOBILITY TO THE CONSTITUTION: A MODERN APPROACH TO A FOUNDING PRINCIPLE

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It is common lore in the United States that our federal government was structured with a number of checks and balances that ensure, at a minimum, the equal application of law among all citizens. While there are indeed such structural mechanisms embedded in the Constitution, they don't always work as intended and, in fact, at times they fail utterly to prevent blatant abuses of the rule of law by the political class in America.

Our political office holders can, and do, pick and choose which laws apply to them and, more importantly, which laws they are exempt from. This has led to increasing outrage focused on the nation's inequitable political and legal framework, with many calling for, among other things, new amendments to the Constitution to remediate the infirmities of the system.

The solution, however, is already in the Constitution.

The "Nobility Clauses"<sup>2</sup> are among the least understood, and least invoked, provisions of the Constitution relating to the use, limits and distribution of political and legal power in the United States. Many believe that the purpose of the Nobility Clauses is specifically limited to forbidding grants of noble titles by the federal and state governments of the United States and are thus of narrow constitutional importance.

A review of the Constitutional Convention debates,<sup>3</sup> generally, and other historical documents relating to the new political class in America, particularly, show that the Nobility Clauses were intended to have a far greater reach than simply the prohibition of noble titles.<sup>4</sup>

The means of structuring a republican central government and the need to provide checks on the power of the federal government in order to protect state and individual sovereignty<sup>5</sup> was

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<sup>2</sup> U.S. CONST. art. I, § 9, cl. 2 (federal prohibition on titles of nobility) and U.S. CONST. art. I, § 10, cl. 1 (state prohibition on titles of nobility).

<sup>3</sup> Throughout this paper, references to the "Constitutional Convention" and "Constitutional Debates" refer to the federal convention held in Philadelphia, Pennsylvania from May 1787 through September 1787 and the debates taking place with regard thereto, respectively.

<sup>4</sup> See generally THE FEDERALIST No. 57 (James Madison).

<sup>5</sup> What others call "popular sovereignty" I call "individual sovereignty". See generally Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994). In discussing the "central pillar of Republican Government" Amar broadly defines popular sovereignty as "the people rule" *Id.* at 749. A distinction must be made between the sovereignty of the state (in relation to the federal government) and the sovereignty of the people, distinct from any subdivision. It is my

a central theme of the Constitutional Convention. It was also the subject of great debate. The anti-federalists, in particular, objected to the proposed Constitution based in large part on the risk of the political class becoming an American nobility, unresponsive to the will of the people and unchecked in its power.

As the reach of the federal government has grown, especially since the New Deal, there has been an increasingly disturbing trend towards political office holders and government employees granting themselves extra-constitutional privileges and immunities.<sup>6</sup> The anti-federalists were prescient: there is now a de facto noble class in the United States of America.

By way of example, in California, nearly 1,000,000 vehicles registered to owners affiliated with state and local government agencies are effectively immune from traffic tickets.<sup>7</sup> A similar loophole exists in Colorado for state lawmakers and representatives.<sup>8</sup> Immunity from the enforcement of laws isn't limited to parking and traffic laws for the political class; it extends to the concealed carry of firearms by retired government officials<sup>9</sup> and the exemption from a host of federal regulations for the very political body that promulgates those regulations.<sup>10</sup> Most notorious of late, the Congressional Office of Personnel Management created a functional exemption from the Affordable Care Act for members of Congress and their staffs.<sup>11</sup>

This paper will show that the Nobility Clauses were never intended to be limited solely to prohibiting titles and were, in fact, intended to prevent the political class from granting themselves and their favored affiliates privileges and immunities not available to the general public.

Part I of this paper will provide an overview of the Constitutional Debates as they relate to the creation of the federal political class and concerns that led to specific safeguards, including the Nobility Clauses, to protect the uniquely structured republican form of government in the United States. Part II will discuss the various loopholes in federal and state law available to political office holders and their appointees, which I refer to herein as the "Nobility Loopholes".<sup>12</sup> Part III will provide an argument that the modern political class has become a de

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contention that the ultimate pillar of Republicanism is a respect for the individual, with all political subdivisions existing primarily to safeguard the natural rights of the individual. *See also infra* note 18.

<sup>6</sup> In this paper the term "privileges and immunities" is used, unless otherwise indicated, in a colloquial sense, and not solely as used under 14<sup>th</sup> Amendment and/or Article IV, Section 2, Clause 1 Constitutional jurisprudence.

<sup>7</sup> *See infra* note 122.

<sup>8</sup> *See infra* note 125.

<sup>9</sup> *See infra* note 88.

<sup>10</sup> *See infra* note 68.

<sup>11</sup> Kimberly A. Strassel, *A Test of GOP Resolve on Obamacare*, WALL STREET JOURNAL, August 30, 2013 at A11.

<sup>12</sup> Politicians who seek to change or add to a law or regulation that has otherwise been effective for its intended purpose frequently describe their new law or regulation as "closing a loophole". By describing something as a loophole from the law, they seek to obtain public support for additional laws that were never included in the original law. One example of this relates to California's Proposition 13, which was enacted in the 1970s to limit the increases in real property taxes. The law was always intended to cover both commercial and residential real property, but some claim that the application of the law to commercial real estate is a "loophole". *See*, California Democratic Party Resolution 13-04.39, *Close the Corporate Loophole* (available at <http://www.cadem.org/admin/miscdocs/files/Resolutions-Report-FINAL-2.pdf>). The proponents of eliminating the protections of Proposition 13 for commercial real property are in fact advocating a new tax, rather than closing a loophole. An actual loophole, however, is a weakness or ambiguity in a system that allows some to take an

facto noble class that is in violation of the Nobility Clauses. Part IV will provide several proposed solutions to the Nobility Loopholes and discuss potential arguments for and against such solutions.

## I. What Do the Nobility Clauses Mean?

There is a dearth of scholarship, and even less caselaw,<sup>13</sup> on the background and meaning of the Nobility Clauses. To many, this is a result of the very narrow scope of the Nobility Clauses, which, facially, are specific and absolute.

*No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.*<sup>14</sup>

Even the Constitutional Convention debates contain little discussion of the Nobility Clauses, other than an acknowledgement that the provision carries forward from the Articles of Confederation.<sup>15</sup> This limited commentary on the Nobility Clauses has formed the basis for the

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advantage where no advantage was intended. In this paper, I seek to put the focus on actual extra-Constitutional acts that benefit the political class and thus are in fact loopholes.

<sup>13</sup> Because existing caselaw on the Nobility Clauses has not provided substantive precedential material, this paper will not focus on a review of that caselaw. For a review of such caselaw, *see* Larson, *infra* note 16 at 1409-1411 and Delgado, *infra* note 16 at 113-114.

There have, however, been three potentially substantive references to the Nobility Clauses in United States Supreme Court opinions. None of the cases directly involved Nobility Clauses questions but the references made in these opinions are illustrative of the potential scope of Nobility Clauses doctrine.

The reference to the Nobility Clauses in *Mathews v. Lucas*, 427 U.S. 495 (1976) was simply a footnoted conclusion in Justice Stewart's dissent that the reasoning behind the enactment of the Nobility Clauses would prevent the United States from discriminating against illegitimate children. *Id.* at 520, note 3. Similarly, in *Zobel v. Williams*, 457 U.S. 55 (1982), Justice Brennan, in a concurring opinion, referred to the Nobility Clauses as standing for the founding principle that there was to be no American aristocracy or preferential treatment for select individuals or groups. *Id.* at 69 and note 3.

I believe that Justice Stevens intimated at future broad uses of the Nobility Clauses as a check on government favoritism and cronyism in his dissenting opinion to *Fullilove v. Klutznick*, 448 U.S. 448 (1980): “[o]ur historic aversion to titles of nobility is only one aspect of our commitment to the proposition that the sovereign has a fundamental duty to govern impartially. When government accords different treatment to different persons, there must be a reason for the difference...it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.” *Id.* at 533-4. Justice Stewart also invoked the Nobility Clauses in his dissenting opinion to this case to support the proposition that all people are to be treated equally under the Constitution. *Id.* at 531, note 13.

<sup>14</sup> U.S. CONST. art. I, § 9, cl. 2. The Nobility Clauses are applied to the states with the same substance through U.S. CONST. art. I, § 10, cl. 1.

<sup>15</sup> THE FEDERALIST No. 44, at 279 (James Madison) (Clinton Rossiter ed., Signet Classic 2003) (1961) “The prohibition with respect to titles of nobility is copied from the articles of Confederation and needs no comment.” Richard Delgado argues persuasively that “the anti-nobility clauses were part of an American reaction to feudalism...monarchs cemented relationships with nobles and local gentry by offering them places in the English administrative government.” *Infra* note 16 at 110.

view that if there is any meaning to the Nobility Clauses beyond their plain language, it is as a restriction on any governmental grant of hereditary benefit to individuals.<sup>16</sup>

### a. Historical Background of the Nobility Clauses

Benjamin Franklin considered titles of nobility to be baneful remnants of the waning feudal system that tended to suppress individual achievement.<sup>17</sup>

*For Honour, worthily obtain'd (as for Example that of our Officers), is in its Nature a personal Thing, and incommunicable to any but those who had some Share in obtaining it. Thus among the Chinese, the most ancient, and from long Experience the wisest of Nations, honour does not descend, but ascends. If a man from his Learning, his Wisdom, or his Valour, is promoted by the Emperor to the Rank of Mandarin, his Parents are immediately entitled to all the same Ceremonies of Respect from the People, that are establish'd as due to the Mandarin himself; on the supposition that it must have been owing to the Education, Instruction, and good Example afforded him by his Parents, that he was rendered capable of serving the Publick.*

*This ascending Honour is therefore useful to the State, as it encourages Parents to give their Children a good and virtuous Education. But the descending Honour, to Posterity who could have no Share in obtaining it, is not only groundless and absurd, but often hurtful to that Posterity, since it is apt to make them proud, disdain to be employ'd in useful Arts, and thence falling into Poverty, and all the Meannesses, Servility, and Wretchedness attending it; which is the present case with much of what is called the Noblesse in Europe. Or if, to keep up the Dignity of the Family, Estates are entailed entire on the Eldest male heir, another Pest to Industry and Improvement of the Country is introduc'd, which will be followed by all the odious mixture of pride and Beggary, and idleness, that have half depopulated [and decultivated] Spain; occasioning continual Extinction of Families by the Discouragements of Marriage [and neglect in the improvement of estates].*

The distaste for titles of nobility also extended to the possibility of foreign influence in American politics through the grant of noble titles to American citizens by foreign governments. One of the more curious cases of a proposed constitutional amendment, the so-called Titles of Nobility Amendment would have revoked United States citizenship from any person who

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<sup>16</sup> While the desire to divest hereditary privileges generally is most certainly one of the foundations of the Nobility Clauses, those who focus exclusively on this element have lost sight of the overarching purpose of the Nobility Clauses, which is to protect and promulgate the republican form of government. For discussions that focus on the hereditary view of the Nobility Clauses, see generally Carlton F. W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 WASH U. L. REV. 1375 (2006); Jack M. Balkin, *The Constitution of Status*, 106 YALE L. J. 2313 (1997); and Richard Delgado, *Inequality "From the Top": Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. REV. 100 (1984). Also see the discussion *infra* at Section I(c) regarding my belief that the hereditary focus is misguided to the extent it is an argument for a limited view of the scope of the Nobility Clauses.

<sup>17</sup> See THE WRITINGS OF BENJAMIN FRANKLIN (Albert Henry Smyth, Ed., 10 vols. New York: Macmillan Co.), 1905-7., where Franklin criticizes the Society of the Cincinnati's hereditary elements, deriding them as being too close to a form of nobility. For more about the Society of the Cincinnati and its connection to the Nobility Clauses, see Larson, *infra* note 16 at 1386-1399.

accepted a title of nobility from a foreign source. The concern was that if an American citizen (in particular, an American government official) obtained the honor of a noble title from a foreign nation, that American would have some form of loyalty or obligation to the foreign nation. Had this amendment been enacted, not only would the grant of titles of nobility by federal and state governments in the United States be forbidden, such a grant by a foreign nation to a United States citizen would be barred, effectively foreclosing the possibility of any noble class existing in the United States. Though this amendment was never ratified, it did enjoy the support of a number of states and, in fact, was erroneously published in the 1815 edition of the Statutes at Large as a ratified amendment.<sup>18</sup>

Ultimately, the Nobility Clauses were just one part of the mosaic that the framers structured to ensure that the republican form of government that they were proposing would be a government where those in service were provided no enhanced legal status by virtue of their service and had, as its primary goal, service to the people.

Anti-Federalist author “Centennial” described federalism as a government where

*the people are the sovereign and their sense or opinion is the criterion of every public measure; for when this ceases to be the case, the nature of the government is changed, and an aristocracy, monarchy or despotism will rise on its ruin.*<sup>19</sup>

Elaborating on the contradictions between the nascent republican government in the United States and the hoary aristocracy of Europe, Joseph Story explained the prohibition on titles of nobility as a protection against government sanctioned privileges accruing to a select few.

