RESOLUTION 12-63

A RESOLUTION OF THE CITY COUNCIL OF MISSION VIEJO IN SUPPORT OF THE RULE OF LAW AND IN SUPPORT OF ELECTRONIC EMPLOYMENT ELIGIBILITY VERIFICATION

WHEREAS, the preservation of our freedom depends upon adherence to the principles that underlie successful self-government; and

WHEREAS, adherence to the principles of self-government requires habitual reference to them in discussion and debate on policies that are proposed to address current problems and challenges; and

WHEREAS, adherence to the principles of self-government requires that those principles be taught to and reaffirmed by each new generation; and

WHEREAS, reiteration and reaffirmation of the principles of self-government is particularly necessary in times when they are being challenged or neglected; and

WHEREAS, one of the constitutive principles of self-government is the rule of law;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MISSION VIEJO DOES HEREBY FIND, RESOLVE, AND ORDER AS FOLLOWS:

SECTION 1 - FINDINGS

1. A central tenet of the American political tradition--the ideal our nation's Founders called "a government of laws and not of men," and which we today call "the rule of law"--is under assault. Some of the particular principles that constitute the general principle of the rule of law are being challenged most particularly in the area of enforcement of our country's immigration laws.

2. The government of the United States in recent decades has been grossly negligent in its enforcement of our immigration laws. Given the current annual goal of deporting 400,000 illegal immigrants, and the 11 million figure for those estimated to be present, it would take more than a quarter of a century to restore compliance with the immigration laws if during that time no new migrants were able to enter or remain in the United States unlawfully.

3. In 2007, the City of Mission Viejo adopted, and in 2010 it amended, its Lawful Hiring Compliance Ordinance (Mission Viejo Municipal Code, Title 2, Chapter 2.80) requiring use by the city and city contractors of the Basic Pilot Program, now denominated E-Verify.

4. E-Verify is a supplemental screening system made available by the federal government to employers to screen newly hired employees for eligibility to work in the United States. E-Verify uses an Internet connection to federal government records to determine work eligibility. It has been shown to be detecting nearly half of those persons not lawfully present in the United States who, by means of felony document fraud and perjury, evade detection by the federally-mandated Form I-9 document-based screening process.

5. The city adopted its ordinance based upon stated findings that a just society requires enforcement of and compliance with democratically enacted laws; that governmental entities should promote compliance with the law and should avoid actions and policies that encourage disrespect for and violation of the law and reward lawbreakers at the expense of law-abiding people and businesses; that federal law regulates immigration and justifiably requires that certain conditions be met for a person to be authorized to work or reside in the United States; that the welfare of the public and, in particular, law-abiding persons and business entities, is served and promoted by governmental policies and procedures that deter and prevent legally unauthorized employment; and that among such policies and procedures are those that ensure verification of eligibility for employment consistent with federal law.

6. In adopting the ordinance, the City Council was implementing its conviction that, consistent with public policy intended to be realized through federal immigration law, all American jobs should go to legal residents rather than aliens not lawfully admitted to the United States. At the same time, the issue was considered in the broader context of (1) our nation's traditional commitment to the rule of law, and (2) decades of lax enforcement of the immigration laws by the Executive Branch of the federal government. In first introducing the measure, the council member who proposed it said: "The rule of law is in fact what this country was founded upon, and what makes this country work as well as it does."

7. The United States was founded as a republic, a representative democracy, based on the concept of the rule of law--"a government of laws and not of men." The rule of law--effecting equal obligations and equal rights--is the central concept of our democratic system. The rule of law has been defined in various ways, but virtually all definitions stress the supremacy of law: the supremacy of regular power as opposed to arbitrary power. The rule of law in the American political tradition is not merely formal, or merely procedural, but is a natural law or higher law theory, having substantive moral and political content. The rule of law means that everyone in the nation is subject to the law, and the law is subject to the nation's citizens. Defined more fully, it means that everyone in the nation is morally--"under God"--subject to just laws, and the law is subject to the nation's citizens morally--"under God"--exercising their political sovereignty so as to impose just laws.

8. We affirm the centrality of the rule of law to the American Creed. We reverence the Declaration of Independence and the Constitution of the United States, and we reverence our nation's Founders and the heroes who for more than two centuries have sustained the Founders' achievement. We believe that American political philosophy, especially as embodied in the founding documents, may be justly understood to have four great themes, or to be structured with four essential pillars: God/divine sovereignty, Freedom/human rights, Democracy/consent of the governed, and Law/the rule of law. Government by law ranks among "our great civilized

ideas: individual liberty, representative government, the rule of law under God." Of all the contributions that America has made to human progress, there may be none that is more important than the advance of the ideal of law as a check upon power.

9. Law subject to the rule of law is the mechanism of genuine democracy: it is the basic means of doing self-government, the principal instrument by which we guide cooperation toward the common good so as to live together in harmony "with liberty and justice for all."

10. Law functions--it results in the compliance with democratic law that constitutes ordered liberty--through two chief mechanisms, or motivators: (1) moral respect for the law, and (2) enforcement of the law. The American political tradition and its underlying religious tradition hold that each of us has a serious moral obligation to obey the law. Our nation's Founders and statesmen insisted that each of us has a duty of respect or reverence for the law. No one is above the law. Everyone has a duty to obey the law, and a right to obedience of the law by others.

11. Where the moral obligation to obey the law is not subscribed to in theory or adhered to in practice, law enforcement, with its physical and deterrent effects, assumes its supplemental role. One of the principles most basic to the rule of law is congruence between the rules as announced and their actual administration. The laws that are enacted must be enforced. Sanctions provided in proscriptive laws must actually be applied to the proscribed behavior. The requirement that officials apply the enacted rules has, in fact, been asserted to be the essence of the rule of law.

12. A corollary to the principle of enforcement is that the executive authority of government must faithfully execute *all* of its jurisdiction's laws: each law to one degree or another, with the degree of enforcement of each being prioritized--on a principled basis--as necessitated by any inadequacy of enforcement resources obtainable from the legislative authority.

13. Just as citizens and other residents may not elect what laws they will obey, the executive authority may not elect which laws it will enforce. The duty of the government to enforce the laws is coequal with the duty of citizens to obey them. The executive authority may not pick and choose which laws to enforce such that there results a complete absence of enforcement of one or more laws. The executive may not substitute its own policy preferences for the will of the people as expressed in legislation. The government of the United States was established to get rid of arbitrary, discretionary executive power. Any concept of presidential nullification of disfavored statutes by means of nonenforcement is contrary to the constitutional mandate of Article II, Section 3 that the president take care that the laws be faithfully executed, and to the Article I, Section 1 vesting of all legislative powers in the Congress, and to the constitutional doctrine of separation of powers.

14. One essential principle of the rule of law is that proscriptive laws must include sanctions--punishment for disobedience. A legal sanction, to be effective, must be at least the equivalent of what the offender gained or expected to gain from the offense, and it usually must be that and something more. The offender's gains from the offense must be confiscated from him upon apprehension or conviction. If the sanction is something less than the equivalent of the contemplated gains of the offense, the offender will calculate that by committing the offense he will come out ahead even if he is apprehended and punished.

15. The contemplated gain of illegal immigration is presence in the United States, with the opportunities such presence provides. The indispensable, minimum sanction needed to deter and prevent illegal entry and illegal presence is removal from the United States, with the resulting elimination of the opportunities presented. With anything less, there is little deterrence, and immigration lawbreaking pays: the lawbreaker knows he will come out ahead, even after being apprehended and paying the prescribed penalty.

16. Given the significant support that E-Verify has received from quarters in both major political parties, E-Verify ought not to be considered a partisan issue. And it is here acknowledged that most people on each side of the major divisions on the illegal immigration issue are people of sincerity and good will. But government is an influential teacher, by word and by example, and it is an inescapable fact that tolerating lawbreaking and rewarding lawbreaking, when doing so is not necessary, constitute governmental ratification of lawbreaking, and send a baneful message, at odds with our tradition, that people do not have a serious moral obligation to obey the law.

17. There are a myriad of factors that affect the rate of crime, which at any given time is either increasing or decreasing. One of the major factors is what government teaches through rewards and punishments. When our government rewards breach of a law or effectively penalizes compliance with a law, it impairs respect for law. "The worst evil of disregard for some law is that it destroys respect for all law." To every small degree we diminish respect for the law we engender more lawbreaking, and more people become victims of crime.

18. It is the poor and the least powerful who are the greatest beneficiaries of, and the most dependent upon, the rule of law and the ethic of adherence to the rule of law. From a comparison of the degrees of freedom, safety, and prosperity that exist in countries that adhere to the rule of law to the degrees of freedom, safety, and prosperity that exist in countries where corruption predominates, it is obvious that it is detrimental to the common good to attempt to help people in need by methods that degrade the principle of the rule of law. Compassion is truly humane not when it focuses just on those in need and how proposed remedial action would redound to their benefit, but when it focuses, as well, on the consequences of the proposed remedy for everyone. Policies that have the effect of diminishing adherence to the law and to the rule of law, however well-intentioned they might be, are ultimately not humane.

19. All nations, or nearly all nations, are, at least in terms of historical origin, nations of immigrants. But unlike many nations, America is a nation of laws, as we use the term. America has been able to remain both a nation of immigrants and a nation of laws by means of adherence to immigration law and assimilation of its immigrants. It has required immigrants to accept its basic values. Immigrants have been, and should be, obliged to respect our cultural heritage and obey our laws. The Founding generation set the precedent of restricting naturalization to people who share our nation's republican principles. We should not now proceed, contrarily, to effectively reward people with legal residency status and citizenship for violating republican principles. Governmental ratification of a path of crime to citizenship would not be unprecedented, but it would be contrary to rule of law principles of respecting observance and punishing inobservance, and would replicate one of the features of the 1986 immigration law that most strongly encouraged unlawful immigration. The adverse consequences of the 1986

amnesty law are ample proof that rewarding lawbreakers cannot constitute an element of true immigration reform.

20. Grants of amnesty and pardon should not counteract the rule of law and enforcement of law. Powers to grant amnesty and pardon, when properly used, are fully consistent with government by law, even though at times necessity dictates their use in a manner that allows prior disobedience to escape punishment. The Framers of the Constitution understood the pardoning power to be principally an instrument of law enforcement. It was considered to be exercised most appropriately in making offers of pardon in conflict situations for purposes of restoring the peace. Government undermines its ability to perform its basic function of securing our inalienable rights when its policies convey a message that people need not respect its legitimate authority. Government should not capitulate to lawbreaking, even mass lawbreaking, except when it is not possible to do otherwise.

21. Amnesty, historically, can be absolute or conditional. If absolute, the prescribed legal sanction is waived in full. If conditional, the sanction is waived to some significant degree, and a lesser sanction or other condition is imposed. One measure of a proposed policy of amnesty for illegal immigrants is whether its proponents are willing to forthrightly call it by name, rather than seeking to masquerade some substantially lesser or token or nominal penalties as the substantial equivalent of prescribed deportation.

22. We welcome from abroad--as we are grateful that our forebears were welcomed from abroad--those who would share with us the American Dream: the "perennial conviction that those who work hard and play by the rules will be rewarded with a more comfortable present and a stronger future for their children." We honor Americans by birth and by legal immigration who do the true hard work of making a living and endeavoring to better their circumstances by those means only that are consistent with our society's immigration and domestic rules. We assert that government should honor such Americans by policies that restrict to them the rewards and privileges that justly result from honest efforts, and should decline to accord discretionary benefits to those who seek unfair advantages by employment of means of advancement that violate our laws. We insist there is a contradiction between our sacred principle of equal justice under law and policies that gratuitously accord to some the privilege of breaking the law with impunity.

23. The people of Mission Viejo share with other Americans a patriotic devotion to the principles upon which our nation was founded, and they take pride in their previous efforts to uphold our nation's ideals. The city considers its adoption of one of the nation's first local government E-Verify laws to be an example of legitimate local efforts to enhance compliance with U.S. immigration and employment laws and to uphold the bedrock American principle of the rule of law. The city chose to do business with only those firms that were willing to make an extra effort to better comply with federal immigration law. It took the risk that its contracting costs would increase. It applied the electronic verification requirement to both its contractors and itself. We consider it to be our duty--indeed, it is our privilege--to pay whatever cost is entailed in doing all we can to defend the American system of religious, political, and economic freedom secured by popular government under the rule of law.

24. Mission Viejo was one of the first cities in the nation to adopt an E-Verify requirement for its city contractors. Within four years, there were E-Verify requirements in about 20 California cities and counties, some of which had considered the experience of Mission Viejo in their evaluation of E-Verify. Mission Viejo has often been contacted about E-Verify, and its ordinance has been consulted, by jurisdictions in California and other states.

25. In 2010, the city amended the ordinance to add contractor E-Verify participation reporting requirements. As of the first reporting period, in 2011, the city achieved 100% compliance by its contractors subject to the E-Verify requirement, numbering approximately 70 companies. We commend our city's contractors for their positive response to the city's efforts in support of the integrity of American law.

26. In September 2011, the California Legislature passed, and in October 2011, the governor signed, Assembly Bill 1236, the Employment Acceleration Act of 2011 (California Labor Code §§2811-2813), prohibiting the state, cities, counties, and special districts from requiring nongovernmental employers to use electronic employment verification systems, such as E-Verify, as a condition of receiving governmental contracts, as a condition for applying for or maintaining business licenses, or as a penalty for violating licensing laws, except when required by federal law or to receive federal funds.

27. In California, the legislative power of the people, excepting rights of initiative and referendum, is vested in the Legislature. State government is sovereign, and local governments are mere subdivisions of the state. The state preempts power in issues of statewide concern. Local ordinances may not authorize acts prohibited by state statute or prohibit acts specifically authorized by state statute. AB 1236 prevents the City of Mission Viejo from entering into contracts with city contractors requiring use of the E-Verify system, on or after January 1, 2012.