*This clause seems scarcely to require even a passing notice. As a perfect equality is the basis of all our institutions, state and national, the prohibition against the creation of any titles of nobility seems proper, if not indispensable, to keep perpetually alive a just sense of this important truth. Distinctions between citizens, in regard to rank, would soon lay the foundation of odious claims and privileges, and silently subvert the spirit of independence and personal dignity, which are so often proclaimed to be the best security of a republican government.*<sup>20</sup>

Story’s commentary shows that the titles of nobility prohibition was rooted in a substantive basis far beyond that of titles or even inherited powers. At the very core of the prohibition was the desire to prevent corruption of those who served the people through government service; that is, the Nobility Clauses were, as Story stated, a bulwark against subversion of the republican form of government.

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<sup>18</sup> For more on the “Titles of Nobility Amendment”, see Gideon M. Hart, *The “Original” Thirteenth Amendment: The Misunderstood Titles of Nobility Amendment*, 94 Marq. L. Rev. 311 (2010).

<sup>19</sup> CENTENNIAL I, PHILADELPHIA INDEPENDENT GAZETTER, October 5, 1787, reprinted in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION AND THE BILL OF RIGHTS, 326, 331 (M. Jensen, J. Kaminski, G. Saladino and R. Leffler, eds 1976-86).

<sup>20</sup> JOSEPH STORY COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES. 3 vols. Boston, 1833.

The Constitutional Convention-era debates contrasted the structural elements of republicanism, where the power came from the people and existed solely at their discretion, with a monarchy, where the crown was seen as sanctioned by divinity and the nobility, provided for by the crown, were an elite intermediary between the crown and the commoners.

To address copious concern that a central government, especially one without strictly enumerated and limited powers, would infringe upon state and individual sovereignty<sup>21</sup> and perhaps even take on the appearance of a monarchy<sup>22</sup> the framers implemented a series of institutional limitations and checks and balances. In addition to empowering the federal government with defined and limited powers,<sup>23</sup> members of Congress would be elected at regular and relatively frequent intervals and the Executive and Legislative branches were to have counterbalancing powers.<sup>24</sup>

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<sup>21</sup> See Brutus Letter 1, NEW YORK JOURNAL, October 18, 1787, reprinted in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES (Ralph Ketcham ed., Mentor Books 1986) (“...in so extensive a republic, the great officers of government would soon become above the controul of the people, and abuse their power to the purpose of aggrandizing themselves, and oppressing them. The trust committed to the executive offices, in a country of the extent of the United-States, must be various and of magnitude. The command of all the troops and navy of the republic, the appointment of officers, the power of pardoning offences, the collecting of all the public revenues, and the power of expending them, with a number of other powers, must be lodged and exercised in every state, in the hands of a few. When these are attended with great honor and emolument, as they always will be in large states, so as greatly to interest men to pursue them, and to be proper objects for ambitious and designing men, such men will be ever restless in their pursuit after them. **They will use the power, when they have acquired it, to the purposes of gratifying their own interest and ambition, and it is scarcely possible, in a very large republic, to call them to account for their misconduct, or to prevent their abuse of power**”) (emphasis added).

<sup>22</sup> See Benjamin Franklin’s warning “I am apprehensive, therefore - perhaps too apprehensive - that the Government of these States may in futures times end in a monarchy” in JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (Athens: Ohio University Press, 1985), 41-42. See also THE FEDERALIST No. 48, at 306 (James Madison) (Clinton Rossiter ed., Signet Classic 2003) (1961) (“...In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a democracy, where a multitude of people exercise in person the legislative functions, and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter. But in a representative republic, where the executive magistracy is carefully limited; both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.)

<sup>23</sup> See MARK. R. LEVIN THE LIBERTY AMENDMENTS: RESTORING THE AMERICAN REPUBLIC (1<sup>st</sup> edition 2013), 6 and THE FEDERALIST No. 45, at 289 (James Madison) (Clinton Rossiter ed., Signet Classic 2003) (1961) (“[t]he powers delegated by the proposed Constitution to the federal government, are few and defined”).

<sup>24</sup> For purposes of this paper the systems of checks and balances designed into the federal government will be dealt with in summary fashion. For a robust explanation of the workings and nuances of separation of powers and checks and balances, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939 (2011) (“[T]he Constitution not only separates powers, but also establishes a system of checks and balances through power sharing practices such as the presidential veto, senatorial advice and consent to appointments, and the like”) *id.* at 1952. See also THE FEDERALIST No. 51, at 320 (James Madison) (Clinton Rossiter ed., Signet Classic 2003) (1961) (“In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.

Far from being simply a discrete prohibition on government bestowed noble titles,<sup>25</sup> the Nobility Clauses were intended to be structural impediment against the creation of a political aristocracy, a guarantee that there would be no privileged class in the United States, either by title or by treatment.

Alexander Hamilton called the prohibition on titles of nobility “the corner stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people.”<sup>26</sup>

In short, republicanism was presented as the antidote to nobility and the Nobility Clauses were included in the Constitution as a broad prophylactic against any intrusion of nobility in American politics and society.<sup>27</sup>

In The Federalist No. 39, Madison used the term “tyrannical nobles” while writing in support of the republican form of government.

*It is ESSENTIAL to such a government that it be derived from the great body of society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic.*<sup>28</sup>

It was no coincidence that Madison referred to nobility in the discussion of republicanism, as later in The Federalist No. 39 he, like Alexander Hamilton in the Federalist No. 84, explicitly declared that the prohibition on titles of nobility was to guarantee republicanism: “Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility....”<sup>29</sup>

Indeed, as Professor Jack Balkin noted,

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Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself”).

<sup>25</sup> In fact, one of the initial orders of business for the first Senate was the selection of a proper title for the President. The Senate decided upon “His Highness the President of the United States and the Protector of the Rights of the Same” but the House of Representatives feared that the title would signify a retrenchment to the age of aristocracy and overruled any title other than the simple title used in the Constitution: “The President of the United States”. See MICHAEL P. RICCARDS, A REPUBLIC, IF YOU CAN KEEP IT: THE FOUNDATION OF THE AMERICAN PRESIDENCY, 1700-1800 (1987) at 87. See, also, Hart, *supra* note 18 at 352 (“...it is exceedingly unlikely that the federal or state government would have ever tried to create an official distinction of nobility in that purest sense, even if the prohibitions in the Nobility Clauses did not exist...[t]he framers were not nearly so constrained in their conception of the Nobility Clauses and did not intend the prohibitions in the Constitution to be construed so narrowly.”)

<sup>26</sup> THE FEDERALIST No. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic 2003) (1961).

<sup>27</sup> Hart, *supra* note 18 at 352 (“...it is exceedingly unlikely that the federal or state government would have ever tried to create an official distinction of nobility in that purest sense, even if the prohibitions in the Nobility Clauses did not exist...[t]he framers were not nearly so constrained in their conception of the Nobility Clauses and did not intend the prohibitions in the Constitution to be construed so narrowly”).

<sup>28</sup> THE FEDERALIST No. 39, at 237 (James Madison) (Clinton Rossiter ed., Signet Classic 2003) (1961).

<sup>29</sup> *Id.* at 238-239.

*[t]he American Revolution was not simply a political revolution; it was also a social revolution. As Gordon Wood has described in a book aptly titled *The Radicalism of the American Revolution*, the generation of 1776 consciously attempted to break free from the aristocratic social structure they had inherited from Great Britain. They hoped to create in its stead not only a republican form of government but a new republican system, freed from the caste-like system of nobility and royal honors...[t]hey hoped, in short, to breed a new sort of person, a republican citizen, equal to all and subordinate to none.*<sup>30</sup>

There is thus ample authority for the conclusion that the framers intended to for the prohibition on titles of nobility to be a fundamental protection of the republican system. Implicit in this was the idea that one of the most effective ways to ensure that there would be a republican system was to prohibit the incidents and substance of nobility as well as the titles of nobility.

### **b. What is Nobility?**

But what is the substance of that which was prohibited by the Nobilities Clause?

British historian Lawrence James briefly described nobility as that which “...represented ‘virtue and ancient riches’ and was the sheet anchor of the country....”<sup>31</sup> Charles de Montesquieu contrasted a democracy, where “...the body of the people is possessed of the supreme power...” with nobility, where “...the supreme power is lodged in the hands of a part of the people....”<sup>32</sup> Indeed, Montesquieu drew parallels between monarchy and nobility as they relate to power over the citizenry. More specifically,

*In an aristocracy the supreme power is lodged in the hands of a certain number of persons. These are invested both with the legislative and executive authority; and the rest of the people are, in respect to them, the same as the subjects of a monarchy in regard to the sovereign.*<sup>33</sup>

Historically, the nobles were thought to have the wisdom and pedigree that uniquely enabled them to promulgate and enforce law. Though the noble class was in large part based on

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<sup>30</sup> Jack M. Balkin, *The Constitution of Status*, 106 Yale L. J. 2313, 2345 (1997).

<sup>31</sup> LAWRENCE JAMES, *ARISTOCRAT: POWER, GRACE, AND DECADENCE: BRITAIN’S GREAT RULING CLASSES FROM 1066 TO THE PRESENT*, (2009) at 2. James, like many historians and scholars, uses the words “aristocracy” and “nobility” interchangeably. In defining the word “aristocracy” James recounts that the “...concept of aristocracy was highly flattering to an already dominant elite, which, since the eleventh century, had been called the ‘baronage’, ‘nobility’ and latterly the ‘peerage’”. *Id.* at 1. For purposes of this paper I will follow this convention as well and use the term “aristocracy” as an analog for nobility.

<sup>32</sup> CHARLES DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 8,13 (Thomas Nugent trans., Colonial Press) (revised ed. 1900).

<sup>33</sup> *Id.* at 13. The positioning of the noble class as the buffer between the monarch and the people is a theme through Montesquieu’s works. *Id.* at 22 (“[t]he people, who in respect of nobility are the same as the subjects with regard to a monarch, are restrained by their laws.”) Lawrence James portrays a similar hierarchy, stating that “[s]ubmission to the Crown meant submission to the nobility.” James, *supra* note 31 at 95.



heredity, the perception of nobility as a closed system is erroneous.<sup>34</sup> Nevertheless, the noble class was indeed a small and elite fraternity. Much like today's political class, the noble class presented themselves as the protectors of the common person from omnipotent forces (whether it be a monarch or, as today, a corporation).

*From the Middle Ages onwards, aristocrats had encouraged the perception of themselves as robust, independent-minded fellows who could take up cudgels to protect the people from overbearing monarchs and elected governments with authoritarian instincts.*<sup>35</sup>

More important than the public perception of nobility, however, was the power that came with nobility. The privileges of nobility were quite amorphous, but as general principle, "the nobles formed[ed] a body, who by their prerogative, and for their own particular interest, restrained the people...."<sup>36</sup> That is, they prescribed the law and ensured that it was executed, often for their own benefit.<sup>37</sup>

Certainly, there were many other noble pursuits in addition to lawmaking, ranging from hunting to the raising of forces and fighting on the field of war. For the purposes of this paper, however, the legislative and executive aspects of nobility is of greatest import. Though the scope of the political power of the noble class ebbed and flowed over the course of history, at the time of the Constitutional Debates the British noble class had almost supreme political power.<sup>38</sup>

And it was this superior political class that was the target of the Nobility Clauses. Professor Jack Balkin cogently explained the evil to which the Nobility Clauses were directed as "an entire social system of superiority and inferiority" and political privilege.<sup>39</sup>

### **c. What was the Intent of the Nobility Clauses?**

The Constitution's framers' concern with the noble class was likely the same as that of Montesquieu, as expressed in his "The Spirit of the Laws" (which was published less than 40 years prior to publication of the Federalist papers).

*[E]asy as it may be for the body of the nobles to restrain the people, it is difficult to restrain themselves. Such is the nature of this constitution, that it seems to subject the very same persons to the power of the laws, and at the same time to exempt them.*<sup>40</sup>

<sup>34</sup> James, *supra* note 31, at 6. "[t]he aristocracy have always been open elite. New blood was welcomed and assimilated."

<sup>35</sup> James, *supra* note 31, at 3.

<sup>36</sup> Montesquieu, *supra* note 32, at 22.

<sup>37</sup> James, *supra* note 31, at 117. "...the aristocracy continued to expect slavish deference and the law gave them comfort."

<sup>38</sup> *Id.* at 165. "[w]hat was most significant of all for the future of the nobility was that it had emerged from an unquiet century [the 17<sup>th</sup> century] as the collective protector of the nation's liberties...[f]or the next century, the nobility enjoyed a near monopoly of all the major offices of state"

<sup>39</sup> Balkin, *supra* note 30, at 2350.

<sup>40</sup> Montesquieu, *supra* note 32, at 22.

The framers' solution was to prohibit the bestowal of titles of nobility. Montesquieu, presciently observing that an unchecked nobility would only work to protect its own powers, went to the substance of the problem and proposed that the only way for a republican form of government to exist would be for the nobility to be "on a level with the people" with regard to the application of law.<sup>41</sup>

As the framers were heavily influenced by Montesquieu, it is likely that they believed that the prohibition on titles of nobility would suffice to implement Montesquieu's prescription for preventing the emergence of an American nobility.

It was the intent of the framers to ensure that no one, from the lowest political officeholder to the President, would have legal privileges or immunities not available to the population as a whole nor would they be able to bestow such privileges and immunities on their colleagues or other individuals.<sup>42</sup>

In fact, in *The Federalist* No. 57, Madison dealt with the question of whether members of the House of Representatives would be subject to the laws that come from Congress or, instead, would they, like the noble class, be above the laws. There can be no question that the framers intended for the political class to have no privileges when it came to the applicability of laws.

*I will add, as a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, **that they can make no law which will not have its full operation on themselves and their friends**, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments, of which few governments have furnished examples; but without which every government degenerates into tyranny. If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius of the whole system; the nature of just and constitutional laws; and above all, the vigilant and manly spirit which actuates the people of America -- a spirit which nourishes freedom, and in return is nourished by it.*

*If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate anything but liberty.*<sup>43</sup>

The *Federalist* Papers are complete with cautionary notes about the tendency towards self aggrandizement of those individuals who are given power under the Constitution<sup>44</sup> and the

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<sup>41</sup> *Id.* at 313.

<sup>42</sup> See Balkin, *supra* note 30, at note 118 ("[t]he *Federalist* Papers took great care to distinguish the President from [a monarch] and to emphasize the President's limited powers and subjection to ordinary law.") In furtherance of the point that political office holders in the United States were to be stripped of any remnant of nobility that existed in the British system, Balkin goes on to note that the President was not intended to have the power to confer any privileges at all.

<sup>43</sup> *THE FEDERALIST* No. 57 (emphasis added), at 350 (James Madison) (Clinton Rossiter ed., Signet Classic 2003) (1961).

quoted text above puts a point on the issue. The language “...they can make no law which will not have its full operation on themselves and their friends” could not be more clear. The framers knew that the greatest guarantee that laws would be fair and have a minimal impact on liberty was to ensure that those who make the laws, and their friends, had to live with those laws exactly as the citizenry at large would have to live with them. Gordon Wood reiterates this in discussing the structure of early American society, proclaiming that there was a new egalitarianism where the Nobility Clauses “were interpreted to mean that no one should be set apart from the body of the people.”<sup>45</sup>

Decades after the ratification of the Constitution, Andrew Jackson, in vetoing the creation of the Second Bank of the United States, reiterated the objection to government bestowed privileges for the benefit of a select few, urging that there be a mechanism for redress when the government acts in such an unjust manner.

*In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society the farmers, mechanics, and laborers who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government.*<sup>46</sup>

Consequently, where the political class has the power to exempt itself and its friends from the operation of the law, we not only have an affront to republicanism, we have a de facto nobility in contravention of the intention of the framers and the spirit of the Constitution. This was the fear of the framers as well as noted scholars and commentators of the time.

*If what has been said be a sufficient answer to the necessity of the distinction of ranks and honours to the well government of a state, the commentator himself hath afforded an unanswerable argument against their expedience in a republic, by*

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<sup>44</sup> THE FEDERALIST No. 26, at 163-164(Alexander Hamilton) (Clinton Rossiter ed., Signet Classic 2003) (1961) (“It was a thing hardly to be expected that in a popular revolution the minds of men should stop at that happy mean which marks the salutary boundary between POWER and PRIVILEGE, and combines the energy of government with the security of private rights. A failure in this delicate and important point is the great source of the inconveniences we experience, and if we are not cautious to avoid a repetition of the error, in our future attempts to rectify and ameliorate our system, we may travel from one chimerical project to another; we may try change after change; but we shall never be likely to make any material change for the better.”); THE FEDERALIST No. 51, at 319 (James Madison) (Clinton Rossiter ed., Signet Classic 2003) (1961) (“ In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”); *Id.* at 320 (“It is of great importance in a republic not only to guard the society against the oppression of its rulers...”); and THE FEDERALIST No.57, at 348 (James Madison) (Clinton Rossiter ed., Signet Classic 2003) (1961) (“The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.”)

<sup>45</sup> GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815* at 35 (2009).

<sup>46</sup> Andrew Jackson, Veto Message, July 10, 1832, 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576-89 (Richardson ed., 1897) (emphasis added)

*acknowledging them to be both dangerous and invidious in such a government. And herewith agrees the author of the Spirit of Laws, who informs us, that the principle of a democracy is corrupted, when the spirit of equality is extinct. The same admirable writer [Montesquieu] gives us a further reason why so heterogeneous a mixture ought not to have a place in any government where the freedom and happiness of the people is thought an object worthy the attention of the government. "A nobility," says he, "think it an honour to obey a king, but consider it as the lowest infamy to share the power with the people."*<sup>47</sup>

Thomas Jefferson wrote to John Adams on titles of nobility generally and their place in America specifically. Jefferson saw nobles and politicians as analogous in large part, with nobility being an outdated concept and freely elected political leaders being preferable as there was systemic check on their power. As far as the framers were concerned, the safeguard against the political class taking on the trappings of aristocracy would, primarily, be the constitutionally limited terms in office and the need to be elected and re-elected on a regular basis.<sup>48</sup>

For reasons that defy easy explanation, the people have not served as a check on the political class.

In part, blame can be placed on the 17<sup>th</sup> Amendment,<sup>49</sup> which put both houses of Congress into the same electoral pool. Prior to the 17<sup>th</sup> Amendment, Senators were selected by the respective State's legislature. The framers provided this alternative to the election of members of the House of Representative in order to "more intimately connect the State governments with the national legislature" so that there would be "mutual checks on [each house of Congress]".<sup>50</sup> True to the founders' fears, a Congress without the check of Senators selected directly by the States and accountable to the states, rather than a populist majority, has resulted in the rise of an omnipotent federal government and a corresponding dismantling of the republicanism system.

Added to this, the ease with which incumbents can control public perception and topics of debate obscures from the public consciousness the emergence of a political nobility in the United States. To wit, as Mark Levin argues in "The Liberty Amendments",

*[t]hrough gerrymandering of House districts, patronage, a barrage of self-serving free and paid media, and fund-raising advantages, incumbents are able to extend*

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<sup>47</sup> ST. GEORGE TUCKER. BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA. 220 (The Lawbook Exchange, Ltd., 6<sup>th</sup> prt. 2008).

<sup>48</sup> See THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS (Lester J. Cappon ed., Chapel Hill: University of North Carolina Press for the Institute of Early American History and Culture, Williamsburg, Virginia, 1959). ("It suffices for us, if the moral and physical condition of our own citizens qualifies them to select the able and good for the direction of their government, with a recurrence of elections at such short periods as will enable them to displace an unfaithful servant before the mischief he meditates may be irremediable.")

<sup>49</sup> U.S. CONST. amend. XVII.

<sup>50</sup> John Dickinson of Delaware on June 7, 1787 at 398, in DEBATES IN THE SEVERAL STATE CONVENTIONS (Jonathon Elliott, ed.), vol. 1 (1901).

*their hold on federal office. Furthermore, incumbents often use their positions as lawmakers to promote federal spending and legal initiatives that benefit their personal longevity in office, making it increasingly difficult for successful electoral challenges.*<sup>51</sup>

This point is not to be dismissed lightly. Many of the numerous safeguards that the framers built into the Constitution ultimately depend on the voting public as an enforcement mechanism. History has shown, though, that American voters appear to rarely use their power, even when great abuses are occurring. One study showed that there was less incumbent turnover in the House of Representatives than in the Politburo in the final years of the Soviet Union.<sup>52</sup>

In many ways we have become an untitled aristocracy, where the political class pacifies a majority of the voting population with local pork barrel spending and political patronage in return for being allowed to enrich and entrench themselves with little fear of being removed from office.<sup>53</sup>

It is here that I differ with those who argue that the primary focus of the Nobility Clauses was the prevention of hereditary privilege. It is beyond question that the framers sought to ensure that there would be no hereditary political class,<sup>54</sup> but to focus solely on hereditary privilege is to miss the more overarching concern, which was to establish and protect the republican form of government.

As such, the Nobility Clauses were intended to provide a blanket prohibition on any representative of the people ascending to privileged status by virtue of his or her office, with the privilege being not only of status and opportunity, but of legal standing among the citizenry as a whole.

Even Professor Carlton F.W. Larson, in arguing for the primacy of the hereditary approach to interpreting the prohibitions at the heart of the Nobility Clauses, stated that

[t]he scope of the Nobility Clauses was not limited to holding office. **It extended to any form of privilege provided by the government.** As another Federalist explained,

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<sup>51</sup> Levin, *supra* note 23, at 20.

<sup>52</sup> Ronald Rotunda, A Commentary on the Constitutionality of Term Limits, in THE POLITICS AND LAW OF TERM LIMITS at 141 (Edward H. Crane and Roger Pilon, eds. 1994).

<sup>53</sup> Throughout The Federalist Papers there were cautionary statements with regard to majoritarianism. *See generally*, THE FEDERALIST No. 10, where Madison explained that the flaws in a pure democracy can result in a form of tyranny. Further to this point, the concept of a “tyranny of the majority” was later described by Alexis de Tocqueville in *Democracy in America*: “In general, the American functionaries are far more independent within the sphere that is prescribed to them than the French civil officers. Sometimes, even, they are allowed by the popular authority to exceed those bounds; and as they are protected by the opinion and backed by the power of the majority, they dare do things that even a European, accustomed as he is to arbitrary power, is astonished at. By this means habits are formed in the heart of a free country which may some day prove fatal to its liberties...” ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA at ch. XV, pt. II *Tyranny of the Majority* (Henry Reeve, trans., Phillips Bradley, ed. Vol 1. 2004).

<sup>54</sup> Though political office is not inherited in the United States, the Kennedy, Clinton and Bush families, among others, come close to demonstrating a quasi-hereditary aspect to American politics.

under the Constitution there ‘never can be any nobility in the states, or person possessed of any rights or privileges **but what are common to the meanest subject....**’<sup>55</sup>

Furthermore, I strongly disagree with those who have argued that the Nobility Clauses are a guarantee of societal equality and should be used to ensure some form of government controlled equality. Professor Richard Delgado, while clearly stating that he does not advocate the use of the Nobility Clauses as a form of affirmative action,<sup>56</sup> proposes that the Nobility Clauses be used to provide government with sweeping powers to regulate all forms of individual conduct under the guise of ensuring equal governmental treatment.<sup>57</sup> Such arguments are contrary to the founding principle at the heart of the Constitution: a federal government of limited and enumerated powers. Professor Delgado’s proposed Nobility Clauses doctrine would eclipse modern Commerce Clause jurisprudence in expanding the reach of the federal government. Moreover, a government of select individuals that is empowered to have despotic powers to determine what “fairness” is and how it should be distributed, as Professor Delgado proposes, is one that is in contravention of the clear purpose of the Nobility Clauses, which is to ensure the republican system.

#### d. Is there a Modern Nobility in the United States?

Having established that the Nobility Clauses were intended to prevent the formation of an American nobility characterized by, inter alia, incidents (as well as titles) of nobility, the question turns to whether there is such a system in the United States today.

One could devote a library to chronicling the incidents of nobility throughout history, but for purposes of this paper the most important incident of nobility is that of government-granted privilege. This, too, can take many forms.

Today, it would be rare to find a law that explicitly and affirmatively favors a certain class of person, due in large part to the equal protection provisions of the 14<sup>th</sup> Amendment as well as the political repercussions that would follow from such an obvious abuse of office.

But there was more to noble privilege than simply laws that explicitly benefited the noble class. British nobility, deriving, at times, and sharing, at other times, its power with the crown, had “virtual control over local government”<sup>58</sup> and as a result, other than having to answer to the King, had broad powers to make, and ignore, law. In many cases, nobility’s privilege was in the nature of being exempted from laws that were a burden upon the rest of the population; the American political system was specifically designed to eliminate this practice.<sup>59</sup>

<sup>55</sup> Larson *supra* note 16, at 1403. (emphasis added) (*quoting To The People of Pennsylvania*, PA. Gazette, Nov. 7, 1787)

<sup>56</sup> Delgado, *supra* note 16, at 122.

<sup>57</sup> *Id.* at 127-134. Delgado goes as far as proposing that the Nobility Clauses be used to restrict political donations above a certain amount, even though such restrictions have previously been found to violate other constitutional rights, *Id.* at 128-129, and redistribute wealth that was ostensibly obtained at some level from government action (*id.* at 129-134).