28. AB 1236 was premised upon four principal findings; each of them was questionable, outdated, and/or misleading:

(1) The Legislature said that a 2007 independent evaluation commissioned by the Department of Homeland Security "found that the electronic employment verification database was still not sufficiently up to date to meet requirements for accurate verification," and this "has led to employers being unable to hire employees in a timely manner and kept workers from earning wages." E-Verify screening takes place only after a worker is hired, so it cannot be that it has resulted in employers being unable to hire employees in a timely manner and eligible workers being kept from earning wages. The only workers who are terminated are those who initially receive Tentative Nonconfirmations and then fail to contact the Social Security Administration or Department of Homeland Security and resolve discrepancies in identity or eligibility data within the prescribed period of time. In referencing the now-outdated 2007 Westat evaluation (which at the time resulted in DHS saying E-Verify is "an enormous success"), the Legislature inexplicably ignored the more recent Westat study made public in early 2010, which determined that E-Verify: authorizes over 99% of eligible workers initially ("a resounding affirmation of the accuracy and efficiency of the system," per USCIS), and authorizes the majority of the rest in the second step of the E-Verify process; accurately detects the status of unauthorized workers almost half of the time; may deter many unauthorized workers from applying for jobs; is much more

effective than the Form I-9 verification process used without E-Verify; reduces discrimination against foreign-born workers; is generally considered by employers to be non-burdensome; and is the best available tool to help employers determine whether their employees are authorized to work in the U.S. The Legislature likewise did not mention the CFI Group 2010 Customer Satisfaction Survey wherein "E-Verify received an exceptionally high overall customer satisfaction score." The Legislature ignored administration congressional testimony that E-Verify is "a smart, simple and effective tool" that is "fast, free, and easy-to-use." In our view, a law enforcement tool that is inexpensive, quick, and non-burdensome, and cuts the rate of a particular crime nearly in half, must be considered to be an extremely economical and effective one.

(2) The Legislature found that mandatory use of electronic verification "would increase the costs of doing business in a difficult economic climate," citing a United States Chamber of Commerce estimate that "the net societal cost of all federal contractors using the E-Verify Program would amount to $10 billion a year, federally." It found that employers report that "the cost, technological demands, and staff time that an electronic employment verification system requires to use and implement come at a time when they are already struggling." Mission Viejo's experience since 2007 has been that E-Verify takes an HR staff member only about five minutes per newly hired worker found to be work authorized. A few additional steps are needed for hires initially found not work authorized (3.6% of all workers in 2008, per the recent Westat study; about half that rate in Fiscal Year 2011, per *www.uscis.gov*). E-Verify is provided by the federal government free to a business except for the cost of a computer and an Internet connection, and employee training and use time.

(3) The Legislature found that employers using the program "report that staff must receive additional training that disrupts normal business operations," which if E-Verify was mandated nationwide would cost $2.7 billion, most of it borne by small businesses. Mission Viejo's experience since 2007 has been that, far from disrupting normal business operations, E-Verify has required just a few hours of HR staff training over a period of years.

(4) The Legislature said its intent was "that the state maintain the intent of federal law by ensuring that private employers retain the ability to choose whether to participate in the electronic verification program." It mischaracterized federal law in implying there is an intent that employers retain an ability to choose not to participate in E-Verify despite state or local government mandates. Federal immigration law preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." In May 2011, the U.S. Supreme Court, in *Chamber of Commerce v. Whiting*, found that Arizona's 2007 licensing law requiring use of E-Verify by all Arizona employers "falls well within the authority Congress chose to leave to the States" and "is entirely consistent with the federal law."

29. As of the beginning of 2012, two states--California and Illinois--prohibited local governments from mandating E-Verify for their contractors and business licensees. Seven states--Alabama, Arizona, Georgia, Mississippi, North Carolina, South Carolina, and Utah--mandated E-Verify for all, or most, employers. Two states, Louisiana and Tennessee, had made E-Verify an option in requiring additional verification by all, or most, employers. Seven other

states mandated E-Verify for public agencies and state contractors, and three mandated E-Verify for state contractors but not public agencies. In the great majority of states, local E-Verify requirements are allowed and E-Verify has not yet been instituted on a statewide basis; in these states, local governments--cities, counties, and special districts--have the opportunity to adopt E-Verify requirements for their employees, contractors, and/or business licensees, and thereby substantially increase the chances of American jobs going to legal residents rather than illegal aliens.

30. The city makes no finding as to whether AB 1236, the Employment Acceleration Act of 2011, operates retroactively, such that it prohibits future enforcement of E-Verify provisions contained in city contracts entered into prior to its effective date. However, if AB 1236 has no retroactive effect, the city's suspension of enforcement of its contractor E-Verify requirement is considered, nonetheless, to include suspension of enforcement of E-Verify provisions contained in pre-2012 city contracts, for the sake of continuity respecting nonenforcement begun immediately after the passage of AB 1236.

SECTION 2 - RESOLUTION

BE IT RESOLVED that the City Council of the City of Mission Viejo respectfully calls upon all who love this country to join us in reacquainting ourselves with, and recommitting ourselves to, the foundational American principle of the rule of law, and specifically to those rule of law principles, enunciated here, that are most relevant to the massive and complex problem of illegal immigration.

BE IT RESOLVED that the City Council of the City of Mission Viejo calls upon local governments, including cities, counties, and special districts, in the great majority of states where E-Verify requirements are allowed and statewide requirements are not already in effect, to consider instituting E-Verify requirements for their employees, contractors, and/or business licensees.

BE IT RESOLVED that the City of Mission Viejo shall continue to utilize E-Verify in the hiring of city employees.

BE IT RESOLVED that the City Council of the City of Mission Viejo calls upon local governments in California, including cities, counties, and special districts, to consider instituting E-Verify requirements for their newly hired employees, so as to better comply with federal immigration law and to set a good example for business owners and employers in their jurisdictions.

BE IT RESOLVED that the City of Mission Viejo shall suspend operation of its Lawful Hiring Compliance Ordinance as required by AB 1236, but will maintain the ordinance in the city's Municipal Code for historical and reference purposes. In the city's Municipal Code, the Lawful Hiring Compliance Ordinance shall be accompanied by a reference to this resolution, and a link to this resolution to facilitate access.

SECTION 3 - CERTIFICATION

The City Clerk shall certify to the adoption of this resolution and enter it into the book of original resolutions.

PASSED, APPROVED, AND ADOPTED this 1st day of October, 2012

Frank Ury
Mayor

I hereby certify that the foregoing Resolution was duly adopted by the City Council of the City of Mission Viejo at a regular meeting held on October 1, 2012, by the following vote:

AYES:	Kelley, Leckness, Reardon, Schlicht, and Ury
NOES:	None
ABSENT:	None

ATTEST:

Karen Hamman
City Clerk

RESEARCH PAPER
FOR PROPOSED RESOLUTION IN SUPPORT OF THE RULE OF LAW AND IN SUPPORT OF ELECTRONIC EMPLOYMENT ELIGIBILITY VERIFICATION

PREPARED FOR THE MISSION VIEJO CITY COUNCIL
SEPTEMBER 2012

The purpose of this research paper is to bring together the sources of the ideas and facts set forth in the resolution on the rule of law and E-Verify that is being brought before the Mission Viejo City Council for its consideration.

It is meant to be available to City Council members as a reference respecting the entirety or particular portions of the resolution, and to make available to others who are interested further information on the subjects covered in the resolution. This paper will not be considered by the City Council in the sense that it will be voted upon or endorsed in any manner. The resolution makes no reference to this paper.

The resolution was drafted with the intent of accurately stating the general views of the members of the council and the prevailing sentiment of city residents. However, such was not the particular aim of this paper, and it should not be interpreted to represent those views.

The resolution is part of the city's response to the State Legislature's passage of AB 1236, which banned local government contractor and business licensee E-Verify requirements.

The resolution has three principal components. First, it asserts and advocates for traditional American rule of law principles that are applicable to immigration law enforcement and E-Verify. Second, it presents a defense of E-Verify in the form of a response to the Legislature's findings on E-Verify in AB 1236. Third, it calls for a recommitment to America's rule of law principles and calls upon local governments, in states where E-Verify requirements are permitted but do not yet exist on a statewide basis, to consider instituting E-Verify requirements for their employees, contractors, and/or business licensees.

In addition, the resolution requires continued use of E-Verify by the city for its newly hired employees. And it states an intent to suspend operation of the E-Verify ordinance as required by AB 1236, but to maintain it in the Municipal Code. (The suspension of the ordinance and the preservation of its language in the code may be accomplished by the council separately from the resolution by means of a new ordinance.)

The text of the proposed resolution is presented, here, in bold. Its paragraphs are set forth separately, most of them followed immediately by an explanation and/or pertinent backup or supporting data and source references. (The Certification portion of the resolution is not included.)

Most of the quotations of American presidents may be found in their full context at *www.presidency.ucsb.edu*. Facts set forth in the findings for which no particular reference is given were, for the most part, related to our researcher in personal conversations; these sources will be provided to council members upon request.

A RESOLUTION OF THE CITY COUNCIL OF MISSION VIEJO IN SUPPORT OF THE RULE OF LAW AND IN SUPPORT OF ELECTRONIC EMPLOYMENT ELIGIBILITY VERIFICATION

WHEREAS, the preservation of our freedom depends upon adherence to the principles that underlie successful self-government; and

"As the United States of America looks forward to the two hundredth anniversary of our Nation's independence next July, it is appropriate that we pause and reflect on the principles of self-government that underlie our society and continue to nourish it." (Gerald R. Ford, November 5, 1975.)

"Four times in this century, the sons of America have crossed the oceans to fight for the freedom of others….And because they gave the last full measure of devotion, our nation is at peace. And because of them, the peaceful ideals of America are now the ideals of the world….Memorials like these are the very embodiment of our nation, expressing our deepest values and our character as a people, for we Americans navigate by such symbols. The St. Louis Arch, pointing toward the West; the Statue of Liberty, its silhouette a morning star of freedom; the Lincoln and Jefferson Memorials, whose majesty proclaims the principles of self-government--each reflects what we are as a nation and as a people." (George H.W. Bush, November 11, 1989.)

"The great essential to our happiness and prosperity is that we adhere to the principles upon which the Government was established and insist upon their faithful observance. Equality of rights must prevail, and our laws be always and everywhere respected and obeyed….The preservation of public order, the right of discussion, the integrity of courts, and the orderly administration of justice must continue forever the rock of safety upon which our Government securely rests." (William McKinley, March 4, 1897.)

WHEREAS, adherence to the principles of self-government requires habitual reference to them in discussion and debate on policies that are proposed to address current problems and challenges; and

"Our system fortunately contemplates a recurrence to first principles, differing in this respect from all that have preceded it, and securing it, I trust, equally against the decay and the commotions which have marked the progress of other governments." (Andrew Jackson, December 6, 1830.)

"From a small community we have risen to a people powerful in numbers and in strength; but with our increase has gone hand in hand the progress of just principles….We have learned by

experience a fruitful lesson--that an implicit and undeviating adherence to the principles on which we set out can carry us prosperously onward through all the conflicts of circumstances and vicissitudes inseparable from the lapse of years." (Martin Van Buren, March 4, 1837.)

If we give more constant attention to the rule of law, we can better approximate this great ideal. "Unfortunately, the rule of law is an ideal rather than a complete fact in even the most democratic nation. Special interest groups attempt to persuade lawmakers to benefit these groups at the expense of others. And it is not always clear what it means to apply laws generally and equally. Still, in a democracy well-educated voters who understand the importance of the rule of law can hold to account lawmakers who excessively favor special interests." (O. Lee Reed, et al., *The Legal & Regulatory Environment of Business*, 13th Edition, New York: McGraw-Hill/Irwin, 2005, p. 4.)

WHEREAS, adherence to the principles of self-government requires that those principles be taught to and reaffirmed by each new generation; and

"We founded our society on the belief that the rights of men were ours by grace of God. That vision of our Founding Fathers revolutionized the world. Those principles must be reaffirmed by every generation of Americans, for freedom is never more than one generation away from extinction. It can only be passed on to a new generation if it has been preserved by the old. And that's what I meant last January when I spoke of an American renewal--a rededication to those first principles." (Ronald Reagan, November 20, 1981.)

WHEREAS, reiteration and reaffirmation of the principles of self-government is particularly necessary in times when they are being challenged or neglected; and

"Our battle cry must be, 'Back to the reign of law.' The discretion of executive officers, whether you call them commissioners or not, is a mere quicksand upon which no nation can stand. Only principles are constructive. No miscellaneous programme of measures formed by no principle, unified by no controlling purpose, can give life to a great national party and lift it above faction or futility. The principle to which the voters of this country should be called back now is the great constructive principle of the reign of law....Law, and the government as umpire; not discretionary power, and the government as master, should be the programme of every man who loves liberty and the established character of the Republic." (Woodrow Wilson, "Law or Personal Power," Address at the National Democratic Club, New York, April 13, 1908, in *College and State: Educational, Literary and Political Papers (1875-1913) by Woodrow Wilson*, Vol. II, New York: Harper & Brothers Publishers, Kraus Reprint Co., 1970, pp. 30-31.)