<sup>58</sup> James, *supra* note 31, at 19.

<sup>59</sup> Tucker, *supra* note 47, at 221. (“In America the senate are not a distinct order of individuals, but, the second branch of the national legislature, taken collectively. **They have no privileges, but such as are common to the**

One example of such legal privilege provided to the noble class is embodied by the various British game laws. These laws, starting in the 14<sup>th</sup> century and continuing for centuries after, were “a blatant case of the nobility’s selfishness and [were] deeply resented by peasant farmers and labourers.”<sup>60</sup>

Under the game laws, there were general prohibitions on the hunting of game. A select few (generally lords and knights) were, however, allowed to hunt and consume game. All others were forbidden from any form of hunting or enjoying the products of the hunt. Any violation of this prohibition would subject the offender to fines and imprisonment for violating the privileges reserved for the nobility.<sup>61</sup>

Possessing the right to hunt was no trivial matter. As game was an abundant source of meat (and didn’t involve incurring costs or time involved in raising animals on a farm), hunting provided a practical advantage to those who possessed the right to engage in that activity and was, in addition, a coveted incident of status to the nobility. Even as late as the 19<sup>th</sup> century, British nobility dearly held on to its exclusive right to hunt as one of the last vestiges of noble privilege.<sup>62</sup> Indeed, the British nobility considered the game laws to be protective of its “prestige in the countryside and the sovereignty of the law.”<sup>63</sup>

The game laws, in short, were a proxy for the political, social and economic power of the British nobility. In fact, as a reaction to the rising power of the English bourgeoisie after the English Civil Wars, the nobility engineered the enactment of the Game Act of 1671 as a means of reasserting its status and legal power over the masses.<sup>64</sup>

Far from being limited to hunting privileges, the legal power of the British nobility was profound, even to the point of enabling it to enact legislation that “outlawed the free market in labour”<sup>65</sup> and employing the criminal courts to enforce the nobles’ property rights in serfs.

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**members of the house of representatives, and of the several state legislatures: we have seen that these privileges extend only to an exemption from personal arrests, in certain cases, and that it is utterly lost, in cases of treason, felony, or breach of the peace. They are more properly the privileges of the constituents, than of the members. ... In England the privileges of the peerage are in some instances an insult to the morals of the people ... Happy for America that her constitution and the genius of her people, equally secure her against the introduction of such a pernicious and destructive class of men” ) (emphasis added)**

<sup>60</sup> James, *supra* note 31, at 38.

<sup>61</sup> *Id.*, and Munsche, *infra* note 64, at 21.

<sup>62</sup> James, *supra* note 31, at 227 (in discussing an 1819 Parliamentary challenge to the game laws, James noted that it was “highly unlikely that the Lords would have agreed to forfeit a legal privilege at a time when their monopoly of political power was under attack.”)

<sup>63</sup> James, *supra* note 31, at 225.

<sup>64</sup> See P.B. MUNSCH, GENTLEMEN AND POACHER: THE ENGLISH GAME LAW, 1671-1831 (Cambridge University Press, 1981) at 19 (“Such, then, was the context in which the Game Act of 1671 was passed. In the decades following the Restoration, the gentry watched the growth and prosperity of the urban bourgeoisie with feelings of anger and frustration. The consequence was not only a number of discriminatory measures against the bourgeoisie, but also an enhanced feeling of self-esteem among the gentry themselves. The Game Act combined both elements.”)

<sup>65</sup> James, *supra* note 31, at 45.

If the nobles were not above the law (it could be argued that the crown kept the nobility in check at various points in history), they were as close to such a status as could be imagined. Though largely without their historical power by the end of the 19<sup>th</sup> century, the nobles, through the House of Lords, still retained their legal superiority, having the right to “throw out laws passed by the [House of] Commons.”<sup>66</sup> And more important, at the time of American independence, the House of Lords, which had been abolished along with the crown roughly a century earlier in the wake of the English Civil Wars, was reasserting noble hegemony in England.

It was in this context that the Nobility Clauses were drafted.

It is worth repeating here Madison’s guarantee from The Federalist 57 regarding the power and privileges intended for members of the House of Representatives (and, presumably, Congress as a whole)

*“...they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society.”*<sup>67</sup>

The power to meld the law to the benefit of the political class is precisely the privilege that the modern noble class has reserved for itself. In the next section I will outline the modern day analogs to noble legal privilege. I refer to these legal privileges as the “Nobility Loopholes”.

## II. The Nobility Loopholes

That the political class in the United States has exempted itself from compliance with law is not a matter of supposition or circumstantial conjecture. Congress, itself, has formally acknowledged that unless Congress enacts legislation to compel it to comply with federal law, it is exempt from such law.

The Congressional Accountability Act of 1995 (the “CAA”)<sup>68</sup> nominally obligates Congress to comply with federal law, but only to the extent that the provisions of federal law are enumerated in the CAA and then only insofar as the Office of Compliance (a Legislative branch office created under the CAA) chooses to enforce the provisions of law that are applied to Congress through the CAA.

While its title would lead one to believe that the CAA closed the loophole on Congress’s self-exemption from the laws that it passes, the truth is that only 13 specific labor and employment related federal laws are covered by the CAA.<sup>69</sup> If it took legislation to apply

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<sup>66</sup> *Id.* at 299.

<sup>67</sup> *Supra* note 43.

<sup>68</sup> 2 U.S.C. §§ 1301-1438. *See, also*, the Presidential and Executive Office Accountability Act of 1996 (3 U.S.C. §401), which generally applies the provisions of the CAA to the President and Executive Office.

<sup>69</sup> The 13 federal laws that are incorporated in the CAA are: Access to Public Services and Accommodations for the Disabled, Age Discrimination, Collective Bargaining and Unionization, Disability Discrimination, Equal Employment Opportunity, Fair Labor Standards and the Minimum Wage, Family and Medical Leave, Notification of Office Closings or Mass Layoffs, Occupational Safety and Health, Protection from Polygraph Testing, Uniformed



enumerated provisions of federal labor and employment law to Congress, the only conclusion is that absent authorizing legislation, Congress is exempt from the reach of all other federal law.<sup>70</sup>

Though Congress may assert that it is exempt from the operation of federal law unless it has explicitly agreed to be subject to the same (and the Supreme Court has not, heretofore, acted in any way contrary to this assertion), there is in fact no constitutional provision that provides such an exemption other than the Speech or Debate Clause,<sup>71</sup> which is a narrow exemption to protect Congressional office holders from arrest or prosecution in the course of carrying out their legislative duties.

While the Speech or Debate Clause has been given a broad interpretation, there is no authority for the proposition that it provides Congress with a general exemption from compliance with law. Indeed, the Supreme Court has acknowledged as much, stating that while the Speech or Debate Clause “...must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch...” it was never intended “...to make Members of Congress super-citizens....”<sup>72</sup>

This characterization of Congress as seeing itself as a collection of “super-citizens” exempt from their own lawmaking is also seen in the legislative history of the CAA, where Senator Charles Grassley, the author of the CAA, responded to the objections of many members of Congress by stating that the members are “not better than the people [they] represent and [they] are not, by definition and determination, different than the people [they] represent.”<sup>73</sup> Senator Grassley bemoaned the fact that the CAA was limited in scope to only enumerated provisions of federal law, rather than all federal law<sup>74</sup> and explicitly stated that “[members of Congress] make laws for the people, and we, too, must follow these laws.”<sup>75</sup>

Nonetheless, the problem of the political class (federal, state and local) creating exemptions from the operation of law for themselves and their friends has continued to flourish.

#### **a. Affordable Care Act Loopholes**

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Services Rights and Protections, Veteran’s Employment Opportunity Act and Genetic Information Nondiscrimination Act of 2008. See <http://www.compliance.gov/the-act/covered-laws/>.

<sup>70</sup> This is reinforced in Grassley, *infra* note 73, at 35-36, where Senator Grassley states that the CAA will make it “...more likely that Congress will apply any future legislation to itself as well as to the rest of the country.” If federal legislation applied to Congress without limitation there would be no need for Congressional action to subject itself to future legislation.

<sup>71</sup> U.S. CONST. art. I, § 6, cl 1. “[Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.”

<sup>72</sup> *United States v. Brewer*, 408 U.S. 501, 516 (1972).

<sup>73</sup> Charles Grassley and Jennifer Shaw Schmidt, *Practicing What We Preach: A Legislative History of the Congressional Accountability Act*, 35 Harv. J. on Legis., 33 (1998) at 34.

<sup>74</sup> *Id.* at 47.

<sup>75</sup> *Id.* at 35.

No federal law of recent vintage has created as much political and public outcry as the Patient Protection and Affordable Care Act,<sup>76</sup> also known as the ACA. Among the provisions of the ACA is a requirement that all Americans purchase health insurance. In order to facilitate this provision of the ACA, health insurance exchanges have been created, either at the state or the federal levels, where individuals are guaranteed access to markets for insurance policies and government subsidies are provided to those whose incomes are below a certain threshold.<sup>77</sup>

Under the ACA, all members of Congress, and their staffs, must obtain health insurance through the ACA-created insurance exchange. Prior to the implementation of the ACA, members of Congress and their staffs received their health insurance through the Federal Employees Health Benefits Program, where participants were allowed to select the insurance plan of their choice and in return the federal government provided a subsidy of approximately 72% of the premium cost for the selected coverage.

The government subsidies that are available for ACA insurance premiums are generally limited, for persons who are employed and receive health insurance through their employer, to those whose income is less than four times the federal poverty level where the cost of such insurance is greater than 9.5% of the person's household income.<sup>78</sup>

Thus, under the ACA, all members of Congress and virtually all of their staffs would not be eligible for government subsidies relating to health insurance premium costs. However, after rancorous objections by members of Congress<sup>79</sup> at imminent risk of losing a benefit worth approximately \$10,000 per family,<sup>80</sup> President Obama's Office of Personnel Management issued a proposed ruling that effectively amended the ACA to provide a government subsidy of 75% of the amount paid for obtaining ACA insurance exchange for members of Congress and their staffs (the "Congressional ACA Loophole").<sup>81</sup>

As Representative David Vitter succinctly stated in opposing this ruling, "no ordinary American with an annual income of more than \$43,000 buying on the [ACA health insurance exchange] would receive any government subsidy, much less one worth approximately \$5,000 for an individual or \$10,000 for a family...."<sup>82</sup> Not only was the law changed to provide members of Congress with a loophole, it was done outside of the constitutional framework for amending laws.<sup>83</sup>

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<sup>76</sup> PUB L. 111-148, (2010).

<sup>77</sup> See <http://www.hhs.gov/healthcare/insurance/index.html>

<sup>78</sup> See generally, I.R.S. Notice 2013-45 (<http://www.irs.gov/pub/irs-drop/n-13-45.PDF>)

<sup>79</sup> Strassel, *supra* note 11.

<sup>80</sup> See Letter from Representative David Vitter to Office of Personnel Management dated September 3, 2013, available at Representative Vitter's website <http://www.vitter.senate.gov/newsroom/press/vitter-lawmakers-urge-opm-to-eliminate-obamacare-exemptions-for-washington>.

<sup>81</sup> Office of Personnel Management, Benefits Administration Letter number 13-204, "Federal Employees Health Benefits Program: Members of Congress and Congressional Staff" (August 7, 2013) (available at <http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-204.pdf>)

<sup>82</sup> Vitter letter, *supra* note 80.

<sup>83</sup> Some argue that the Congressional ACA Loophole isn't, in fact, a Congressional exemption from the ACA since it is a continuation of an existing subsidy. See, e.g., Lori Robertson *No 'Special Subsidy' for Congress* FACTCHECK.ORG, August 30, 2013 (available at <http://www.factcheck.org/2013/08/no-special-subsidy-for-congress/>). While it is true that the subsidy is a continuation of an existing benefit, two points have to be considered.

In addition to the Congressional ACA Loophole for government subsidies, there is another loophole in the ACA. The ACA imposes an excise tax on what is commonly referred to as “Cadillac” health insurance plans.<sup>84</sup> However, for those in “high risk” professions, the threshold for the imposition of the excise tax is raised by approximately 13%. “High risk” professions have been defined to be those that are generally well represented by labor unions, such as law enforcement, fire protection and construction.<sup>85</sup>

It is likely no coincidence that labor unions have traditionally been exceedingly active in political affairs. A Wall Street Journal study found that labor unions spent over \$4 billion dollars on political activity from 2005 through 2011<sup>86</sup> and according to the non-partisan research group The Center for Responsive Politics, in the same period over 90% of union political funding went to Democratic party causes.<sup>87</sup>

## **b. Firearms Laws Loopholes**

The Law Enforcement Officer Safety Act (the “LEOSA”), enacted in 2004 and amended in 2010 and 2013, is a federal law that provides a federal exemption from concealed weapon laws at the federal and state levels for both law enforcement personnel and retired law enforcement personnel.<sup>88</sup> The scope of this loophole is impressively large, as it covers any governmental agents (federal, state and local) who are authorized to carry a weapon and have statutory powers of arrest, as well as Amtrak police, Federal Reserve Police, Executive Branch

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First, the implementation of the ACA has changed the health insurance marketplace for all individuals, so a continuation of a pre-existing benefit is in and of itself an exemption, since it allows a select group to continue having a benefit that the law doesn’t provide to the public at large. Second, the argument that the Congressional ACA Loophole is really just an employer benefit, no different from a benefit that would be available from an employer in the private sector, ignores the fact that the benefit is provided by the government using taxpayer funds. Moreover, the ACA will change employer benefits decisions as it, in many cases, will make it more cost effective for employers to pay a fine rather than provide benefits. If one takes two similarly situated employees, each making \$100,000 a year, with one being a member of Congress and the other being an employee of a private corporation, upon the full implementation of the ACA the private sector employer would likely discontinue health care insurance as a benefit and instead pay the ACA fine under the employer mandate. At that point, the private sector employee would buy health care insurance with no government subsidy available. The member of Congress, on the other hand, is insulated from the effects of the cost/benefit analysis that private sector employers will make as a result of the ACA fine provision, and is, instead, guaranteed a taxpayer funded subsidy representing 75% of the cost of her health care insurance. This is clearly differential treatment in favor of the members of Congress, which is why the members of Congress demanded the ruling from the Office of Personnel Management that effected the change in their treatment under the ACA.

<sup>84</sup> See 26 U.S.C. § 4980I. The excise tax will be imposed starting in 2018 for individual plans that have a value of \$10,200 and family plans with a value of \$27,500 (as indexed for cost of living increases in future years).

<sup>85</sup> See United States Department of Labor, Bureau of Labor Statistics news release dated January 23, 2013, USDL-13-0105, available at <http://www.bls.gov/news.release/union2.nr0.htm>. While overall only 6.6% of private sector employees were represented by a union in 2012, 13.2% of construction workers were unionized and a majority of all police and firefighting professionals are affiliated with unions.

<sup>86</sup> Tom Mc Ginty and Brody Mullins, *Political Spending by Unions Far Exceeds Direct Donations*, WALL STREET JOURNAL (July 10, 2012)

<sup>87</sup> Available at CENTER FOR RESPONSIVE POLITICS website: <http://www.opensecrets.org/industries/totals.php?cycle=2014&ind=P>

<sup>88</sup> 18 U.S.C. §§ 926B and 926C.

law enforcement officers and military police officers and as all retired law enforcement personnel.<sup>89</sup>

While it may seem obvious that law enforcement personnel should be allowed to carry concealed weapons, the LEOSA provides a blanket exemption from all concealed weapon laws, whether or not the covered individual is on duty or acting in an official capacity and, notably, the privilege continues after retirement from duty.

The LEOSA's privileges are quite significant and go to the heart of the trappings of nobility in America. In many jurisdictions it is virtually impossible to obtain a permit to carry a weapon. For example, in California, only 1/10<sup>th</sup> of 1% of adult California residents have been issued a concealed weapon permit.<sup>90</sup> Nationwide, less than 4% of adult Americans have been issued a concealed weapon permit and many of these permits are only valid in the state in which they are issued.<sup>91</sup> Yet, nearly 100% of all law enforcement personnel, whether employed or retired, have the right to carry concealed weapons in all 50 states.

Exemptions from firearms laws also exist at the state level in many jurisdictions. In Massachusetts, while the possession of "assault weapons" or high capacity magazines is prohibited, retired (as well as active duty) law enforcement personnel are exempted from the prohibition.<sup>92</sup> Similar exemptions exist in California,<sup>93</sup> Hawaii,<sup>94</sup> New Jersey<sup>95</sup> and New York.<sup>96</sup> New York's assault weapons ban, as the most recently enacted law, is quite illustrative of the political and legal inequities taking place with regard to firearms laws.

The New York assault weapons ban, known as the "SAFE Act", banned both assault weapons and ammunition magazines with a capacity in excess of seven rounds of ammunition. The ban did not provide an exemption for retired law enforcement personnel. Immediately after the enactment of the ban, unions representing law enforcement personnel publicly attacked New York Governor Andrew Cuomo's administration and demanded the creation of an amendment that exempted retired law enforcement from the ban.<sup>97</sup> Some local law enforcement officials in

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<sup>89</sup> Subject to certain limitations, such as the officer being in good standing and not otherwise being prohibited from carrying a firearm. *See Id.*

<sup>90</sup> *States' Laws and Requirements for Concealed Carry Permits Vary Across the Nation*, GAO Publication dated July 2012 at page 38. Available at <http://www.gao.gov/assets/600/592552.pdf>

<sup>91</sup> *Id.* at pages 77-78.

<sup>92</sup> MASS. GEN L. ch. 140 §131M.

<sup>93</sup> Exemption from assault weapons ban for off-duty law enforcement personnel (CAL PENAL §36030).

<sup>94</sup> State and county law enforcement personnel and certain state employees are exempted from, inter alia, the prohibitions against possession of assault pistols and automatic weapons and concealed carry or any firearm as well as the firearms storage provisions of Hawaii law. See HAW. REV. STAT. ch. 134, §§ 134-11.

<sup>95</sup> Exemption from assault weapons ban for law enforcement personnel on duty and, at the discretion of the New Jersey Attorney General, off duty. (N.J. CRIM. CODE tit. 2C:39-3(g)).

<sup>96</sup> N.Y. PENAL §265.20(e).

<sup>97</sup> Murray Weiss, *NY Gun Control Laws Anger Retired Police Who Believe They Should Be Exempted From Some Restrictions*, HUFFINGTON POST (January 17, 2013) (available at [http://www.huffingtonpost.com/2013/01/17/ny-gun-control-laws-anger-police-retired\\_n\\_2495417.html](http://www.huffingtonpost.com/2013/01/17/ny-gun-control-laws-anger-police-retired_n_2495417.html)).

New York State went so far as to state that they would not enforce the SAFE Act's provisions as they were originally enacted.<sup>98</sup>

Shortly after New York police unions demanded an exemption for their retired members, the Cuomo administration delivered the amendment<sup>99</sup> and explained that it was because retired law enforcement personnel "...are different"<sup>100</sup> from the rest of New York's population. Almost immediately after the Cuomo administration provided the exemption that the police unions had demanded the police unions did an about-face and declared their full support for the SAFE Act.<sup>101</sup>

A more direct example of the political class providing above-the-law privileges to their supporters and affiliates would be hard to dream up.

It is important to note, again, that substantially all law enforcement personnel are either employed by government agencies or belong to unions, or both. Thus, like the ACA loopholes, the LEOSA is an exemption from federal, state and local laws that applies solely to the political class and its closest allies.<sup>102</sup>

In 2013 Senator Dianne Feinstein<sup>103</sup> introduced a bill to ban "assault weapons"<sup>104</sup> (the "2013 AWB")<sup>105</sup>. While the bill did not become law, the provisions were similar to legislation enacted in 1994 (the "1994 AWB").<sup>106</sup> The relevant provisions of the 2013 AWB are similar to the 1994 AWB, with the 2013 AWB being more expansive, such that a review of the 2013 AWB should prove illustrative of both the federal assault weapons ban that had been enacted and the successor law that has been proposed (and likely will be proposed again).

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<sup>98</sup> Jeff Preval, *Lawmakers Calls on Sheriff to Enforce SAFE Act*, WGRZ.COM (May 18, 2013) (available at <http://www.wgrz.com/news/article/215027/37/Lawmaker-Calls-on-Sheriff-to-Enforce-SAFE-Act>)

<sup>99</sup> See *supra* note 96.

<sup>100</sup> Glenn Bain, *NY Gov. Cuomo Signs SAFE Act Exemption for Retired Cops*, NY DAILY NEWS (July 8, 2013) (available at <http://www.nydailynews.com/blogs/dailypolitics/2013/07/ny-gov-cuomo-signs-safe-act-exemption-for-retired-cops>)

<sup>101</sup> Dan Mosher, *SAFE Act Gets Support From Key Law Enforcement Officials*, LEGISLATIVE GAZETTE, (July 8, 2013) (available at <http://www.legislativegazette.com/Articles-Top-Stories-c-2013-07-08-84355.113122-SAFE-Act-gets-support-from-key-law-enforcement-officials.html>).

<sup>102</sup> While political office holders are not explicitly exempted from concealed weapons laws, they generally are provided with security that is exempted from such laws. In addition, political officeholders are frequently given special dispensation in jurisdictions where such permits are issued only at the discretion of law enforcement authorities.

<sup>103</sup> Though only one concealed weapons permit has been issued in San Francisco in the past 30 years, former San Francisco Mayor Dianne Feinstein, before she was elected to the United States Senate, had such a permit when she lived in San Francisco. Debra J. Saunders, *Feinstein's Gun-Packing History*, SAN FRANCISCO CHRONICLE March 21, 2013 (available at <http://blog.sfgate.com/djsaunders/2013/03/21/feinsteins-gun-packing-history>)

<sup>104</sup> The firearms covered by the 1994 AWB (and proposed to be covered by the 2013 AWB) were not, in fact, assault weapons and only had cosmetic similarities to actual assault weapons. Nonetheless, to avoid further confusion this paper adopts the erroneous term "assault weapons" in reference to the weapons covered by the foregoing bans.

<sup>105</sup> S. 150--113th Congress: Assault Weapons Ban of 2013 (2013). In [www.GovTrack.us](http://www.govtrack.us/congress/bills/113/s150). Retrieved September 19, 2013, from <http://www.govtrack.us/congress/bills/113/s150>.

<sup>106</sup> A ban on "assault weapons" was part of Pub.L. 103-322, which ban expired in 2004 due to a sunset provision. Though the 2013 bill was not enacted as law, since it closely resembled the 1994 law I will use it for illustrative purposes in discussing the Nobility Loopholes.

Under the 2013 AWB, the “manufacture, transfer and importation of 157 of the most commonly-owned military-style assault weapons”<sup>107</sup> would have been banned. As with the 1994 AWB, the 2013 AWB contained a massive loophole for non-military ownership and use of assault weapons.

Section 3 of the 2013 AWB began by amending Title 18, Part I, Chapter 44, Section 922 of the United States Code to add new subsections (v) and (w) (said subsections being referred to in this letter as the “Proposed Firearms Ban Amendment”). Subsection (1) of the Proposed Firearms Ban Amendment stated, in essence, that assault weapons couldn’t be possessed in the United States.

Subsections (4) and (6) of the Proposed Firearms Ban Amendment exempted from the general ban on possession of assault weapons a wide range of people, including (paraphrased here):

- “qualified law enforcement officers” (which is defined in Title 18, Part I, Chapter 44, Section 926(B)(c) of the United States Code as being, generally, anyone who is given law enforcement powers under federal, state or local authority);
- People who transport nuclear material;
- Security personnel at educational facilities; and
- Retired law enforcement personnel.

The latest data available from the United States Department of Justice (2008) show that there were over 765,000 sworn state and local law enforcement personnel<sup>108</sup> while the federal government had over 120,000 law enforcement personnel.<sup>109</sup>

There, alone, are nearly 900,000 non-military individuals who would be exempted from the 2013 AWB.

Current data are not available for the number of people transport nuclear material, serve as campus security personnel<sup>110</sup> or are retired law enforcement personnel.<sup>111</sup> Assuming, for

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<sup>107</sup> S. 150--113th Congress: Assault Weapons Ban of 2013 (2013). The 2013 AWB would have had a far greater reach than the 1994 AWB due to the structure of the ban. Weapons that would be subject to the ban were described in very general terms while those that were not subject to the ban were specifically enumerated. As a result, any firearms that were not in existence at the time of the enactment of the 2013 AWB would likely have been subject to the ban unless they were later added to the list of exempted weapons by an act of Congress. In this way, the 2013 AWB would have eventually prevented the introduction of any new firearms and, in the mid to long term, would have effected a ban on virtually all semi-automatic firearms. Since the 2013 AWB listed numerous bolt action and lever action weapons as not subject to the ban, it could be argued that bolt action and lever action firearms not on the list were intended to be subject to the ban.

<sup>108</sup> Brian A. Reaves, *Census of State and Local Law Enforcement Agencies, 2008*, UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS (July 26, 2011) (available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2216>)

<sup>109</sup> Brian A. Reaves, *Federal Law Enforcement Officers, 2008*, UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS (June 26, 2012) (available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4372>)



purposes of this paper, that the number of such individuals equals the number of active federal, state and local law enforcement personnel, there are over 1,700,000<sup>112</sup> individuals who would be exempt from the operation of the 2013 AWB. All of these individuals are affiliated with the government.<sup>113</sup>

### c. Chrysler and General Motors Bankruptcies.

Though the bankruptcies of each of Chrysler LLC and General Motors Company<sup>114</sup> were not direct exemptions from law for the political class, they were perhaps the most blatant example of political patronage in the history of the United States. In short, the rule of law was suspended by the Obama administration in order to provide financial benefits to the unions that were instrumental in electing President Obama just a year earlier.