WHEREAS, one of the constitutive principles of self-government is the rule of law;

"Our educational system has always done far more than simply train people for a given job or profession; it has equipped generation upon generation of young men and women for lives of responsible citizenship, by helping to teach them the basic ethical values and principles that are both our heritage as a free people and the foundation of civilized life. As the beneficiaries of that heritage, we bear a corresponding responsibility to ensure that the moral values on which freedom rests continue to be transmitted to each successive generation of Americans. If our

educational efforts are rooted in first principles--that human life is sacred; that men and women should be treated as individuals, with certain fundamental rights and responsibilities; that respect for law is crucial to the survival of freedom--then our children and our children's children will share, as we have, in the blessings of liberty." (Ronald Reagan, April 13, 1984.)

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MISSION VIEJO DOES HEREBY FIND, RESOLVE, AND ORDER AS FOLLOWS:

SECTION 1 - FINDINGS

1. A central tenet of the American political tradition--the ideal our nation's Founders called "a government of laws and not of men," and which we today call "the rule of law"--is under assault. Some of the particular principles that constitute the general principle of the rule of law are being challenged most particularly in the area of enforcement of our country's immigration laws.

2. The government of the United States in recent decades has been grossly negligent in its enforcement of our immigration laws. Given the current annual goal of deporting 400,000 illegal immigrants, and the 11 million figure for those estimated to be present, it would take more than a quarter of a century to restore compliance with the immigration laws if during that time no new migrants were able to enter or remain in the United States unlawfully.

"The number of illegal immigrants in the United States trickled down slightly to 11.5 million as of January 2011, according to statistics released by the Obama administration on an issue likely to play a big role in the U.S. presidential campaign. The U.S. Department of Homeland Security estimated the number has remained largely stable - just down from 11.6 million in 2010 - citing the high U.S. unemployment rate, improved economic conditions in Mexico and increased border enforcement....States along the Southwest border with Mexico topped the list with the most immigrants illegally in the country, with about 2.83 million in California, followed by almost 1.8 million in Texas, the DHS Office of Immigration Statistics report said." ("Number of illegal immigrants in U.S. is stable: DHS," Reuters, *www.reuters.com*, March 24, 2012.)

U.S. immigration authorities under the Obama administration set a goal of 400,000 deportations for the year ending September 30, 2010. ("ICE officials set quotas to deport more illegal immigrants," *The Washington Post*, March 27, 2010, *www.washingtonpost.com*, 3/31/10; "Tough Q&A for first lady," *The Orange County Register*, May 20, 2010, News 4.)

"Obama administration officials say they forcibly removed a record number of people last year, some 396,906 in all, including 216,608 criminal immigrants, or about 55% of the total. ICE has removed 147,044 criminal illegal immigrants this fiscal year, officials said. That is behind last year's rate by approximately 12,000, or 9%." ("U.S. steps up deportation efforts for criminal immigrants," *Los Angeles Times*, May 26, 2012, *articles.latimes.com*.)

"The vast majority of the American public is not racist or 'playing politics' in worrying about out-of-control illegal immigration. The enforcement of existing federal immigration law has

become a joke." (Victor Davis Hanson, "Obama's demagoguery on immigration historic," *www.ocregister.com*, May 19, 2011.)

"An estimated one in 25 people in the United States (12 million) are here in violation of our laws. Such widespread flouting of immigration law is understandably disquieting; it strikes at U.S. sovereignty. We should either enforce our immigration quotas, or repeal them. The illegal presence of so many corrupts our own law enforcement, politics and economy, and it undermines our ability to protect ourselves from terrorists. This corruption is the biggest threat from illegal immigration." (Prof. Andrew Yuengert, "The turmoil of illegal immigration," *The Orange County Register*, May 5, 2006, Local 9.)

"Illegal immigration is, by its nature, a breakdown in the rule of law. Indeed, the magnitude of today's problem betrays a systemic breakdown in the rule of law. The illegal workers don't respect our immigration and identification laws, but they're hardly alone. Employers who wink as they hire them or have other companies hire them; government agencies that haven't enforced existing immigration laws; middle-class folks who hire illegals to landscape their properties or nibble on fruit made cheap by illegal laborers -- all are complicit as well in the collapse of the rule of law." (David Reinhart, "So is this what you call compassion?," June 25, 2007, *politicalmavens.com*, 7/14/07.)

3. In 2007, the City of Mission Viejo adopted, and in 2010 it amended, its Lawful Hiring Compliance Ordinance (Mission Viejo Municipal Code, Title 2, Chapter 2.80) requiring use by the city and city contractors of the Basic Pilot Program, now denominated E-Verify.

The city's Lawful Hiring Compliance Ordinance (No. 07-247) was adopted unanimously by the City Council on March 19, 2007. It required use of the Basic Pilot Program (later renamed E-Verify) (1) for city employees and (2) by city contractors pursuant to new or renewed contracts for services for over $30,000 (increased from $15,000 by Ordinance No. 07-260 in September 2007).

In July/August 2010, the council unanimously passed the amended ordinance (No. 10-281), mainly to strengthen city monitoring of contractor compliance.

4. E-Verify is a supplemental screening system made available by the federal government to employers to screen newly hired employees for eligibility to work in the United States. E-Verify uses an Internet connection to federal government records to determine work eligibility. It has been shown to be detecting nearly half of those persons not lawfully present in the United States who, by means of felony document fraud and perjury, evade detection by the federally-mandated Form I-9 document-based screening process.

The Westat study released in early 2010 showed that E-Verify accurately detects the status of unauthorized workers almost half of the time. For the time period studied (April-June 2008), an estimated 6.2% of those run through E-Verify were unauthorized, and an estimated 46% of those unauthorized employees received final nonconfirmations. (*Findings of the E-Verify Program Evaluation*, December 2009, *www.dhs.gov*, 8/6/12.)

Those who escape detection by E-Verify do so primarily by means of identity theft and fraud. According to Obama administration testimony in 2011: "E-Verify is one tool the government uses to combat identity fraud. While E-Verify alone cannot detect all instances of identity fraud, USCIS is working to improve the program's ability to detect identity fraud and significant improvements already have been implemented. To help combat identity fraud, USCIS has continued to expand the type of documents for which E-Verify provides biometric (i.e., photographic) confirmation. In September 2010, USCIS added U.S. Passport and U.S. Passport Card photographs to the E-Verify database. As with other photographic matching documents in the E-Verify database (Employment Authorization Documents and Permanent Resident Cards), the addition of U.S. Passport photographs allows the employer to compare the photograph displayed in E-Verify with the photograph on the employee's U.S. Passport. The E-Verify program monitors the use of multiple identities and social security numbers, and USCIS is exploring ways to identify and lock these identities in cases where fraud likely exists to prevent future use in E-Verify." (Testimony of USCIS Associate Director Theresa C. Bertucci, House Subcommittee on Immigration Policy and Enforcement, "E-Verify: Preserving Jobs for American Workers," February 10, 2011, *www.dhs.gov*, 8/6/12.)

All new employees, at the time of hire, complete a portion of Form I-9, attesting under penalty of perjury that the employee is a citizen, national, lawful permanent resident, or alien authorized to work in the United States. The employer then examines the employee's identity and employment eligibility document(s) and completes its section of the Form I-9, attesting under penalty of perjury that the document(s) appear(s) to be genuine.

Federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of Form I-9. Under federal law, knowing use of forged or falsely made documents prescribed as evidence for employment constitutes a felony punishable by a fine or imprisonment for up to 10 years. (18 U.S.C. §1546, 18 U.S.C. §3559(a).)

Perjury is a felony punishable by a fine or imprisonment for up to five years. (18 U.S.C. §1621, 18 U.S.C. §3559(a).)

5. The city adopted its ordinance based upon stated findings that a just society requires enforcement of and compliance with democratically enacted laws; that governmental entities should promote compliance with the law and should avoid actions and policies that encourage disrespect for and violation of the law and reward lawbreakers at the expense of law-abiding people and businesses; that federal law regulates immigration and justifiably requires that certain conditions be met for a person to be authorized to work or reside in the United States; that the welfare of the public and, in particular, law-abiding persons and business entities, is served and promoted by governmental policies and procedures that deter and prevent legally unauthorized employment; and that among such policies and procedures are those that ensure verification of eligibility for employment consistent with federal law.

Taken from the findings of Ordinance No. 07-247 (not included in the Municipal Code), available at *dms.cityofmissionviejo.org*.

6. In adopting the ordinance, the City Council was implementing its conviction that, consistent with public policy intended to be realized through federal immigration law, all American jobs should go to legal residents rather than aliens not lawfully admitted to the United States. At the same time, the issue was considered in the broader context of (1) our nation's traditional commitment to the rule of law, and (2) decades of lax enforcement of the immigration laws by the Executive Branch of the federal government. In first introducing the measure, the council member who proposed it said: "The rule of law is in fact what this country was founded upon, and what makes this country work as well as it does."

A Mission Viejo resident who spoke to the City Council at the second reading of the ordinance, who had himself lost his job to an illegal alien, said: "Our borders are porous. Anybody can get into this country, and they are taking jobs away from American citizens....So please pass this law. It's a start." (Mission Viejo City Council Meeting, Public Comments on proposed Lawful Hiring Compliance Ordinance, March 19, 2007, *cityofmissionviejo.org*.)

Another Mission Viejo resident said: "People are talking about cheap labor. There's nothing cheap about cheap labor. It's a pay-me-now or pay-me-later situation. Either we pay a few dollars more for labor now and hire real American citizens that we've forgotten about, or we pay the extra burdens in the schools, and the jails, and the hospitals..." (Mission Viejo City Council Meeting, Public Comments on proposed Lawful Hiring Compliance Ordinance, March 19, 2007, *cityofmissionviejo.org*.)

From the start, the issue was considered in the broader context of the rule of law and the substantial failure of the federal government to enforce immigration laws. Upon proposing the ordinance, its sponsor, Council Member John Paul Ledesma, said: "The rule of law is in fact what this country was founded upon, and what makes this country work as well as it does. Now, no set of laws, obviously, no matter what you do, is going to be perfect or utopian in any way. That's never going to happen. But the fact of the matter is this country was built on rule of law and respects the law, without which our system of government would simply crumble. And I think this is sending a positive message, a proactive message. As far as I know we'll be the first city in the state of California to pass this. But I believe a school district has already passed a similar ordinance." (Mission Viejo City Council Meeting, March 5, 2007, *cityofmissionviejo.org*.)

The other council members likewise viewed the proposal in this broader context. Council Member Lance MacLean said: "It is already the law of the land....This is not going to create any immigration raids. It is not going to do anything along those lines, which again fall into the purview of the federal government. It's a simple adhering to our federal laws that exist today and have existed for a long time." Council Member Trish Kelley said: "It is right and appropriate that we should comply with the law, and this provides a tool that helps us to be able to do that." Council Member Frank Ury said: "I am the son of an immigrant, who immigrated here in the late '50s, early '60s, and he came from Eastern Europe, and there was a set of rules...And if the laws were good enough for him...there's no reason why they shouldn't apply to everybody today." Mayor Gail Reavis said: "My grandparents immigrated from Cuba....This has nothing to do with the color of anybody's skin. This is the rule of law in this country." (Mission

Viejo City Council Meeting, discussion on proposed Lawful Hiring Compliance Ordinance, March 19, 2007, *cityofmissionviejo.org*.)

7. The United States was founded as a republic, a representative democracy, based on the concept of the rule of law--"a government of laws and not of men." The rule of law--effecting equal obligations and equal rights--is the central concept of our democratic system. The rule of law has been defined in various ways, but virtually all definitions stress the supremacy of law: the supremacy of regular power as opposed to arbitrary power. The rule of law in the American political tradition is not merely formal, or merely procedural, but is a natural law or higher law theory, having substantive moral and political content. The rule of law means that everyone in the nation is subject to the law, and the law is subject to the nation's citizens. Defined more fully, it means that everyone in the nation is morally--"under God"--subject to just laws, and the law is subject to the nation's citizens morally--"under God"--exercising their political sovereignty so as to impose just laws.

"The first question that offers itself is whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible....If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior." (James Madison, *The Federalist*, No. 39.)

"Convinced that the republican is the only form of government which is not eternally at open or secret war with the rights of mankind, my prayers & efforts shall be cordially distributed to the support of that we have so happily established. It is indeed an animating thought that, while we are securing the rights of ourselves & our posterity, we are pointing out the way to struggling nations who wish, like us, to emerge from their tyrannies also. Heaven help their struggles, and lead them, as it has done us, triumphantly thro' them." (Thomas Jefferson, Letter to William Hunter, March 11, 1790.)

"The full experiment of a government democratical, but representative, was and still is reserved for us….The introduction of this new principle of representative democracy has rendered useless almost everything written before on the structure of government…" (Thomas Jefferson, Letter to Isaac H. Tiffany, August 26, 1816.)

John Adams said that what is learned from the great writers on government is "that all good government is republican; that the only valuable part of the British constitution is so; for the true idea of a republic is an empire of laws, and not of men; and, therefore, as a republic is the best of governments, so that particular combination of power which is best contrived for a faithful execution of the laws, is the best of republics." (John Adams, Letter to John Penn, 1776, in Charles Francis Adams, ed., *The Works of John Adams, Second President of the United States*,

Vol. 4, Boston: Little, Brown and Co., 1856, in The Online Library of Liberty, *oll.libertyfund.org*, 9/13/12.)

"This new Nation was to be a democracy based on the concept of the rule of law." (Harry S. Truman, June 27, 1950.)

"AMERICAN democracy is founded on the rule of law." (Lyndon B. Johnson, December 20, 1967.)

"The rule of law--equal for all--is the central concept of our democratic system." (George H.W. Bush, April 21, 1989.)

"The government of the United States has been emphatically termed a government of laws, and not of men." (Chief Justice John Marshall, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).)

"The historic phrase 'a government of laws and not of men' epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic." (Justice Felix Frankfurter, *United States v. United Mine Workers*, 330 U.S. 258, 307 (1947).)

"My fellow Americans, our long national nightmare is over. Our Constitution works. Our great Republic is a government of laws and not of men." (Gerald R. Ford, August 9, 1974.)

"A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct." (Alexander Hamilton, *The Federalist*, No. 33.)

Black's Law Dictionary (Ninth Edition, Bryan A. Garner, ed., St. Paul, MN: West, 2009, p. 1448) defines rule of law in its broad sense as: "The supremacy of regular as opposed to arbitrary power <citizens must respect the rule of law>. Also termed *supremacy of law*."

"Among those ideas thought distinctive of modern ideals of good governance is that of the 'rule of law,' or a 'government of laws, not men.' The essence of the idea is that the law is a system of principles or rules to which all individuals--including those who govern--are subject. Even the sovereign is subject to the constraints of the law, as distinguished from arbitrary personal preference or whim." (Robert Hockett, *Little Book of Big Ideas: Law*, Chicago: Chicago Review Press, 2009, p. 10.)

"'The rule of law' means literally what it says: the rule of the law. Taken in its broadest sense, this means that people should obey the law and be ruled by it." (Joseph Raz, "The Rule of Law and Its Virtue," in Robert L. Cunningham, ed., *Liberty and the Rule of Law*, College Station: Texas A&M University Press, 1979, p. 5.)

It is recognized that "laws, in actuality, cannot really rule; rule is always by men, who may, however, either exercise power under the law or outside the law." (Mortimer J. Adler, ed., William Benton, Publisher, *Great Issues in American Life: A Conspectus, Vol. I (The Annals of America)*, Chicago: Encyclopedia Britannica, Inc., 1968, p. 125.) Thus, some people do in fact govern other people, but when they govern under the rule of law they govern in a particular, restricted way: they govern according to law. Duly enacted and respected law stands protectively between the rulers and those who are ruled.

"The rule of law constrains rulers by holding them accountable to those they govern." (Rebecca Bill Chavez, *The Rule of Law in Nascent Democracies*, Stanford: Stanford University Press, 2004, p. 2.) "At base, the rule of law is concerned with defining the relations between citizens and their government and, to an important extent, the relations of citizens to each other." (Francis A. Allen, *The Habits of Legality: Criminal Justice and the Rule of Law*, New York: Oxford University Press, 1996, p. 4.)

An introduction to the subject by Professor Lillian R. BeVier ("Civilization, Progress, and the Rule of Law," in Roger Pilon, ed., *The Rule of Law in the Wake of Clinton*, Washington, D.C.: Cato Institute, 2000, p. 20, footnotes omitted) states:

> ...a "government of laws, not of men," refers to a legal and political order in which clear, impersonal, universally applicable, general laws constrain the conduct of both individual citizens *and* those who govern them; in which no act is punished except pursuant to a pre-existing rule; and in which a stable, relatively permanent organic law, such as a written constitution, constrains and separates the institutions that exercise its everyday law-making, law-executing, and law-applying powers. In other words, a government of laws and not of men is a government that is limited in principle; it is not a government that may act as it pleases and simply deem its actions law: "all [the] actions of such a state would be legal but [that government] would certainly not be under the rule of law." By limiting *in principle* the legitimate authority of those who wield the power of the state, the rule of law secures to all citizens the promise that law itself will exhibit qualities of regularity, certainty, transparency, predictability, evenhandedness, and equal impersonal treatment according to known general rules and without regard to status, rank, or political persuasion.
>
> What is the rationale for embracing such an ideal? What ultimate end do we seek? [Friedrich] Hayek described it well. We seek "that condition of men in which coercion of some by others is reduced as much as possible in society"--in other words, we seek to maximize individual liberty consistent with the recognition of reciprocal rights in all. Anyone who deems personal freedom to be a good in itself, and who simultaneously recognizes that the task of government is to secure freedom, must inevitably ask how to constrain government power. As it turns out, the best answer is to hold fast to the rule of law.

"Here, in essence, is the meaning of the rule of law as it arises from the proposition that all men are created equal: Those who live under the law have an equal right in the making of the law, and those who make the law have a corresponding duty to live under the law." (Harry V. Jaffa, *A*

New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War, Lanham, Maryland: Rowman & Littlefield, 2000, p. 336.)

"Although there is no simple way to ensure that discretion is exercised fairly in each and every case, principal decisions made by individuals within the criminal justice system are meant to be governed by a set of ideals known as the **rule of law**. Developed over many years through case law, statutes, and scholarly writings, the rule of law can be stated simply as follows (National Strategy Information Center 1999):

- All people in society have the opportunity to participate in establishing the law;
- The rules apply equally to everyone; and
- The rules protect individuals as well as society.

The rule of law was developed in an effort to constrain kings and rulers who regarded themselves as above the law. At its heart is a commitment to the fundamental idea that equality before the law and justice are inseparable. Regardless of their position or responsibilities, all agents within the criminal justice system are bound by the rule of law, and they are required to exercise their discretion according to the limits it prescribes. Of course, in practice not every decision meets the high standards required by the rule of law. Much of its significance, however, derives from its status as an *ideal*; it is a standard which guides individuals and agencies within the system, and which--in theory at least--binds them together through a shared commitment to justice and the law." (Heath B. Grant, Karen J. Terry, *Law Enforcement in the 21st Century*, Second Edition, Boston: Pearson Education, Inc., 2008, p. 10.)

"The rule of law is the general principle that government and the governed alike are subject to law, as regularly adopted and applied. The principle is nowhere express in the United States Constitution, but it is a concept of basic importance in Anglo-American constitutional law. In that context, it is not merely a positivist doctrine of legality, requiring obedience to any duly adopted doctrine, but a means to assure that the actions of all branches of government are measured against the fundamental values enshrined in the COMMON LAW and the Constitution." (L. Kinvin Wroth, "Rule of Law," in Leonard W. Levy and Kenneth L. Karst, *Encyclopedia of the American Constitution*, Second Ed., Vol. 5, New York: Macmillan Reference USA, 2000, p. 2297.)

"In some countries the political leaders assert that the rule of law has no substantive content. These leaders argue that a government may deprive its citizens of fundamental liberties so long as it does so pursuant to a duly enacted law. At the NUREMBERG TRIALS, the political, military, and industrial leaders of Nazi Germany unsuccessfully advanced this argument as a defense to Allied charges that they had committed abominable crimes against European Jews and other minorities during World War II. In other countries the political leaders assert that all laws must conform with universal principles of morality, fairness, and justice. These leaders argue that as a necessary corollary to the axiom that 'no one is above the law,' the rule of law requires that the government treat all persons equally under the law. Yet the right to equal treatment is eviscerated when the government categorically denies a minimal level of respect, dignity, and autonomy to a single class of individuals. These unwritten principles of equality, autonomy, dignity, and respect are said to transcend ordinary written laws that are enacted by government. Sometimes known as NATURAL LAW or higher law theory, such unwritten and universal principles were invoked by the Allied powers during the Nuremberg trials to overcome the

defense asserted by the Nazi leaders." (*West's Encyclopedia of American Law*, Vol. 9, St. Paul: West Group, 1998, p. 89.)

"The story of man's advance from savagery to civilization is the story of reason and morality displacing brutal force. While law is reason systematized, it is more than reason alone. A great justice of our Supreme Court said long ago, 'The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.'" (John F. Kennedy, January 25, 1963.)

The rule of law in the American political tradition is not merely formal, or merely procedural, but is a natural law or higher law theory, having substantive moral and political content--in its various formulations encompassing such universal principles as human dignity, equality, morality, fairness, justice, limited government, law flowing from collective agreement, and consent. (*West's Encyclopedia of American Law*, Vol. 9, St. Paul: West Group, 1998, p. 89; Vernon Bogdanor, ed., *The Blackwell Encyclopedia of Political Institutions*, Oxford: Basil Blackwell Ltd., 1987, pp. 547-548; Steven P. Croley, "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law," 690 *University of Chicago Law Review* 689, 698, n. 25 (1995); "rule of law," in Paul Barry Clarke and Joe Foweraker, eds., *Encyclopedia of Democratic Thought*, New York: Routledge, 2001, p. 396.)

Thus, for example: "Consent Rule of law principle that states laws must be generally acceptable to those who must live by them....Electing the lawmakers and upholding the constitutional system are examples of the way we give consent....What counts...is that the people, if they truly dislike a certain law, have the means at their disposal to wipe it off the books." (Frank W. Fox, Clayne L. Pope, *America's Founding Heritage*, 3rd Ed., Provo: BYU Academic Publishing, 2007, p. 37.)

There are, then, different formulations as to the substantive aspects of the rule of law. But, for purposes of developing a "working definition" for use here, it is submitted that there are three ideas, in particular, that together well encompass the various other legitimate possibilities for inclusion. One such idea is the existence of transcendent moral law--a function of the sovereignty of God--to which man's powers, political and otherwise, are subject. Another is government by consent. A third such idea is justice.

The political philosophy enunciated in the Declaration of Independence is "founded on...the laws of nature and of nature's God, and of course presupposes the existence of a God, the moral ruler of the universe, and a rule of right and wrong, of just and unjust, binding upon man, preceding all institutions of human society and of government." (John Quincy Adams, *The Jubilee of the Constitution: A Discourse*, April 30, 1839, New York: Samuel Coleman, 1839, pp. 13-14.)

The Declaration of Independence, in the second of four contexts referencing God, affirms that "all men are created equal," and that "they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness," and that "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

Legitimate government, then, is government by "consent": the people as a whole--at least an overwhelming majority of consent-capable people--make known the conditions under which they will freely follow the rules that the rulers make for the coordination of social interaction, notwithstanding individuals' differing preferences respecting those rules.

"More than 200 years after the adoption of our Constitution and Bill of Rights, we Americans continue to enjoy a rich heritage of liberty under law….The American Experience demonstrates clearly how the rule of law ensures respect for the rights of individuals while establishing a solid foundation for responsible self-government. Our Constitution provides for the separation of powers within the Federal Government, including our independent judiciary, and reserves to the States, or to the people, those rights and powers that are not expressly delegated to the United States. The authority of the Federal Government comes entirely from the freely given consent of the people and is exercised only in accordance with public laws and due process. Indeed, the rule of law has endured in the United States because of the active and voluntary participation of our citizens at all levels of government, particularly the local level, and because of the deep respect that Americans have had historically for our legal system….The rule of law, the belief in freedom under the law, is a precious legacy--and our only means of preserving fairness and equality and justice." (George H.W. Bush, May 1, 1992.)

"For Jefferson, as for all the Founding Fathers, popular rule was inseparable from the rule of law." (Harry V. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War*, Lanham, Maryland: Rowman & Littlefield, 2000, p. 116.) "The relationship between the rule of law and liberal democracy is profound. The rule of law makes possible individual rights, which are at the core of democracy. A government's respect for the sovereign authority of the people and a constitution depends on its acceptance of law. Democracy includes institutions and processes that, although beyond the immediate domain of the legal system, are rooted in it. Basic elements of a modern market economy such as property rights and contracts are founded on the law and require competent third-party enforcement. Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy--regulatory mechanisms, tax systems, customs structures, monetary policy, and the like--would be unfair, inefficient, and opaque." (Thomas Carothers, Carnegie Endowment, "The Rule-of-Law Revival," *Foreign Affairs* 77, No. 2, March/April 1998, p. 95; *www.carnegieendowmwnt.org*, 9/10/12.)

A consequence of the divine endowment of inalienable rights is that the powers the people consent to grant to the people who will govern must be "just powers": *including* those needed to secure inalienable rights and *excluding* any that deny inalienable rights--for people may not alienate what is inalienable--and *either including or excluding* those that are neither essential nor offensive to inalienable rights. As stated by William Henry Harrison in his Inaugural Address (March 4, 1841):

> The broad foundation upon which our Constitution rests being the people--a breath of theirs having made, as a breath can unmake, change, or modify it--it can be assigned to none of the great divisions of government but to that of democracy....The majority of our citizens...possess a sovereignty with an amount of power precisely equal to that which has been granted to them by the parties of the national compact, and nothing beyond. We

> admit of no government by divine right, believing that so far as power is concerned the Beneficent Creator has made no distinction amongst men; that all are upon an equality, and that the only legitimate right to govern is an express grant of power from the governed. The Constitution of United States is the instrument containing this grant of power to the several departments composing the Government. On an examination of that instrument it will be found to contain declarations of power granted and of power withheld. The latter is also susceptible of division into power which the majority had the right to grant, but which they do not think proper to intrust to their agents, and that which they could not have granted, not being possessed by themselves. In other words, there are certain rights possessed by each individual American citizen which in his compact with the others he has never surrendered. Some of them, indeed, he is unable to surrender, being, in the language of our system, unalienable....These precious privileges, and those scarcely less important...the American citizen derives from no charter granted by his fellow-man. He claims them because he is himself a man, fashioned by the same Almighty hand as the rest of his species and entitled to a full share of the blessings with which He has endowed them. Notwithstanding the limited sovereignty possessed by the people of United States and the restricted grant of power to the Government which they have adopted, enough has been given to accomplish all the objects for which it was created.

"Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." (James Madison, *The Federalist*, No. 51.) "Justice is the fundamental law of society." (Thomas Jefferson, Letter to Du Pont De Nemours, 1816, in John P. Foley, ed., *The Jeffersonian Cyclopedia*, Funk & Wagnalls Company, 1900, No. 4224, p. 452, *books.google.com*, 9/10/12.) "The object of law is to secure justice." (Elizabeth Cady Stanton, Address on the Divorce Bill, 1861, in Daniel J. Boorstin, ed., *An American Primer*, New York: Mentor Books, 1968, p. 394.) "EQUAL JUSTICE UNDER LAW." "JUSTICE THE GUARDIAN OF LIBERTY." (Inscriptions on the U.S. Supreme Court Building, Washington, D.C., in Brian Burrell, *The Words We Live By*, New York: The Free Press, 1997, p. 220.)