As Professor Todd Zywicki explained, in a typical bankruptcy proceeding

*[s]ecured debt takes first priority in payment; it is also typically preserved during bankruptcy under what is referred to as the "absolute priority" rule — since the lender of secured debt offers a loan to a troubled borrower only because he is guaranteed first repayment when the loan is up. In the Chrysler case, however, creditors who held the company's secured bonds were steamrolled into accepting 29 cents on the dollar for their loans. Meanwhile, the underfunded pension plans of the United Auto Workers — unsecured creditors, but possessed of better political connections — received more than 40 cents on the dollar.*

*Moreover, in a typical bankruptcy case in which a secured creditor is not paid in full, he is entitled to a "deficiency claim" — the terms of which keep the bankrupt company liable for a portion of the unpaid debt. In both the Chrysler and GM bankruptcies, however, no deficiency claims were awarded to the wronged creditors.*

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<sup>110</sup> According to the Department of Justice, there were 13,000 sworn campus security personnel as of 2005. See Brian A. Reaves, *Campus Law Enforcement, 2004-05*, UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS (February 2008) (available at <http://www.bjs.gov/index.cfm?ty=tp&tid=76>)

<sup>111</sup> According to one source, there are, at the time of the writing of this paper, New York State has over 100,000 retired law enforcement personnel. Weiss, *supra* note 97. Assuming that this is representative of other states, based on New York's population as it relates to the population of the United States as a whole (19.5 million out of 313 million), this would put the number of retired law enforcement officers in the United States at approximately 1,500,000.

<sup>112</sup> The number of individuals exempt from the 2013 AWB would likely have been at least 2,500,000 if the assumption in the foregoing note is accurate.

<sup>113</sup> It is important to note that the assault weapons ban was justified on the basis that the weapons being banned were weapons of war. Since law enforcement deals with enforcing the law with respect to citizens, and not foreign armies, and as a result of the ban, citizens will not have assault weapons, there is no justification for exempting law enforcement from the effects of the ban. Furthermore, retired law enforcement personnel receive special dispensation under the bans. If relying on active duty law enforcement personnel is sufficient for an ordinary citizen it should be sufficient for retired law enforcement personnel as well. Providing them with access to assault weapons is preferential and disparate treatment, as though their lives and safety are more important than the lives and safety of all other citizens. Clearly, this is in conflict with Madison's admonitions regarding equal application of the law.

<sup>114</sup> For an overview of the events leading up to the bankruptcies of the two companies, see Todd Zywicki, *The Auto Bailout and the Rule of Law*, NATIONAL AFFAIRS (Issue 7, Spring 2011) (available at <http://www.nationalaffairs.com/publications/detail/the-auto-bailout-and-the-rule-of-law>)

*Were bankruptcy experts to comb through American history, they would be hard-pressed to identify any bankruptcy case with similar terms.*<sup>115</sup>

What was the impetus for the United States government pushing through such an extraordinary plan? Professor Richard A. Epstein summed it up as “[United Auto Workers union] favoritism”.<sup>116</sup>

Upon the conclusion of the Chrysler and General Motors bankruptcies the United Auto Workers union was given a 55% ownership stake in Chrysler and a 17.5% ownership stake in General Motors.<sup>117</sup> Not coincidentally, this occurred only a few months after the Democratic party took control of both houses of Congress and the White House.

How special was the treatment received by the United Auto Workers Union? According to one study, by providing the United Auto Workers union with preferential treatment the Obama administration showered them with \$20 billion more than they would have received in a normal bankruptcy process.<sup>118</sup>

To put a point on this, it is worth repeating that over 90% of union political donations in recent years has been directed to Democratic candidates<sup>119</sup> and in the 2008 and 2012 Presidential election cycles, over 99% of United Auto Workers political spending was in support of Democratic causes.<sup>120</sup>

Clearly, the Democratic party has a friend in the unions, and the United Auto Workers union in particular. This is not to say that the Democratic party and unions are the only symbiotic political union, as the Republicans have similar relationships with other interest groups.<sup>121</sup> The political class abusing its power is something that transcends party lines.

#### **d. Other State and Local Laws**

<sup>115</sup> *Id.*

<sup>116</sup> Richard A. Epstein, *Political Bankruptcies: How Chrysler and GM Changed the Rules of the Game*, THE FREEMAN, (Vol. 59, No. 10, December 2009) (available at [http://www.fee.org/the\\_freeman/detail/political-bankruptcies-how-chrysler-and-gm-have-changed-the-rules-of-the-game#axzz2fpsV6VW1](http://www.fee.org/the_freeman/detail/political-bankruptcies-how-chrysler-and-gm-have-changed-the-rules-of-the-game#axzz2fpsV6VW1))

<sup>117</sup> In addition to the common equity stakes, the UAW was given promissory notes and preferred stock. See James Sherk and Todd Zywicki, *Obama's United Autoworkers Bailout*, WALL STREET JOURNAL (June 13, 2012) (available at <http://online.wsj.com/article/SB10001424052702303768104577462650268680454.html>).

<sup>118</sup> *Id.*

<sup>119</sup> Data available at CENTER FOR RESPONSIVE POLITICS website <http://www.opensecrets.org/industries/indus.php?Ind=P>

<sup>120</sup> *Id.* (available at <http://www.opensecrets.org/orgs/totals.php?cycle=A&id=d000000070>). In the eight years leading up to the Chrysler and GM bankruptcies the United Auto Workers union gave nearly \$24,000,000 to Democratic candidates and less than \$200,000 to Republican candidates. *Id.*

<sup>121</sup> See, e.g., Richard W. Caperton, Jackie Weidman and Daniel J. Weiss, *Pumped and Quartered*, CENTER FOR AMERICAN PROGRESS, (February 28, 2012) (available at <http://www.americanprogress.org/issues/green/news/2012/02/28/11087/pumped-and-quartered/>) (study finding that “the big five and other oil and gas firms spent more than \$146 million lobbying Congress [in 2011]. The big five oil companies alone spent more than \$18 million on federal campaign contributions. Ninety percent of these contributions went to Republican candidates and 10 percent to Democrats. Many of these politicians were the loudest defenders of oil tax breaks.”)



In 2008, the Orange County Register investigated reports that hundreds of thousands of individuals affiliated with state and local government agencies in California were effectively exempted from traffic laws (and fines) by virtue of having received confidential license plates issued by the California Department of Motor Vehicles.<sup>122</sup> As it happens, the confidential license plate loophole is available to union members as well as political office holders: “[i]n some cases the secret plates have been negotiated as part of a labor contract.”<sup>123</sup>

To this day, the relevant provision of the California Vehicle Code has not been revised to remove this loophole, even though a bill for that purpose was introduced in 2010.<sup>124</sup> This loophole covers everyone from the Governor of the State of California to members of every city council to museum security officers. In other words, virtually every political office holder and a significant number of unionized state employees, and members of their families, are effectively exempt from the enforcement of certain traffic laws.

Similar loopholes exist in Colorado, Iowa and the District of Columbia.<sup>125</sup>

Whether it’s Congress exempting itself from its own laws, as with the ACA, exempting its friends and sponsors, as with the LEOSA, Congress and the President bending bankruptcy rules with the primary goal of rewarding supporters, as with the Chrysler and GM bankruptcies, or state and local authorities quite literally making themselves and their union friends invisible to the law, all of these acts are forms of government putting itself and its favored supporters above the law.

This is precisely what Madison was warning us of when he said that Congress (and, presumably, all subordinate forms of government) “...can make no law which will not have its full operation on themselves and their friends....” Applying the law to favor friends is, functionally, no different from making a law that exempts such friends. Such favoritism isn’t just unfair, it’s an affront to the republican nature of the United States and is, in substance and effect, an incident of nobility.

### **III. Conflict between the Nobility Loopholes and the Nobility Clauses**

There are two types of potential conflicts between the Nobility Loopholes and the Nobility Clauses: laws that directly exempt political office holders (“Direct Nobility Conflict”)

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<sup>122</sup> Jennifer Muir, *Special License Plates Shield Officials from Traffic Tickets*, ORANGE COUNTY REGISTER (April 4, 2008).

<sup>123</sup> *Id.*

<sup>124</sup> California AB 2097 (2009-2010 Session) would have revised Section 1808.4 of the California Vehicle Code to require anyone holding a confidential license plate to provide the Department of Motor Vehicles “...with a current employment address for purposes of processing the service and collection of a traffic, parking, or toll road violation.” The bill was never enacted into law. In the 2011-2012 Session of the California Legislature another bill was introduced for the same purpose (AB 2192) but it too was never enacted into law. Thus, the loophole remains.

<sup>125</sup> Tim Cushing, *Lawmakers Issued License Plates That Make Them ‘Invisible’ to Traffic Cams and Parking Tickets*, TECHDIRT (August 6, 2013) (available at <http://www.techdirt.com/articles/20130805/08323124067/lawmakers-issued-license-plates-that-make-them-invisible-to-traffic-cams-parking-tickets.shtml>)

and laws that exempt what Madison referred to as the “friends” of political office holders (“Indirect Nobility Conflict”).

### **a. Direct Nobility Conflict**

The Congressional ACA Loophole is an example of a Direct Nobility Conflict. While the Congressional ACA Loophole was provided by Executive Branch rulemaking, it is nonetheless an instance of Congress being exempt from the laws that they enact.<sup>126</sup>

Throughout the debate on the ACA, members of Congress expended an extraordinary effort to find a way to implement what eventually became the Congressional ACA Loophole.<sup>127</sup> The concern for many members of Congress was the negative publicity and constituent outrage that would result from an explicit Congressional exemption in the ACA.

Consequently, members of Congress did not explicitly exempt themselves from the operation of the ACA. Rather, Congressional leaders from both parties appealed to President Obama<sup>128</sup> (some would say that the appeal was more of a demand<sup>129</sup>) to provide an exemption from the ACA, which ultimately was delivered in the form of the Congressional ACA Loophole. Though the authority of President Obama to provide an exemption that was not in the ACA has been disputed by some,<sup>130</sup> the Congressional ACA Loophole effects what the members of Congress demanded: an exemption for members of Congress from the effects of the law that they enacted.

Nobility Loopholes that constitute Direct Nobility Conflicts are easily discerned and because they constitute an exemption from law for members of Congress, they clearly violate the Nobility Clauses.

### **b. Indirect Nobility Conflict**

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<sup>126</sup> In fact, in previous attempts to enact reform of the healthcare system Congress explicitly exempted itself from the operation of the applicable laws. See Robert E. Moffit, *Congress and the Taxpayers: A Double Standard on Health Care Reform?* THE HERITAGE FOUNDATION, ISSUE BULLETIN #174, (April 16, 199) (available at <http://www.heritage.org/research/reports/1992/04/congress-and-the-taxpayers-a-double-standard-on-health-care-reform>)

<sup>127</sup> Robert E. Moffit, Edmund F. Haislmaier and Joseph A. Morris, *Congress in the Obamacare Trap: No Easy Escape* THE HERITAGE FOUNDATION, BACKGROUNDER #2831, (August 2, 2013) (available at [http://www.heritage.org/research/reports/2013/08/congress-in-the-obamacare-trap-no-easy-escape#\\_ftn8](http://www.heritage.org/research/reports/2013/08/congress-in-the-obamacare-trap-no-easy-escape#_ftn8))

<sup>128</sup> John Bresnahan and Jake Sherman, *Lawmakers, Aides, May Get Obamacare Exemption*, POLITICO (April 24, 2013) (available at <http://www.politico.com/story/2013/04/obamacare-exemption-lawmakers-aides-90610.html>)

<sup>129</sup> John Bresnahan and Jake Sherman, *President Obama on Hill's Obamacare mess: I'm on it*, POLITICO (July 31, 2013) (available at <http://www.politico.com/story/2013/07/obama-hill-health-care-dispute-95017.html#ixzz2g8RUeXTD>)

<sup>130</sup> See Moffit, Haislmaier and Morris, *supra* note 127 (“...the lack of a statutory basis for paying the FEHBP contribution to exchange plans means that the Obama Administration cannot fix the issue of greatest concern to Congress....”)

In considering the nature of the Indirect Nobility Conflict, the British game laws, discussed at page 15 hereof, provide an illuminating historical context of the role weapons privileges have played as an incident and sign of noble status.