"The equal and exact justice of which we boast as the underlying principle of our institutions should not be confined to the relations of our citizens to each other. The Government itself is under bond to the American people that in the exercise of its functions and powers it will deal with the body of our citizens in a manner scrupulously honest and fair and absolutely just. It has agreed that American citizenship shall be the only credential necessary to justify the claim of equality before the law, and that no condition in life shall give rise to discrimination in the treatment of the people by their Government." (Grover Cleveland, December 3, 1888.)

"The first requisite for the welfare of any community is justice; not merely legal justice, but ethical justice, moral justice, the kind of justice meant by the ordinary man when he says that he wishes fair play or a square deal. In order to get this justice it is absolutely necessary that there should be order; and there can be no order unless there is law, and unless the law is rigidly and honestly enforced." (Theodore Roosevelt, "Nationalism and the Judiciary," *The Outlook* Magazine, February 25, 1911, *www.theodore-roosevelt.com*, 9/13/12.)

"The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible." (American Bar Association, *ABA Model Code of Professional Responsibility*, Preamble, August 1980, *www.americanbar.org*, 9/13/12.)

President Nixon, in a speech to the National Conference on the Judiciary (March 11, 1971), spoke of how justice is achieved under the rule of law:

> Judge Learned Hand told of the day that he drove Justice Holmes to a Supreme Court session in a horse-drawn carriage. As he dropped the Justice off in front of the Capitol, Judge Learned Hand said, "Well, sir, goodbye. Do justice." Mr. Justice Holmes turned and said, most severely, "That is not my job. My job is to play the game according to the rules."
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> The point of that remark, the reason that Learned Hand repeated it after he had reached the pinnacle of respect in our profession, was this: Every judge, every attorney, every law enforcement official wants to "do justice." But the only way that can be accomplished, the only way justice can truly be done in any society, is for each member of that society to subject himself to the rule of law--neither to set himself above the law in the name of justice, nor to set himself outside the law in the name of justice.
>
> We shall become a genuinely just society only by "playing the game according to the rules" and, when the rules become outdated or are shown to be unfair, by lawfully and peaceably changing those rules.
>
> The genius of our system, the life force of the American way, is our ability to hold fast to the rules that we know to be right and to change the rules that we know to be wrong. In that regard, we would all do well to remember our constitutional roles: for the legislatures, to set forth the rules; for the judiciary, to interpret them; for the Executive, to carry them out.
>
> The American Revolution did not end two centuries ago; it is a living process. It must constantly be reexamined and reformed. At one and the same time, it is as unchanging as the spirit of laws and as changing as the needs of our people.
>
> We live in a time when headlines are made by those few who want to tear down our institutions, to those who say they defy the law. But we also live in a time when history is made by those who are willing to reform and rebuild our institutions--that can only be accomplished by those who respect the law.

It has been said that the best summary of the formal principles of legality was provided by Lon Fuller. (Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law*, Oxford: Oxford

University Press, 2000, p. 89.) Robert P. George ("Reason, Freedom, and Rule of Law: Their Significance in Western Thought," *www.clarionreview.org*, October 29, 2009, originally: *American Journal of Jurisprudence*, 2004, footnote omitted) has listed Fuller's eight principles of legality as follows:

> One of the signal achievements of legal philosophy in the twentieth century was Lon L. Fuller's explication of the content of the rule of law. Reflecting on law as a "purposive" enterprise--the subjecting of human behavior to the governance of rules--Fuller identified eight constitutive elements of legality. These are (1) the prospectivity (i.e., non-retroactivity) of legal rules; (2) the absence of impediments to compliance with the rules by those subject to them; (3) the promulgation of the rules; (4) their clarity; (5) their coherence with one another; (6) their constancy over time; (7) their generality of application; and (8) the congruence between official action and declared rule. Irrespective of whether a legal system (or a body of law) is good or bad, that is to say, substantively just or unjust, to the extent that it truly is a legal system (or a body of law) it will, to some significant degree, exemplify these elements.
>
> It was a mark of Fuller's sophistication that he noticed that the rule of law is a matter of degree. Its constitutive elements are exemplified to a greater or lesser extent by actual legal systems or bodies of law. Legal systems exemplify the rule of law to the extent that the rules constituting them are prospective, susceptible of being complied with, promulgated, clear, and so forth.

One of these essential qualities particularly relevant to the illegal immigration issue is prospectivity. Generally, legislation must be prospective and not retrospective. Retrospective laws have been defined as "laws which *alter the future legal consequences of past actions and events*." They "attach new consequences to actions or events that have already occurred." (Charles Sampford, *Retrospectivity and the Rule of Law*, Oxford University Press, 2006, pp. 22-23.) There are circumstances in which retroactive laws are warranted, as in the case of a legislative mistake that obviously needs correction (Lon Fuller, *The Morality of Law*, New Haven: Yale University Press, 1964, pp. 51-55), but as a general rule they are to be avoided.

Professor Fuller focuses upon the primary objection to retrospective legislation in saying (*The Morality of Law*, p. 80, footnotes omitted): "The evil of the retrospective law arises because men may have acted upon the previous state of the law and actions thus taken may be frustrated or made unexpectedly burdensome by a backward looking alteration in their legal effect." But he noted a broader problem in saying that "retroactive legislation...undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change." (*The Morality of Law*, p. 39.)

Punishing acts that were legal at the time they were performed is particularly unjust to those who are punished. Legalizing acts that were illegal at the time they were committed is unjust, albeit probably to a lesser degree, to those who paid the cost of obeying the subject laws--a cost which the now-pardoned lawbreakers never had to pay.

Giving attention to the effect of retrospective (or retroactive) laws on individuals does not exhaust our responsibility. Even absent an effect on individuals, there is reason for concern. Fuller asserts that "a disregard of the principles of legality may inflict damage on the institution of law itself, even though no immediate harm is done to any individual....If we view the law as providing guideposts for human interaction, we shall be able to see that any infringement of the demands of legality tends to undermine men's confidence in, and a respect for, law generally." (*The Morality of Law*, p. 221.) Punishing acts that were legal at the time they were performed and legalizing acts that were illegal at the time they were committed are both likely to discredit the legal system.

"I agree in an almost unlimited condemnation of retrospective laws. The few instances of wrong which they redress are so overweighed by the insecurity they draw over all property and even over life itself, and by the atrocious violations of both to which they lead, that it is better to live under the evil than the remedy." (Thomas Jefferson, Official Opinion, 1790, in John P. Foley, ed., *The Jeffersonian Cyclopedia*, Funk & Wagnalls Company, 1900, No. 4517, p. 482, *books.google.com*, 9/10/12.)

8. We affirm the centrality of the rule of law to the American Creed. We reverence the Declaration of Independence and the Constitution of the United States, and we reverence our nation's Founders and the heroes who for more than two centuries have sustained the Founders' achievement. We believe that American political philosophy, especially as embodied in the founding documents, may be justly understood to have four great themes, or to be structured with four essential pillars: God/divine sovereignty, Freedom/human rights, Democracy/consent of the governed, and Law/the rule of law. Government by law ranks among "our great civilized ideas: individual liberty, representative government, the rule of law under God." Of all the contributions that America has made to human progress, there may be none that is more important than the advance of the ideal of law as a check upon power.

"Americans, it is often said, are a people defined by and united by their commitment to the political principles of liberty, equality, democracy, individualism, human rights, the rule of law, and private property embodied in the American Creed." (Samuel P. Huntington, *Who Are We? The Challenges to America's National Identity*, New York: Simon & Shuster Paperbacks, 2004, p. 46.)

The centrality of the rule of law to the American Creed is suggested in Paul Johnson, *A History of the American People* (1999) (*books.google.com*, 8/6/12): "Next to religion, the concept of the rule of law was the biggest single force in creating the political civilization of the colonies. This was something they shared with all Englishmen. The law was not just necessary--essential to any civil society--it was noble. What happened in courts and assemblies on weekdays was the secular equivalent of what happened in church on Sundays. The rule of law in England, as Americans were taught in their schools, went back even beyond Magna Carta, to Anglo-Saxon times, to the laws of King Alfred and the Witanmagots, the ancient precursor of Massachusetts' Assembly and Virginia's House of Burgesses….Now, in its arrogance and complacency, the English parliament, forgetting the lessons of the past, was trying to impose the Norman Yoke on

free-born Americans, to take away their cherished rule of law and undermine the rights they enjoyed under it with as much justice as any Englishman!"

In the 1830s, Alexis de Tocqueville and Gustave de Beaumont saw a paradox between "the most extended liberty" characteristic of American society and the rigor and discipline of the American penitentiary. A legal historian says "this was not, perhaps, a paradox at all. Here was a society embarked on what seemed at the time a radical experiment: popular government. All obvious forms of authority had been dethroned. There was no monarchy, no established church, no aristocracy. Instead there was only law. Essentially, people were supposed to govern themselves; the law entrusted them with power. Not everybody could handle the freedom, the power, the trust. Something had to be done about these people. One rotten apple spoils the barrel. Criminals, through their criminality, betrayed the American experiment. The strict regime of the penitentiary was what they needed--and deserved." (Lawrence M. Friedman, *A History of American Law*, Third Edition, New York: Simon & Shuster, 2005, p. 221.)

American political theory may be justly understood to have four great themes, or to be structured with four essential pillars: GOD/divine sovereignty, FREEDOM/human rights, DEMOCRACY/consent of the governed, and LAW/the rule of law. Our beliefs on these subjects answer very basic questions: beliefs respecting God explain life's destiny and purpose, the grounds for morality, and the meaning of freedom; freedom concerns the purpose of government; democracy concerns the kind of government; law concerns the method of government. Government by law ranks among what Ronald Reagan called "our great civilized ideas: individual liberty, representative government, the rule of law under God." (January 26, 1982.)

"We are a religious people whose institutions presuppose a Supreme Being." (Justice William O. Douglas, *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).)

"Religion, at its fundamental level, offers a set of postulates about the universe and man's place therein, including a theory of human nature, its origin, its potentials, and its destination. Religion deals with the meaning and purpose of life, with man's chief good, and the meaning of right and wrong. Thus, religious axioms and premises provide the basic materials political philosophy works with. The political theorist must assume that men and women are thus and so, before he can figure out what sort of social and legal arrangements provide the fittest habitat for such creatures as we humans are. So, some religion lies at the base of every social order." (Edmund A. Opitz, *Religion: Foundation of the Free Society*, Irvington-on-Hudson, NY: The Foundation for Economic Education, Inc., 1994, p. 13.)

"In American political theory, sovereignty rests, of course, with the people, but implicitly, and often explicitly, the ultimate sovereignty has been attributed to God. This is the meaning of the motto, 'In God we trust,' as well as the inclusion of the phrase 'under God' in the pledge to the flag. What difference does it make that sovereignty belongs to God? Though the will of the people as expressed in majority vote is carefully institutionalized as the operative source of political authority, it is deprived of an ultimate significance. The will of the people is not itself the criterion of right and wrong. There is a higher criterion in terms of which this will can be judged; it is possible that the people may be wrong." (Robert N. Bellah, "Civil Religion in

America," in William G. McLoughlin, Robert N. Bellah, *Religion in America*, Boston: Beacon Press, 1968, p. 6.)

"The doctrine of natural law and natural rights enshrined in the Declaration is a doctrine of natural *and* divine right....The American people, in declaring themselves independent of Great Britain and of any mortal power, did so in accordance with laws of nature that were God's laws, to which they declared themselves subject in the very act of independence....For the Founding Fathers and for Lincoln, the attempt to find the nearest earthly approximation to divine rule, to 'reason unaffected by desire,' is by means of the rule of law. The republican form of government, embodying the rule of law, is grounded in the idea of human equality. The proposition that all men are *created* equal implies...a right that is both natural and divine. This is given emphasis in the assertion that all human beings are endowed *by their Creator* with the rights that belong to them by nature. Republican government understands itself to be in accordance with a natural order that is in itself in harmony with the divine government of the universe." (Harry V. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War*, Lanham, Maryland: Rowman & Littlefield Publishers, 2000, pp. 122-123, footnotes omitted.)

"Is not government founded on *grace?* No. Nor on *force?* No. Nor on *compact?* Nor *property?* Not altogether on either. Has it *any* solid foundation? any chief corner stone, but what accident, chance or confusion may lay one moment and destroy the next? I think it has an everlasting foundation in the *unchangeable will of* GOD, the author of nature, whose laws never vary. The same omniscient, omnipotent, infinitely good and gracious Creator of the universe, who has been pleased to make it necessary that what we call matter should *gravitate*, for the celestial bodies to roll round their axes, dance their orbits and perform their various revolutions in that beautiful order and concert, which we all admire, has made it *equally* necessary that from *Adam* and *Eve* to these degenerate days, the different sexes should sweetly *attract* each other, form societies of *single* families, of which *larger* bodies and communities are as naturally, mechanically, and necessarily combined, as the dew of Heaven and soft distilling rain is collected by the all-enlivening heat of the sun. *Government* is therefore most evidently founded *on the necessities of our nature*. It is by no means an *arbitrary* thing, depending merely on *compact* or *human will* for its existence….Government is founded *immediately* on the necessities of human nature, and *ultimately* on the will of God, the author of nature; who has not left it to men in general to choose, whether they will be members of society or not, but at the hazard of their senses if not their lives." (James Otis, *The Rights of The British Colonies Asserted and Proved*, Boston, New-England, Printed, London, Reprinted: J. Almon, 1764, pp. 10-11, 15, *files.libertyfund.org*, 7/25/12.)