In many ways, weapons privileges have been, and still are, a proxy for nobility. Professor David B. Kopel, in reviewing Joyce Lee Malcolm's book on the history of the right to bear arms,<sup>131</sup> gives an outstanding overview of this. Examining the works of St. George Tucker, William Rawle and Supreme Court Justice Joseph Story, Kopel confirms that the British game laws functioned to keep weapons out of the hands of commoners while bestowing the noble class with virtually unfettered rights to own and use weapons.<sup>132</sup> After the restoration of the British monarchy following the British civil wars, King Charles II enacted increasingly draconian laws to consolidate his power and prevent a recurrence of a popular revolt. At first the laws were more on the order of registry laws and limitations on the number of arms and amounts of ammunition that could be kept by commoners<sup>133</sup> but they soon expanded. In concert with the nobles in the House of Lords, Charles II used the game laws to first limit the possession of arms to the nobility and then confiscate arms from commoners.<sup>134</sup>

If the use of government mandated ammunition and weapons registries and possession limitations, followed by further limitations allowing only politically favored persons to possess weapons, and ultimately followed by confiscation of weapons from anyone who isn't of that class sounds familiar, it is because that is very close to the path of current firearms laws. The LEOSA, AWB and various state laws that have similar restrictions and loopholes are hauntingly reminiscent of the British game laws under Charles II which gave the noble class a near-exclusive franchise on private weapons use and ownership.

Loopholes from firearms laws for the political class and those under their patronage are, in fact, tantamount to the bestowal of noble status, just as they were under Charles II.

Many restrictive firearms laws, such as the 2013 AWB, have been justified on the basis that the weapons being banned are weapons of war<sup>135</sup> and have no place outside of the fields of battle. Facially, this argument is without merit since the loopholes in the bans allow a wide variety of individuals to possess and use the weapons who are neither soldiers nor on any field of battle.

In examining the justification for laws such as the 2013 AWB it is important to note that since law enforcement deals with enforcing the law with respect to citizens, and not foreign armies, and as a result of the ban, citizens cannot have assault weapons, there is scant justification for exempting law enforcement from the effects of the ban. Furthermore, while the military does not allow active duty personnel to remove actual assault weapons from military

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<sup>131</sup> Joyce Lee Malcolm, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994)

<sup>132</sup> David B. Kopel, *It Isn't about Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333 (1995). See, e.g., notes 2-9 at 1333-1334.

<sup>133</sup> *Id.* at 1343

<sup>134</sup> *Id.* at 1344-1345.

<sup>135</sup> See, e.g., statement of Senator Diane Feinstein, sponsor of the 2013 AWB, on December 14, 2012 ("As I have said many times before—and now repeat in the wake of yet another tragedy—weapons of war don't belong on our streets or in our theaters, shopping malls and, most of all, our schools.") (*available at* <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=3bec5652-be84-4584-affd-9a6998fd60ce>)

installations other than for duty related purposes, loopholes in the various state and federal firearms laws allow law enforcement personnel to possess otherwise banned weapons while off duty.<sup>136</sup> If military personnel were treated with as much deference as law enforcement personnel are under firearms laws we'd see Army personnel driving tanks home at night.

As a result, not only are the firearms bans and restrictions without justification, they result in those who have no connection to the conduct of war having more access to the subject weapons than soldiers who have the sole responsibility for the conduct of war.

During the Senate debates on the 2013 AWB Senator John Cornyn pointed out that under the proposed law, while retired law enforcement personnel would be allowed to possess assault weapons, retired military personnel, who would be the most skilled in the safe and effective use of such weapons, would not.<sup>137</sup> What Senator Cornyn didn't mention is that there are police unions but there is no military union.

Additionally, retired law enforcement personnel receive special dispensation under most firearms laws.<sup>138</sup> If relying on active duty law enforcement personnel is sufficient for an ordinary citizen as well as retired military personnel, it should be sufficient for retired law enforcement personnel as well. Providing them with access to assault weapons and other banned firearms and accessories (such as high capacity magazines) is preferential and disparate treatment, as though their lives and safety are more important than the lives and safety of all other citizens.

Likewise, the political class, from the President of the United States down to state and local officials, are provided with armed security and preferential access to law enforcement<sup>139</sup> and such security generally is exempt from firearms laws, so while they enact laws to disarm the citizenry, they retain, either directly or through proxies, full rights to keep and bear arms.

Clearly, this is in conflict with Madison's admonitions that the political class and their friends shall be subject to the laws they enact to the same extent as all other citizens are.

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<sup>136</sup> See, e.g., CAL. PENAL § 30630 ("Sections 30605 and 30610 shall not prohibit the possession or use of assault weapons or a .50 BMG rifle by sworn peace officer members of those agencies specified in Section 30625 for law enforcement purposes, **whether on or off duty.**") (emphasis added)

<sup>137</sup> Tiffany Madison, *Feinstein Exempts Police, Not 'PTSD' Vets, from Gun Ban*, The Washington Times (March 8, 2013) (available at <http://communities.washingtontimes.com/neighborhood/citizen-warrior/2013/mar/8/feinstein-ptsd-veteran-assault-weapons-gun-ban/>)

<sup>138</sup> See Section II hereof.

<sup>139</sup> The United States Secret Service provides armed security for both the President and Vice President of the United States and their families as well as Presidential and Vice Presidential candidates, retired Presidents and Vice Presidents and their families and other federal political office holders and visiting dignitaries. 18 U.S.C. §3056. The United States Marshals Service provides armed security for members of the federal judiciary. 28 U.S.C. §566. The United States Capitol Police provides armed security for members of Congress and their families, both in Washington, D.C. when Congress is in session as well as wherever the members of Congress may be throughout the United States at all other times. 2 U.S.C. §1966. Other federal agencies, such as the Federal Bureau of Investigation and the Department of Homeland Security, also provide armed security for political office holders. Additionally, members of Congress may obtain local police details for their private security upon request. *Congressional Leaders Step Up Security After Arizona Shooting*, POLICE MAGAZINE, January 13, 2011. (available at <http://www.policemag.com/channel/patrol/news/2011/01/13/congress-members-step-up-security-after-arizona-shootout.aspx>)

The harm from differential treatment with regard to firearms laws could not be more important in Nobility Clauses analyses as a result of the decision in *District of Columbia v. Heller*.<sup>140</sup> In *Heller*, the United States Supreme Court held the Second Amendment “protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.”<sup>141</sup>

In other words, firearms possession for self defense is an individual right guaranteed by the Constitution. While a law of general application that infringes the Second Amendment right would have to pass the intermediate scrutiny tests applied under constitutional jurisprudence, if not strict scrutiny,<sup>142</sup> a law that suspends Second Amendment rights for all but the political class and those under its patronage could not be justified even under a rational basis test and would, logically, be void ab initio.

#### IV. Proposals

The fundamental problem of government providing disparate treatment to certain individuals is not unique to the Nobility Clauses. In determining how to reinvigorate the import and effect the implementation of the Nobility Clauses it is useful to review the jurisprudence of similar constitutional provisions. Two such provisions, in particular, are illustrative. The first is the Equal Protection clause of the 14<sup>th</sup> Amendment<sup>143</sup> and the second is the Bill of Attainder Clause.<sup>144</sup>

One would think that any disparate treatment of individuals under the law would be a subject best left for the 14<sup>th</sup> Amendment’s Equal Protection Clause. The flaw with Equal Protection analysis, however, is the fact that most Nobility Loopholes would not be examined under strict scrutiny, or even intermediate scrutiny.

Consequently, as long as the government action can satisfy the “rational basis” test, it will be allowed to continue. Since courts are loathe to find that any law fails the rational basis

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<sup>140</sup> 554 U.S. 570 (2008), as incorporated to the individual states by *McDonald v. City of Chicago*, 561 U.S. 3025 (2010).

<sup>141</sup> *Id.*

<sup>142</sup> While the Court did not specify the level of scrutiny to which Second Amendment cases would be subject, they did rule out anything less than intermediate scrutiny. *Id.* at note 27. (“Obviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.”)

<sup>143</sup> U.S. Const. amend. XIV, § 1 “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; **nor deny to any person within its jurisdiction the equal protection of the laws.**” (emphasis added). For purposes of this paper I assume the reader has a working knowledge of Equal Protection jurisprudence. For in-depth discussions on the history and import of the Equal Protection Clause, see Balkin, *supra* note 30, at 2347; Michael J. Perry, “Modern Equal Protection: A Conceptualization and Appraisal”, 70 Colum. L. Rev. 1024 (1979).

<sup>144</sup> U.S. Const. art. I, § 9, cl. 3.

test<sup>145</sup>, using an Equal Protection Clause argument would leave virtually all of the Nobility Loopholes in place. As the framers drafted the Nobility Clauses to apply without qualification, it is clear that the Equal Protection path is a dead end.

The Bill of Attainder Clause can be seen as a mirror image of the Nobility Clauses.<sup>146</sup> While the Nobility Clauses are properly seen as prohibiting the government from bestowing largess on individuals, the Bill of Attainder Clause ensures that individuals won't be the focus of government persecution.

Like the Nobility Clauses, the Bill of Attainder Clause facially has a very narrow scope. The Bill of Attainder Clause, limited to its literal meaning, prohibits the government from enacting legislation that imposes the death penalty on a specific person, without benefit of judicial process.<sup>147</sup>

Unlike the Nobility Clauses, however, there is fairly extensive caselaw on the Bill of Attainder Clause.<sup>148</sup> These cases gradually expanded the reach of the Bill of Attainder Clause<sup>149</sup> to the point where the Supreme Court has held that the Bill of Attainder Clause generally prohibits the government from enacting any law that law that "legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial."<sup>150</sup>

In a recent decision, the Second Circuit took issue with those who would narrowly read the Bill of Attainder Clause as an outdated prohibition on extra-judicial death sentences and described it, instead, as more of "a reflection of the Constitution's concern with fragmenting the government power than merely preventing the recurrence of unsavory British practices of the time."<sup>151</sup>

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<sup>145</sup> See Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747 (2011) at 756 ("...rational basis review generally results in validation of state action") (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-2, at 1442-43 (2d ed. 1988) "The traditional deference both to legislative purpose and to legislative selections among means continues ... to make the rationality requirement largely equivalent to a strong presumption of constitutionality.").

<sup>146</sup> See Balkin, *supra* note 30, at 2349-50 (describing the Nobility Clauses and the Bill of Attainders Clause as "[t]wo of the most status-disestablishing clauses" of the Constitution).

<sup>147</sup> See generally, *United States v. Brown*, 381 U.S. 437, 441-442 (1965).

<sup>148</sup> See, e.g., *United States v. Brown*, 381 U.S. 437 (1965) (stating that the Constitution's prohibition against bills of attainder "was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply-trial by legislature"); *Matter of Extradition of McMullen*, 989 F.2d 603, 606-07 (2d Cir.1993) (en banc) ("[T]he Bill of Attainder Clause broadly ... prohibit[s] bills of pains and penalties as well as bills of attainder."); *South Carolina v. Katzenbach*, 383 U.S. 301, 324, (1966) (the Bill of Attainder Clause provides "protections for individual persons and private groups"); and *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 473 (1977). ("The classic example is death, but others include imprisonment, banishment, the punitive confiscation of property, and prohibition of designated individuals or groups from participation in specified employments or vocations").

<sup>149</sup> See Roger J. Miner, *Identifying, Protecting and Preserving Individual Rights: Traditional Federal Court Functions*, 23 SETON HALL L.REV. 821, 826-30 (1992-1993) (regarding bills of attainder).

<sup>150</sup> *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 846-47 (1984).

<sup>151</sup> *ACORN v. United States*, 618 F.3d 125, 135 (2d Cir. 2010).

At their core, then, the Nobility Clauses are identical to the Bill of Attainder Clause with respect to policy and intent. Both clauses were borne of a desire to prevent the establishment of British practices that, prior to the founding of the United States, had either benefitted or punished specific individuals. It would thus be consistent with establish Supreme Court practice to consider government acts through the prism of the Nobility Clauses.

In response to the Congressional exemption from the ACA, a number of commentators and politicians have discovered the words of James Madison that have been repeated a number of times in this paper. Showing the resurgence of Madison's founding principle regarding the accountability of the political class, legislation to eliminate Congress' ACA exemption was introduced in the House by Representative Ron DeSantis with the title "The James Madison Congressional Accountability Act"<sup>152</sup> and also introduced a proposed 28th Amendment to the Constitution to codify Madison's words into law.<sup>153</sup>

As much as I concur with Representative DeSantis' concerns, there is no need for the proposed 28<sup>th</sup> Amendment.

The Nobility Clauses were included in the Constitution to prevent the very abuses that are the subject of the proposed 28<sup>th</sup> Amendment.

Likewise, there is a danger in relying on Congress to craft a legislative remedy to the Nobility Loopholes. Allowing Congress (and the rest of the political class) to police itself is a fundamentally unsound solution. At the time of the writing of this paper, there was a growing call for the Office of Personnel Management to reverse its ruling that provided an exemption from the ACA for Congress. Even if, ultimately, the exemption is reversed, unless there is a structural impediment in place whereby the presumption is that Congress is subject to all laws there is nothing to stop new instances of above-the-law chicanery in this or future Congresses.

Only Supreme Court precedent holding that the Nobility Clauses apply to the Nobility Loopholes and are subject to strict enforcement will fulfill the letter and spirit of the Nobility Clauses.

A modern implementation of the Nobility Clauses would be nothing less than the use of James Madison's words as the basis for a test of any government action: "[Congress] can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society." As the Executive branch has assumed certain quasi-lawmaking powers, the Nobility Clauses would logically apply to any Executive branch rulemaking as well.

Madison's words would need to be reduced to a practical multi-part test, something that is common in constitutional jurisprudence.<sup>154</sup> The test that I propose is as follows:

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<sup>152</sup> *James Madison Congressional Accountability Act*, H.R. 3076, 113th Cong. (2013).

<sup>153</sup> *Proposing an amendment to the Constitution of the United States relating to the equal application to the Senators and Representatives of the laws that apply to all citizens of the United States*, H.R.J. Res. 55, 113<sup>th</sup> Congress (2013). The text of the proposed 28<sup>th</sup> Amendment is "Congress shall make no law respecting the citizens of the United States that does not also apply to the Senators and Representatives."

<sup>154</sup> For example, in *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court outlined a three part test to determine whether material is obscene and thus not subject to the protections of the First Amendment: (1) whether

*Any law, rule or regulation that*

- i) explicitly excludes from the application thereof; or*
- ii) explicitly or through administration thereof provides a legal entitlement or status that is available solely or primarily to; or*
- iii) is applied subject to the discretion of a government agency or official and the application thereof effectively provides an exemption from all or part of such law, rule or regulation solely or primarily with respect to*

*any*

- 1. political office holder, whether elected or appointed; or*
- 2. employee of any government agency or political subdivision; or*
- 3. any affiliate<sup>155</sup> of a political office holder (or any combination of (1)-(3) hereof);*

*is void ab initio, unless such treatment is required by the provisions of U.S. CONST. art. I, § 6, cl 1.*

Unlike the Equal Protection Clause, the enforcement of which is subject to levels of scrutiny, the Nobility Clauses are unequivocal and should be enforced under a strict scrutiny regime.

Professor Larson suggests that in crafting a judicial interpretation of the Nobility Clauses there needs to be a focus on the difference between government actions that are distinctions, which tend to be quite broad, and government actions that are privileges, which tend to be narrow (though he focuses on whether either category is based on heredity). On this basis, he argues

*[i]n other areas of law, such as equal protection and free speech, these distinctions are often resolved by balancing tests, such as strict scrutiny. In the context of the Nobility Clauses,*

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"the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If a state obscenity law is thus limited, First Amendment values are adequately protected by ultimate independent appellate review of constitutional claims when necessary. *Id.* at 24-25. *See also*, SEC v. Howey, 328 U.S. 293 (1946) (using a five part test to determine whether something is an investment contract, and thus subject to regulation as a security: (1) an investment of money due to (2) an expectation of profits arising from (3) a common enterprise which (4) depends solely on the efforts of a promoter or third party. *Id.* at 298.

<sup>155</sup> The proposed rule will explicitly apply to political office holders and government employees. I have used the phrase "affiliate of a political office holder" to cover what is the modern equivalent of patronage and fealty. Affiliate status would apply in a fashion similar to that of Rule 12b-2 as promulgated under the Securities Exchange Act of 1934, as amended (17 C.F.R. § 240.12b-2), which defines an affiliate as anyone "that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified". In this case, any person who, either directly or through membership in an organization, contributes more than a specified amount to any political party or political office holder would be deemed to be an affiliate of that party or office holder. As such, any law that specifically benefits or exempts that affiliate would be a violation of the Nobility Clauses.



*however, such balancing tests seem particularly inappropriate. The Constitution prohibits titles of nobility absolutely, both as a means and as ends....[t]he point of the [Nobility Clauses], however, is to ensure that such options are permanently off the table....*<sup>156</sup>

A key element to the enforcement of the Nobility Clauses will be the focus on laws that exempt what Madison referred to as the “friends” of Congress (i.e., Indirect Nobility Conflicts). This is in keeping with the intent of the framers, who sought to prevent the entire system of patronage that went along with the British nobility. There are only 535 members of Congress but there are millions of individuals who currently benefit from some form of privilege granted by their political patrons. In many cases the incidents of titles of nobility are granted to individuals or entities in exchange for the ultimate quid pro quo of politics, voting fealty.

For example, in the 2012 Presidential election, the AFL-CIO (representing 11.5 million members), AFSCME (representing 1.4 million members), American Federation of Teachers (representing 900,000 members), Communications Workers of America (representing 500,000 members), International Association of Fire Fighters (representing 300,000 members), International Brotherhood of Teamsters (representing 1.3 million members), National Education Association (representing 3.2 million members) and the SEIU (representing 2 million members) endorsed Barack Obama. No major labor union endorsed Mitt Romney in the 2012 Presidential election and, after his reelection victory, President Obama called the United Auto Workers president, stating “that we could not have done this without the UAW and its membership.”<sup>157</sup> In exchange for the millions of labor union votes for Democratic candidates, President Obama not only delivered billions of dollars to General Motors and Chrysler union members<sup>158</sup> he also went so far as to act in violation of the Constitution to appoint labor friendly members to the National Labor Relations Board.<sup>159</sup>

Some will argue that my proposal is draconian and that employing such defined limitations on the scope of laws would result in a litigation nightmare, as virtually all federal, state and local laws, rules and regulations would be subject to Nobility Clauses challenge.

During the debates on the CAA members of Congress objected to the proposed law on a number of grounds: it would violate the Speech or Debate Clause; it would violate the Separation of Powers doctrine; it would subject Congress to such levels of litigation that all of its time would be spent defending against claims, some of which would be baseless, others that would be made for political purposes.<sup>160</sup>

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<sup>156</sup> Larson, *supra* note 16 at 1414.

<sup>157</sup> See statement from United Auto Workers president Bob King *The UAW Member Difference* (November 9, 2012) (available at <http://www.uaw.org/articles/uaw-member-difference>). For an overview of labor union activity in the 2012 Presidential election, see Jeremy M. Peters, *Auto Workers Tap Network for Obama*, N.Y. TIMES (February 24, 2012), (“The United Automobile Workers union, a primary beneficiary of President Obama’s decision to rescue domestic carmakers, is now trying to return the favor.”). The UAW represents approximately 400,000 members.

<sup>158</sup> See Section II(c) of this paper.

<sup>159</sup> *National Labor Relations Board v. Enterprise Leasing Co. SE, LLC*, 2013 U.S. App. LEXIS 14444 (4th Cir. July 17, 2013) (holding that the President’s appointment of three pro-union members to the NLRB violated the Recess Appointments Clause of the Constitution).

<sup>160</sup> Grassley, *supra* note 73, at 36.

A careful reading of the test that I have proposed, however, will show that the reach of my proposal is narrowly tailored to fulfill the intentions of the framers. Only when a law, rule or regulation directly provides the political class or its friends with a privilege or immunity not available to the public at large will the Nobility Clauses apply. There is a specific exclusion to retain the protections of the Speech or Debate Clause. As for the other arguments made by Congress, as Senator Grassley said, Congressional self regulation has not worked.<sup>161</sup>

Furthermore, non-governmental action wouldn't be subject to the Nobility Clauses nor would laws of general applicability, such as affirmative action or anti-discrimination laws.

## V. Conclusion

The case made in this paper may be one of first impression, but there have been many others who have argued that the Nobility Clauses deserve consideration in dealing with current political issues.

Professor Carlton F.W. Larson has argued that legacy admissions in public schools constitute an unconstitutional title of nobility based on the idea that the admissions are a form of hereditary privilege.<sup>162</sup> While Professor Larson focuses on the hereditary aspect of the Nobility Clauses, his premise at a foundational level is that the Nobility Clauses were intended to prevent government bestowed privileges to select groups.<sup>163</sup>

Professor Richard Delgado advocates a Nobility Clauses based system to scrutinize any aspect of government that perpetuates inequality and even comes up with a four part test to determine whether specified government action violates the Nobility Clauses.<sup>164</sup>

Professor Jack M. Balkin, while not explicitly endorsing the judicial use of the Nobility Clauses, provides extensive commentary on incidents of political class privilege, how such privilege is tantamount to titles of nobility and how the Nobility Clauses were intended to prevent the rise of political class privilege in the United States.<sup>165</sup>

Finally, Professor Glenn H. Reynolds has identified numerous instances of political class privilege which he believes is in violation of the Nobility Clauses and has proposed any law or rule "giving government officials -- whether elected, appointed, or members of the civil service -

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<sup>161</sup> *Id.*

<sup>162</sup> Larson, *supra* note 16, at 1375.

<sup>163</sup> *Id.* at

<sup>164</sup> Delgado, *supra* note 16, at 134. Delgado's test consists of determining whether government action either confers an actual title of nobility or specified indices of nobility. The indices of nobility that Delgado specifies are (a) wealth/political influence; (b) advantages with respect to speech and thought; (c) perceived superiority and (d) membership in a closed class. *Id.* at 115. If government action results in either an actual title of nobility or most or all of the listed indices of nobility, a court would find that action to be in violation of the Nobility Clauses. As mentioned in my critique of Delgado's proposal at page 13 hereof, I believe that the broad and vague standards that Delgado proposes would result in the government both defining and guaranteeing fairness, which would be far outside of the federal government's enumerated constitutional powers.

<sup>165</sup> Balkin, *supra* note 30, at 2350-2352. (Balkin describes nobility as a system of political privilege and argued that the Nobility Clauses were intended to dismantle the system of privilege).

- preferential treatment compared to ordinary citizens would have to withstand ‘strict scrutiny.’”<sup>166</sup>

In the past 30 years Congressional approval rankings have plummeted from approximately 34% in 1974 to approximately 14% today.<sup>167</sup> Concurrent with this precipitous drop in public approval has been a massive expansion of the size of government, particularly at the federal level, and a zealous drive to regulate virtually every element of American life. As Mark Levin pointed out in his proposal for the “Liberty Amendments”,

*[w]hat was to be a relatively innocuous federal government...has become an ever-present and unaccountable force. It is the nation’s largest creditor, debtor, lender, employer, consumer, contractor, grantor, property owner, tenant, insurer, health-care provider and pension guarantor...what it does not control directly it bans or mandates by regulation...the question is not what the federal government regulates, but what it does not.*<sup>168</sup>

It should be obvious that the American public’s dissatisfaction with its omnipotent government must, in part, be based on the gradual evolution of the political class from one that was meant to be in service to the public to one that is now, in substance, an American nobility, enjoying privileges and status that are unreachable by the population at large.

The framers knew that there with power came the risk of self-aggrandizement. They assumed that the need to face the electorate on a regular basis would keep any excesses in check. As a guaranty, though, they also include the Nobility Clauses in the Constitution to ensure that if our elected officials couldn’t control their own lust for power, our system would. Though Congressional approval ratings are at all time lows and disapproval ratings are near or above 80%, turnover in Congress remains the exception.<sup>169</sup>

The checks and balances residing within the political system and the electorate have been comprised. Even those in the political class acknowledge as much, though they have no incentive to make the sweeping changes that are necessary to abolish the new nobility and restore the United States to a true republican system. As Senator Grassley said about the CAA

*It is simply not fair, or good governance, for the Congress of the United States to enact laws for the American people, while exempting itself from compliance...we in Congress are no better than the businessmen and women in our states. We are not different and we, too, must live under the laws that we pass. We no longer sit in Washington and look down upon the people and tell them how to run their businesses.*

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<sup>166</sup> Glenn Harlan Reynolds, *Stop Privileges for Government Officials*, USA TODAY (August 16, 2013) (available at <http://www.usatoday.com/story/opinion/2013/08/26/constitution-government-officials-privileges-column/2696945/>). It is with deep gratitude that I give credit to Professor Reynolds for inspiring this paper and providing, through Instapundit ([www.instapundit.com](http://www.instapundit.com)) specific examples of privilege that were used herein.

<sup>167</sup> Jeffrey M. Jones, *Congressional Approval Ratings Remains Near Historic Lows* Gallup Politics Poll (August 13, 2013) (available at <http://www.gallup.com/poll/163964/congress-approval-rating-remains-near-historical-lows.aspx>).

<sup>168</sup> Levin, *supra* note 23, at 6-7.

<sup>169</sup> Levin, *supra* note 23.

*This is a democracy, and therefore, we make laws for the people, and we, too, must follow these laws.*<sup>170</sup>

Nonetheless, in the 18 years since the enactment of the CAA, other than with respect to a handful of labor laws, we are no closer to fulfilling what should be a goal without controversy: equal application of the law among all citizens, whether in government service or not.

Unless the Supreme Court implements the Nobility Clauses as they were intended to work there is every reason to believe that the system will remain broken.

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<sup>170</sup> Grassley, *supra* note 73 at 34-35.