"American democracy is rooted in the Judeo-Christian tradition and in British history. Democracies emphasize the value of the *individual*, and early American colonists emphasized *liberty* over other goals of government." (Byron M. Jackson, *Encyclopedia of American Public Policy*, Santa Barbara: ABC-CLIO, 1999, p. xvi.)

John Adams, in a letter dated June 28, 1813 to Thomas Jefferson, recalled the general principles of the Founding Fathers who adopted the Declaration of Independence (excerpted from Lester J. Cappon, ed., *The Adams-Jefferson Letters: The Complete Correspondence between Thomas*

Jefferson and Abigail and John Adams, The University of North Carolina Press, 1959, by the National Humanities Center, *nationalhumanitiescenter.org*, 9/19/12):

> The *general Principles*, on which the Fathers Atchieved Independence, were the only Principles in which that beautiful Assembly of young Gentlemen could Unite....And what were these *general Principles*? I answer, the general Principles of Christianity, in which all those Sects were United: And the *general Principles* of English and American Liberty, in which all those young Men United, and which had United all Parties in America, in Majorities sufficient to assert and maintain her Independence.
>
> Now I will avow, that I then believed, and now believe, that those general Principles of Christianity, are as eternal and immutable, as the Existence and Attributes of God; and that those Principles of Liberty, are as unalterable as human Nature and our terrestrial, mundane System. I could therefore safely say, consistently with all my then and present Information, that I believed they would never make Discoveries in contradiction to these *general Principles*. In favor of these general Principles in Phylosophy, Religion and Government, I could fill Sheets of quotations from Frederick of Prussia, from Hume, Gibbon, Bolingbroke, Reausseau and Voltaire, as well as Neuton and Locke: not to mention thousands of Divines and Philosophers of inferior Fame.

"Americans so completely confound Christianity with liberty that it is almost impossible to induce them to think of one without the other. For them, moreover, this is by no means a sterile belief, a legacy of the past that lies moldering in the depths of the soul, but a vital article of faith." (Alexis de Tocqueville, 1835, *Tocqueville: Democracy in America*, Translated by Arthur Goldhammer, New York: The Library of America, 2004, p. 338 (Vol. I, Part II, Chapter 9: On the Principal Causes That Tend to Maintain the Democratic Republic in the United States).)

"And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?" (Thomas Jefferson, *Notes on Virginia*, Q. XVIII, 1785.)

"Despotism can do without faith, but liberty cannot....How can society fail to perish if, as political bonds are loosened, moral bonds are not tightened? And what is to be done with a people that is its own master, if it is not obedient to God?" (Alexis de Tocqueville, 1835, *Tocqueville: Democracy in America*, Translated by Arthur Goldhammer, New York: The Library of America, 2004, p. 340 (Vol. I, Part II, Chapter 9: On the Principal Causes That Tend to Maintain the Democratic Republic in the United States).)

"Now the *virtue* which had been infused into the Constitution of the United States, and was to give to its vital existence the stability and duration to which it was destined, was no other than the consecration of those abstract principles which had been first proclaimed in the Declaration of Independence--namely, the self-evident truths of the natural and unalienable rights of man, of the indefeasible constituent and dissolvent sovereignty of the people, always subordinate to a rule of right and wrong, and always responsible to the Supreme Ruler of the universe for the *rightful* exercise of that sovereign, constituent, and dissolvent power." (John Quincy Adams,

The Jubilee of the Constitution: A Discourse, April 30, 1839, New York: Samuel Colman, 1839, p. 54.)

Our leaders and statesmen acknowledge a "Supreme Ruler of the Universe" (George Washington, Eighth Annual Address, December 7, 1796); a "Being who is supreme over all" (John Adams, Inaugural Address, 1797); an "Infinite Power which rules the destinies of the universe" (Thomas Jefferson, First Inaugural Address, 1801); a "Great Sovereign of the Universe" (James Madison, A Proclamation, November 16, 1814); a "great Ruler of nations" (Andrew Jackson, The Nullification Proclamation, December 10, 1832); a "Supreme Ruler of the Universe" (John Tyler, Fourth Annual Message, December 3, 1844); an "Almighty Ruler of the Universe" (James K. Polk, Inaugural Address, 1845); an "Almighty Ruler of Nations" (Abraham Lincoln, First Inaugural Address, 1861).

"Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign." (James Madison, *A Memorial and Remonstrance* (1785), in Robert S. Alley, *James Madison on Religious Liberty*, New York: Prometheus Books, 1985, p. 56.) Political man is thus possessed of only a "limited sovereignty." (William Henry Harrison, March 4, 1841.)

"But where says some is the King of America? I'll tell you Friend, he reigns above, and doth not make havoc of mankind like the Royal Brute of Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law *ought* to be King; and there ought to be no other." (Thomas Paine, *Common Sense*, 1776.)

"America is not going to abandon its principles or desert its ideals. The foundation on which they are built will remain firm....It seems to me perfectly plain that the authority of law, the right to equality, liberty and property, under American institutions, have for their foundation reverence for God....The institutions of our country stand justified both in reason and in experience. I am aware that they will continue to be assailed. But I know they will continue to stand. We may perish, but they will endure. They are founded on the Rock of Ages." (Calvin Coolidge, September 21, 1924.)

"In large measure, the beginnings of the modern concept of human rights go back to the laws and the prophets of the Judeo-Christian traditions. I've been steeped in the Bible since early childhood, and I believe that anyone who reads the ancient words of the Old Testament with both sensitivity and care will find there the idea of government as something based on a voluntary covenant rather than force--the idea of equality before the law and the supremacy of law over the whims of any ruler; the idea of the dignity of the individual human being and also of the individual conscience; the idea of service to the poor and to the oppressed; the ideas of self-

government and tolerance and of nations living together in peace, despite differences of belief." (Jimmy Carter, November 2, 1977.)

"Democracy today, as reflected in the government structures created by national constitutions, requires decision making based on majority rule, with protection for minority rights and individual freedoms and guarantees to ensure state protection of life, liberty, and property, as well as access to the country's political processes. Above all, democracy requires strict adherence to the rule of law to ensure rational government. Key concepts that undergird democracy are individualism, liberty, equality, and fraternity." ("Constitutionalism," in Robert L. Maddex, *The Illustrated Dictionary of Constitutional Concepts*, Washington, D.C.: Congressional Quarterly Inc., 1996, p. 68.)

"The institution makers of this period [1776 to 1787] were able to draw on a heritage of political wisdom and experience obtained from the mother country and from 180 years of political development between the founding of the Virginia colony and the Constitutional Convention of 1787. It has been said that the American experience is unique in 'the continuity of its political and constitutional aspects with the experience and institutions of the past.' Providing this continuity were the concepts of *rule of law* and *self-government*, which formed the core of the American consensus and the foundation for our political development." (Emmette S. Redford, et al., *Politics and Government in the United States*, Harcourt, Brace & World, Inc., 1968, p. 44, footnote omitted.)

"Liberty is the hallmark of the American experience--liberty from the tyranny of foreign domination and liberty from tyranny at home. To ensure our domestic liberty, based on our faith that all men are endowed by their Creator with certain unalienable rights, the Constitution of the United States of America guarantees certain rights and privileges to every citizen. Among those are: freedom of speech, freedom of the press, freedom of religion, the right to assemble and petition, and the right to due process of law. Throughout our history, the preservation of those individual rights has been dependent upon our dedication to the rule of law." (Gerald R. Ford, March 1, 1976.)

"On September 17, 1787, in Independence Hall, Philadelphia, our Founding Fathers adopted the Constitution of the United States. With this great document as its cornerstone, our country has become the finest example in all history of the principle of government by law, in which every individual is guaranteed certain inalienable rights. The strong beliefs of its authors in the worth of the individual and the rights to be enjoyed by all citizens have made the Constitution not only an enduring document but one which finds new life with the passing of years and continues to inspire freedom-seeking people all over the world." (Jimmy Carter, July 23, 1979.)

"The crucial role of the law in American history has been apparent to all observers, from Alexis de Tocqueville to the present day. The true American contribution to human progress has not been in technology, economics, or culture; it is been the development of the notion of law as a check upon power. American society has been dominated by law as has no other society in history. Struggles over power that in other countries have called forth regiments of troops, in this country call forth battalions of lawyers." (Bernard Schwartz, *The American Heritage History of The Law in America*, New York: McGraw-Hill Book Company, 1974, pp. 7-8.)

9. Law subject to the rule of law is the mechanism of genuine democracy: it is the basic means of doing self-government, the principal instrument by which we guide cooperation toward the common good so as to live together in harmony "with liberty and justice for all."

"The organization of every free government must be adapted to the duties it has to perform; and the government will be most free in which the organization is most perfect, and the best security provided for the strict observance of the rules prescribed. The prominent duties of a government consist in the enactment of laws, in pronouncing judgment on those laws, and in the execution of them." (James Monroe, *The People The Sovereigns*, Philadelphia: J.B. Lippincott & Co., 1867, p. 44; *books.google.com*, 9/10/12.)

"In a government framed for durable liberty, not less regard must be paid to giving the magistrate a proper degree of authority, to make and execute the laws with vigor, than to guard against encroachments upon the rights of the community. As too much power leads to despotism, too little leads to anarchy, and both, eventually, to the ruin of the people." (Alexander Hamilton, *The Continentalist*, 1781-1782, quoted in Alpheus Thomas Mason, Richard H. Leach, *In Quest of Freedom: American Political Thought and Practice*, Eaglewood Cliffs, NJ: Prentice-Hall, Inc., 1959, p. 78.)

"In the compass of thirty-six years since this great national covenant was instituted a body of laws enacted under its authority and in conformity with its provisions has unfolded its powers and carried into practical operation its effective energies....Liberty and law have marched hand in hand." (John Quincy Adams, March 4, 1825.)

President Kennedy said "the educated citizen has an obligation to uphold the law. This is the obligation of every citizen in a free and peaceful society--but the educated citizen has a special responsibility by the virtue of his greater understanding. For whether he has ever studied history or current events, ethics or civics, the rules of a profession or the tools of a trade, he knows that only a respect for the law makes it possible for free men to dwell together in peace and progress. He knows that law is the adhesive force in the cement of society, creating order out of chaos and coherence in place of anarchy. He knows that for one man to defy a law or court order he does not like is to invite others to defy those which they do not like, leading to a breakdown of all justice and all order. He knows, too, that every fellowman is entitled to be regarded with decency and treated with dignity. Any educated citizen who seeks to subvert the law, to suppress freedom, or to subject other human beings to acts that are less than human, degrades his heritage, ignores his learning, and betrays his obligation. Certain other societies may respect the rule of force--we respect the rule of law." (May 18, 1963.)

"Civilization depends on obedience being normal and disobedience exceptional; otherwise, the fundamental order undergirding a cultivated life would break down." (Glenn Tinder, *Political Thinking; The Perennial Questions*, 6th Edition, New York: HarperCollins College Publishers, 1995, p. 130.)

"There can be no freedom without order. There can be no order without authority; and authority that is impotent or hesitant in the face of intimidation, crime, and violence, cannot endure. The rule of law is all that stands between civilization and barbarism, for, as Locke said, 'where there is no law, there is no freedom.' Most important, the purpose of law is not to diminish but to enlarge freedom." (Margaret Thatcher, "Reason and Religion: The Moral Foundations of Freedom," The James Bryce Lecture, September 24, 1996, *www.margaretthatcher.org*, 8/6/12.)

"When each citizen submits himself to the authority of law he does not thereby decrease his independence or freedom, but rather increases it. By recognizing that he is a part of a larger body which is banded together for a common purpose, he becomes more than an individual, he rises to a new dignity of citizenship. Instead of finding himself restricted and confined by rendering obedience to public law, he finds himself protected and defended and in the exercise of increased and increasing rights. It is true that as civilization becomes more complex it is necessary to surrender more and more of the freedom of action and live more and more according to the rule of public regulation, but it is also true that the rewards and the privileges which come to a member of organized society increase in a still greater proportion. Primitive life has its freedom and its attraction, but the observance of the restrictions of modern civilization enhances the privileges of living a thousand fold." (Calvin Coolidge, May 30, 1924.)

President Kennedy said "law is the strongest link between man and freedom, and by strengthening the rule of law we strengthen freedom in our own country and contribute by example to the goal of justice under law for all mankind." (April 7, 1961.)

10. Law functions--it results in the compliance with democratic law that constitutes ordered liberty--through two chief mechanisms, or motivators: (1) moral respect for the law, and (2) enforcement of the law. The American political tradition and its underlying religious tradition hold that each of us has a serious moral obligation to obey the law. Our nation's Founders and statesmen insisted that each of us has a duty of respect or reverence for the law. No one is above the law. Everyone has a duty to obey the law, and a right to obedience of the law by others.

"Government is frequently and aptly classed under two descriptions--a government of FORCE, and a government of LAWS; the first is the definition of despotism--the last, of liberty. But how can a government of laws exist when the laws are disrespected and disobeyed? Government supposes control. It is that POWER by which individuals in society are kept from doing injury to each other, and are brought to co-operate to a common end. The instruments by which it must act are either the AUTHORITY of the laws or FORCE. If the first be destroyed, the last must be substituted; and where this becomes the ordinary instrument of government, there is an end to liberty! Those, therefore, who preach doctrines, or set examples which undermine or subvert the authority of the laws, lead us from freedom to slavery; they incapacitate us for a GOVERNMENT of LAWS, and consequently prepare the way for one of FORCE, for mankind must have GOVERNMENT OF ONE SORT OR ANOTHER." (Alexander Hamilton, *To the People of the United States*, 1795, *oll.libertyfund.org*, 9/10/12.)

"Now there are two ways, and two ways only by which men can be governed in society; the one by physical force; the other by religious and moral principles pervading the community, guiding

the conscience, enlightening the reason, softening the prejudices, and calming the passions of the multitude. Physical force is the chief instrument by which mankind have heretofore been governed; but this always has been, and I trust will always continue to be inapplicable in our case. My trust, however, in this respect, springs entirely from a confidence, that the Christian religion will continue as heretofore to exert upon us, its tranquilizing, purifying, elevating and controlling efficacy. No power less efficacious than Christianity, can permanently maintain the public tranquillity of the country, and the authority of law." (Rev. Jasper Adams, *The Relation of Christianity to Civil Government in the United States: A Sermon*, Charleston: A.E. Miller, 1833, *books.google.com*, 8/18/12.)

Shortly before the convening of the Constitutional Convention in Philadelphia, the Reverend Elizur Goodrich, who years before argued that participation in the Revolution was a religious duty, asserted in a sermon delivered before Connecticut's state legislature ("The Principles of Civil Union and Happiness Considered and Recommended," Hartford, May 10, 1787, in Ellis Sandoz, ed., *Political Sermons of the American Founding Era, 1730-1805*, Second Edition, Vol. 1, Indianapolis: Liberty Fund, 1998, pp. 921-923) that we "owe obedience and subjection to all rulers in the execution of their office, according to the laws of the land," and ultimately concluded the point by quoting one of the New Testament's primary passages on civil government (Romans 13:1-7):

> If we willfully transgress the laws of society and resist the just demands of civil authority, we do an injury not so much to the magistrate, as to the community, and expose ourselves to the high displeasure of Almighty GOD, whose authority is above all human constitutions, and can never be annulled by the decrees of kings and nobles, the consults of senates, or the joint consent of a people.
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> This is the sentiment of a great and good man, who well knew the rights of human nature, and the privileges of a subject, which he had the courage to plead before kings and magistrates; I mean the apostle Paul, who, illuminated by the knowledge of christianity, and inspired with the benevolence of the gospel, the slave of no party, in the greatest transports of zeal, spoke only the words of truth and soberness. The doctrine he delivered was not the effect of servile flattery and shameful cowardice: It proceeded not from the spirit of fear, but of love and a sound mind: It is so expressed as at once to declare the great end of civil government, the duty of the magistrate, and the reasonableness of the subjects obedience. It contains both an effectual guard against supporting tyranny and oppression, and a most serious and solemn warning against lawless rebellion, anarchy and confusion: It is delivered as a divine injunction upon christians, in a letter to the saints at Rome, and is profitable for all ages, and especially reasonable for the present.
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> "Let every soul be subject to the higher powers. For there is no power but of GOD. The powers that be are ordained of GOD. Whosoever therefore resisteth the power, resisteth the ordinance of GOD, and they that resist shall receive judgment to themselves. For rulers are not a terror to good works, but to the evil. Wouldst thou then not be afraid of the power? Do that which is good, and thou shalt have praise of the same. For he is the minister of GOD to thee for good. But if thou dost evil, be afraid, for he beareth not the

> sword in vain: for he is the minister of GOD, a revenger to execute wrath, upon him that doeth evil. Wherefore ye must needs be subject, not only for wrath, but for conscience sake. For, for this cause pay ye tribute also: for they are GOD's ministers, attending continually upon this very thing. Render therefore to all their dues: tribute to whom tribute is due; custom, to whom custom; fear to whom fear; honor to whom honor."

"*GOD hath set the world* upon the governments and rulers, whom he has made the pillars of it.... See the divine wisdom and goodness in ordering and establishing a magistracy and government in the world. It is one of the many great instances, wherein the Supream Governour of the world has taken care for the universal and perpetual weal of it....These are some of the just and true principles of the Protestant religion, according to the oracles of GOD in this matter: Rom. xiii, 1-5. *Let every Soul be subject unto the higher Powers: For there is no Power but of GOD; the Powers that be are ordained of GOD: Whosoever therefore resisteth the Power, resisteth the Ordinance of GOD. Wherefore ye must needs be subject, not only for Wrath* (or fear of punishment) *but also for Conscience sake. Render therefore unto all their Dues, Tribute to whom Tribute is due, Custom to whom Custom, Fear to whom Fear, and Honour to whom Honour.* Tit. iii. 1. *Put them in mind to be subject to Principalities and Powers, to obey Magistrates.* I Pet. ii. 13, 14, 15, 16, 17. *Submit your selves to every Ordinance of Man for the Lord's sake; whether it be to the King as supream, or unto Governours as unto them that are sent by Him: For so is the Will of GOD.* Let us very gratefully observe these precepts, for they are very graciously given us for the good of the world." (Rev. Benjamin Coleman, "Government the Pillar of the Earth, a Sermon," Boston, August 13, 1730, in Ellis Sandoz, ed., *Political Sermons of the American Founding Era, 1730-1805*, Second Edition, Vol. 1, Indianapolis: Liberty Fund, 1998, pp. 19-21.)

"Obey the public authorities, not only for wrath but also for conscience sake. Show your attachment to the institutions of our beloved country by prompt compliance with all their requirements, and by the cautious jealousy with which you guard against the least deviation from the rules which they prescribe for the maintenance of public order and private rights." (The Bishops of the Catholic Church in the United States, *The Pastoral Letter of 1852*, in Rev. Peter Guilday, *The National Pastorals of the American Hierarchy (1792-1919)*, Washington, D.C.: National Catholic Welfare Council, 1923, p. 192.) "The Church, indeed, does not proclaim the absolute and entire independence of the Civil Power, because it teaches with the Apostle, that 'all Power is from God;' that the temporal magistrate is His minister, and that the power of the sword he wields is a delegated exercise of authority committed to him from on high. For the children of the Church obedience to the Civil Power is not a submission to force which may not be resisted; nor merely the compliance with a condition for peace and security; but a religious duty founded on obedience to God, by whose authority that Civil Magistrate exercises his power. This power, however, as subordinate and delegated, must always be exercised agreeably to God's Law." (The Bishops of the Catholic Church in the United States, *The Pastoral Letter of 1866*, in Rev. Peter Guilday, *The National Pastorals of the American Hierarchy (1792-1919)*, Washington, D.C.: National Catholic Welfare Council, 1923, p. 205.)

Our Founders and statesmen insisted upon what Washington called "inviolable respect to the laws" (January 8, 1790), what Jefferson called "a reverence for law" (Letter to John B. Colvin, 1810), what Madison (*The Federalist*, No. 49) and Lincoln (January 27, 1838) called "reverence

for the laws," what Theodore Roosevelt (December 3, 1906) and Franklin D. Roosevelt (September 27, 1934) and Dwight D. Eisenhower (September 24, 1957) and John F. Kennedy (September 12, 1963) and Gerald Ford (April 25, 1975) and Ronald Reagan (August 9, 1988) called "respect for law."

"If it were to be asked, What is the most sacred duty, and the greatest source of security in a republic? the answer would be, An inviolable respect for the Constitution and laws--the first growing out of the last." (Alexander Hamilton, *To the People of the United States*, 1795, *oll.libertyfund.org*, 9/10/12.)

"This Government, the offspring of your own choice, uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and your support. Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true liberty. The basis of our political systems is the right of the people to make and to alter their constitutions of government. But the constitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all. The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government." (George Washington, *Farewell Address*, 1796.)

"Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others." (Abraham Lincoln, January 27, 1838.)

"The one all-important element in good citizenship in our country is obedience to law." (Theodore Roosevelt, September 1, 1895.)

"No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor." (Theodore Roosevelt, December 7, 1903.)

"The lesson of obedience to law and government and political self-restraint and discipline should be an easy one to teach in schools and to exemplify. Respect for authority can be lost by lack of discipline and can be strengthened by its exercise. Liberty, abiding for each person, is impossible unless it be ordered liberty. Without law and conformity to it, we shall have license and not law, and anarchy, inequality and tyranny, and not liberty. In no respect do lovers of America feel more concern than in the outbursts of lawlessness, not so much in personal crime, but in the manifestation of the mob spirit and indifference to the enforcement of law. Why can we not surround our youth with the atmosphere of respect for, and obedience to, authority? That is self-government. Without it, popular government is a failure, and our constitutional system is a hollow mockery." (William Howard Taft, "Liberty under Law," David H. Burton, ed., *William Howard Taft: Essential Writings and Addresses*, Madison, Teaneck, NJ: Fairleigh Dickenson University Press, 2009, pp. 328-329.)

"In a republic the first rule for the guidance of the citizen is obedience to law....Those who want their rights respected under the Constitution and the law ought to set the example themselves of observing the Constitution and the law....Those who disregard the rules of society are not exhibiting a superior intelligence, are not promoting freedom and independence, are not following the path of civilization, but are displaying the traits of ignorance, of servitude, of savagery, and treading the way that leads back to the jungle." (Calvin Coolidge, March 4, 1925.)

"Now as President of the United States, I have the most honorable and the greatest job in the world--the greatest position that can come to any man on earth. I am invested with certain great powers by the Constitution of the United States in the operation of the Government of the United States. But I was put into this place by the people of the United States. I am the servant of the people. And in the first place, I am a citizen of this great country. And as a citizen it is my duty as President of the United States to be exceedingly careful in obedience to the Constitution and the laws of this great Nation. I believe that as President it is necessary for me to be more careful in obeying the laws than for any other person to be careful. I never infringe a traffic rule. I never exercise the prerogatives which I sometimes have of going through red lights. I never exercise the prerogative of taking advantage of my position as President of the United States, because I believe, first, that I am a citizen, and that as a citizen I ought to obey the laws first and foremost." (Harry S. Truman, February 15, 1950.)

President Kennedy said "our nation is founded on the principle that observance of the law is the eternal safeguard of liberty and defiance of the law is the surest road to tyranny. The law which we obey includes the final rulings of the courts, as well as the enactments of our legislative bodies. Even among law-abiding men few laws are universally loved, but they are uniformly respected and not resisted. Americans are free, in short, to disagree with the law but not to disobey it. For in a government of laws and not of men, no man, however prominent or powerful, and no mob, however unruly or boisterous, is entitled to defy a court of law." (September 30, 1962.)

"America has always been a nation of reformers. And we have always been a people who knew and who accepted the responsibilities that that role demands. To be a reformer is to be responsible. It is to be a remaker--not a wrecker--of what man has made. It is to be a restorer--not a destroyer--of truth and good. It is, beyond all else, to respect the laws of society--to rebuild society by changing laws, yes, by improving laws, yes, by using the laws--lest we accidentally or willfully weaken the foundations of law and bring all that we have achieved crashing down upon our heads." (Lyndon B. Johnson, July 26, 1967.)

In our society, respect for the law plays a much greater role in maintaining social order than threats and applications of force by law enforcement authorities. "The police can't be everywhere at once, and so for societies to function properly people need to be willing to obey the law by choice rather than by threat of sanctions." (Danny Oppenheimer, Mike Edwards, *Democracy Despite Itself*, Cambridge: The MIT Press, 2012, p. 136.)

Per Richard Vetterli and Gary Bryner, *In Search of the Republic: Public Virtue and the Roots of American Government* (Totowa, NJ: Rowman & Littlefield, 1987, p. 4-7, footnotes omitted):

> The Founders believed that virtue was a practical necessity for a people determined to govern themselves. More than the classical notions that emphasized such ideas as patriotism and willingness to fight and die for the state, public virtue represented voluntary self-restraint, a commitment to the moral social order, honesty and obedience to law, benevolence, and a willingness to respect the unwritten rules and norms of social life. Whether this was a result of fear of God's wrath and judgment, or a pure love of others did not particularly matter to the polity as a whole. It was *assumed* that there was sufficient virtue to make a system based on individual liberty work. If there was insufficient virtue, then order would have to be imposed by force and coercion, by pervasive governmental intervention in individuals' lives. The Founders clearly recognized that contradiction and their whole effort in forming a government assumed it could be avoided....
>
> The idea of the necessity of virtue--developed as a "modern" doctrine and practice from an amalgam of classical, medieval, Renaissance, Reformation and biblical concepts--was commonplace. Out of this metamorphosis came the belief that virtue and morality--specifically biblical *morality*--were synonymous, although they were sometimes referred to as separate concepts....
>
> The American Founders were aware of the problems of "democracy" that had plagued the ancient Greeks and had resigned themselves to the reality that they could learn little of positive value from them. They had come to the conclusion that classical philosophy had relied too heavily on the expectation of the consistency of stringent virtuous behavior, devoid of any of self-interest. Their understanding of the nature of man reflected a profound awareness of his selfishness and aggressiveness. Nevertheless, they believed that man had certain redeeming qualities, that he had the potential for self-government. The Founders believed that the "auxiliary precautions" they had devised, *combined* with, rather than replacing, individual virtue, might just make it all possible. They also believed that no structure of government in a republic would long survive the absence of virtue in the people. They believed that their efforts might decide once and for all if self-government was even possible.
>
> While some of the colonial thinkers apparently believed that virtue could be inculcated through reason, most thought its primary source to be in religion. Yet, the Founders were vigorously opposed to establishing a state church; their concern was with freedom of conscience and religion as a fundamental right for all Americans to enjoy. To a substantial degree, they saw virtue as a product of the general Judeo-Christian beliefs that permeated the colonies, and of organized religion and family life. Virtue was to be privately developed and nurtured, the state itself was not to be responsible for it. Since general Christianity and the different churches were already viewed as a primary source of virtue, government need only keep from interfering in these areas. There was a clear and fundamental recognition of the importance of religion and its relationship with republican government, as reflected in legislation enacted by the first congresses....

"That love of order and obedience to the laws, which so remarkably characterize the citizens of the United States, are sure pledges of internal tranquility." (Thomas Jefferson, Letter to

Benjamin Waring, March 1801, in John P. Foley, ed., *The Jeffersonian Cyclopedia*, Funk & Wagnalls Company, 1900, No. 4514, p. 481, *books.google.com*, 9/10/12.)

"Americans have been justly praised for their obedience to the law. One should add that in America the laws are made by the people and for the people." (Alexis de Tocqueville, 1835, *Tocqueville: Democracy in America*, Translated by Arthur Goldhammer, New York: The Library of America, 2004, p. 257 (Vol. I, Part II, Chapter 5: On the Government of Democracy in America).)

"I have been selected by you to execute and enforce the laws of the country. I propose to do so to the extent of my own abilities, but the measure of success that the Government shall attain will depend upon the moral support which you, as citizens, extend....To those of criminal mind there can be no appeal but vigorous enforcement of the law. Fortunately they are but a small percentage of our people." (Herbert Hoover, March 4, 1929.)

"Most people, most of the time and under most circumstances, conform to the law because they adhere to the same moral values as those embodied in the law, not because they are worried about imprisonment. We do not steal and kill because we believe it is morally wrong. We have been educated and socialized to abhor these things. Our socialization comes from the family, church, school, and other groups and institutions in society; and partly from the educative effect of the law itself, simply by its formal condemnation of certain acts..." (Ronald L. Akers, Christine S. Sellers, *Criminological Theories: Introduction, Evaluation, and Application*, Los Angeles: Roxbury Publishing Company, 2004, p. 22.)

"It is very difficult for a nation to maintain the rule of law if its citizens do not respect the law. Assume that people in your community decided that they didn't want to be bothered by traffic laws and began to ignore stop signs and traffic signals. The ability of police officers to enforce the laws would be overwhelmed and the streets of your community would quickly become a chaotic and dangerous place. The rule of law functions because most of us agree that it is important to observe the law, even if a police officer is not present to enforce it. Our agreement as citizens to obey the law to maintain our social order is sometimes described as an essential part of the **social contract**. This means that, in return for the benefits of social order, we agree to live according to certain laws and rules." (American Bar Association's World Justice Project, *Dialogue on the Rule of Law*, Chicago: ABA Division for Public Education, 2008, p. 5, *www.americanbar.org*, 8/6/12.)

"Public order in a free society does not and cannot rest solely on applications or threats of force by the authorities. It must also rest on the people's sense of the legitimacy of the rule-making institutions of the political and social order and of the rules these institutions make. Persons obey the rules of society when the groups with which they identify approve those who abide by the rules and disapprove those who violate them. Such expressions of approval or disapproval are forthcoming only if the group believes that the rule-making institutions are in fact entitled to rule--that is, are 'legitimate.'…This concept of acceptance of rules based upon legitimacy may be termed 'the rule of law.'…The 'rule of law' expresses the idea that people recognize the legitimacy of the law as a means of ordering and controlling the behavior of *all* people in a society, the governors and the governed, the rich and poor, the contented and the discontented."

(James S. Campbell, Joseph R. Sahid, David P. Stang, *Law and Order Reconsidered: Report of the Task Force on Law and Law Enforcement To The National Commission on the Causes and Prevention of Violence*, Washington, D.C.: U.S. Government Printing Office, 1969, pp. 7-8.)

We acknowledge, of course, as, for example, did the Second Continental Congress (July 4, 1776) and Lincoln (July 4, 1861), that there are in fact certain circumstances, generally rare in democracies, in which resistance to particular laws is morally, or legally, justified. Certain circumstances--gravely unjust laws, mortal threat to the nation, necessity, impossibility, "repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny"--and certain responses--legitimate resistance and revolution, principled civil disobedience--are recognized exceptions to the obligation of strict obedience.

"Distinctively English, the common law had begun with the customs of the people. With the passage of time it jelled into a substantial *corpus juris*. Rising above all other claimants and equated with perfect reason, the common law emerged supreme and decisive in 1607, when Sir Edward Coke applied it to the king himself. More than anything else, the common law persuaded the English people to revere rule of law rather than that of men. Devotion to this maxim finally expressed itself in the theory that revolutionary action was justified against those who abused it." (Alpheus Thomas Mason, Richard H. Leach, *In Quest of Freedom: American Political Thought and Practice*, Eaglewood Cliffs, NJ: Prentice-Hall, Inc., 1959, p. 3.)

"Long before 1763, ideas proclaimed every Sunday and in special election sermons made familiar to church-going New Englanders not only the doctrines of natural rights, social contract, and the right of resistance, but also the fundamental principle of American Constitutional law: that government, like its citizens, is bounded by law; and when it transcends these limits it cannot claim validity." (Alpheus Thomas Mason, Richard H. Leach, *In Quest of Freedom: American Political Thought and Practice*, Eaglewood Cliffs, NJ: Prentice-Hall, Inc., 1959, p. 42.)

"We may very safely assert these two things in general, without undermining government: One is, That no civil rulers are to be obeyed when they enjoin things that are inconsistent with the commands of God...disobedience to them is a duty, not a crime....Another thing that may be asserted with equal truth and safety is, That no government is to be submitted to, at the *expence* of that which is the *sole end* of all government,--the common good and safety of society." (Rev. Jonathan Mayhew, West Church, Boston, *A Discourse Concerning Unlimited Submission*, 1750, quoted in Alpheus Thomas Mason, Richard H. Leach, *In Quest of Freedom: American Political Thought and Practice*, Eaglewood Cliffs, NJ: Prentice-Hall, Inc., 1959, pp. 40-41.)

"We believe in law and the rule of law. We recognize an obligation to comply with laws, whether we like them or not. That obligation is defeasible, however. Gravely unjust laws, and especially laws that seek to compel people to do things that are unjust, do not bind in conscience." (Prof. Robert P. George, Interview: "Reminding Caesar of God's Existence," *NationalReviewOnline*, December 1, 2009, *www.nationalreview.com*, 8/28/12.)

But the fact that particular circumstances and particular responses are recognized exceptions to the obligation of strict obedience does not mean that they are exceptions to the rule of law.

These concepts are themselves, rather, rule of law principles or at least consistent with rule of law principles, for they serve the purposes that law serves. "Sometimes...the values to be secured by the genuine Rule of Law and authentic constitutional government are best served by departing, temporarily but perhaps drastically, from the law and the constitution." (John Finnis, *Natural Law and Natural Rights*, Oxford: Clarendon Press, 1980, p. 275.)

"When the first principles of civil society are violated, and the rights of a whole people are invaded, the common forms of municipal law are not to be regarded. Men may then betake themselves to the law of nature; and, if they but conform their actions to that standard, all cavils against them betray either ignorance or dishonesty. There are some events in society, to which human laws cannot extend, but when applied to them, lose all their force and efficacy. In short, when human laws contradict or discountenance the means which are necessary to preserve the essential rights of any society, they defeat the proper end of all laws, and so become null and void." (Alexander Hamilton, *The Farmer Refuted*, 1774, *oll.libertyfund.org*, 8/5/12.)

11. Where the moral obligation to obey the law is not subscribed to in theory or adhered to in practice, law enforcement, with its physical and deterrent effects, assumes its supplemental role. One of the principles most basic to the rule of law is congruence between the rules as announced and their actual administration. The laws that are enacted must be enforced. Sanctions provided in proscriptive laws must actually be applied to the proscribed behavior. The requirement that officials apply the enacted rules has, in fact, been asserted to be the essence of the rule of law.

Enforcement of law works primarily by two means: (1) actual physical force (e.g., apprehension, incarceration), and (2) the psychological threat of force, or deterrence. (James S. Campbell, Joseph R. Sahid, David P. Stang, *Law and Order Reconsidered: Report of the Task Force on Law and Law Enforcement To The National Commission on the Causes and Prevention of Violence*, Washington, D.C.: U.S. Government Printing Office, 1969, pp. 5-6.)

"*Laws are authoritative rules backed by the force of the State*. Brute force lies at the end of the legal process that begins with a written rule, runs through the courts, and is finally enforced by a police officer armed with a pistol. Those who violate the law may be punished by loss of property or liberty. Most people voluntarily comply before such sanctions are imposed because most consider laws to be legitimate. However, it is always difficult to distinguish between compliance based on conscience and compliance based on fear of punishment. The potential for punishment is an essential element of law." (Herbert Jacob, *Law and Politics in the United States*, Second Edition, New York: HarperCollins College Publishers, 1995, p. 23.)

President Hoover said that "the processes of criminal-law enforcement are simply methods of instilling respect and fear into the minds of those who have not the intelligence and moral instinct to obey the law as a matter of conscience." (April 22, 1929.)

Among the principles, or qualities, or characteristics, or constitutive elements of the rule of law is "congruence between the rules as announced and their actual administration," congruence between declared rule and official action. (Lon Fuller, *The Morality of Law*, New Haven: Yale University Press, 1964, p. 39.)

"Consider...the principle that [Lon] Fuller describes as the essence of the Rule of Law, namely, the...requirement that officials apply the rules enacted. Imagine that officials were not required to apply the enacted rules, but were free to evaluate conduct in light of their best judgment. Clearly, such behavior is antithetical to a system of social planning. Plans are supposed to settle in advance what is to be done; if officials are not required to apply those norms they deem mistaken, then the norms cannot bring about the results that plans are designed to achieve. The Rule of Law, we can say, is the Rule of Social Planning: its value derives entirely from the benefits that social planning generates and is best served when legal structures maximize these benefits." (Scott J. Schapiro, *Legality*, Cambridge: Harvard University Press, 2011, p. 396.)

"All governments have therefore a legislative authority lodged in some hand or other; not to be exercised at the arbitrary will and pleasure of one or more individuals; but in the exercise of it to be restrained and limited, at least by the eternal rules of justice and righteousness, as it is designed, not for the destruction, but for the health and preservation of the body. And as it is necessary for the well-being of society, that good laws be made; so 'tis likewise necessary that they be duly put in execution; and that, both in civil and criminal cases: this being the life of the law, without which it signifies nothing toward answering the end for which it was made." (Samuel Sherwood, "A Sermon Containing Scriptural Instructions to Civil Rulers, and all Free-born Subjects," New-Haven, August 31, 1774, in Ellis Sandoz, ed., *Political Sermons of the American Founding Era, 1730-1805*, Second Edition, Vol. 1, Indianapolis: Liberty Fund, 1998, p. 387.)

"Civil society can exist no longer, than while connected by its laws and constitution: These are of no force, otherwise than as they are maintained and defended by the members of the commonwealth. This regular support of authority is the only security, a people can have against violence and injustice, feuds and animosities, in the unmolested enjoyment of their honest acquisitions: Hence the very end of civil society demands, that the orders of government be enforced; the fountains of justice, kept open; the streams, preserved pure; and the state, defended against all internal and foreign violence. These ends can never be attained, under the most excellent constitution and laws, but by means of an able and faithful administration, and the concurring zeal and assistance of all good and virtuous citizens." (Elizur Goodrich, "The Principles of Civil Union and Happiness Considered and Recommended," Hartford, May 10, 1787, in Ellis Sandoz, ed., *Political Sermons of the American Founding Era, 1730-1805*, Second Edition, Vol. 1, Indianapolis: Liberty Fund, 1998, p. 923.)

According to Thomas Jefferson, "The execution of the laws is more important than the making them." (Quoted in Charles Maurice Wiltse, *The Jeffersonian Tradition in American Democracy*, New York: Hill and Wang, Inc., 1960, p. 165; also, Jefferson, Letter to M. L'Abbé Arnond, 1789, in John P. Foley, ed., *The Jeffersonian Cyclopedia*, Funk & Wagnalls Company, 1900, No. 4494, p. 479, *books.google.com*, 9/10/12.)

"Among the difficulties encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form....Energy in government is essential to that security against external and internal danger and to that prompt and salutary execution of the laws which enter

into the very definition of good government. Stability in government is essential to national character and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society. An irregular and mutable legislation is not more an evil in itself than it is odious to the people; and it may be pronounced with assurance that the people of this country, enlightened as they are with regard to the nature, and interested, as the great body of them are, in the effects of good government, will never be satisfied till some remedy be applied to the vicissitudes and uncertainties which characterize the State administrations." (James Madison, *The Federalist*, No. 37.)

12. A corollary to the principle of enforcement is that the executive authority of government must faithfully execute *all* of its jurisdiction's laws: each law to one degree or another, with the degree of enforcement of each being prioritized--on a principled basis--as necessitated by any inadequacy of enforcement resources obtainable from the legislative authority.

The executive authority must enforce *all* of its jurisdiction's laws: it must enforce *each* law to one degree or another. The Constitution's take care clause (Article II, Section 3) "expresses the fundamental mission of the executive branch: to enforce the law." (Linda R. Monk, *The Words We Live By*, New York: Hyperion, 2003, p. 84.) It requires of the Executive faithful execution of "the Laws," without qualification. A president will govern constitutionally if he can honestly say that "all laws will be faithfully executed, whether they meet my approval or not....Laws are to govern all alike--those opposed as well as those who favor them." (Ulysses S. Grant, March 4, 1869.)

But even a president who meets his implied duty of requesting from Congress the requisite means for enforcement of all the laws will likely be faced with insufficient resources, requiring a (principled, not political) prioritization, an assignment of the laws into various categories of higher and lower enforcement priority, with the laws properly belonging in the lowest prioritization category intended to be enforced to at least some degree, so as to have at least some physical and deterrent effect, and to warrant their still being considered to be laws. Neither the rule of law nor the Constitution allow for "cafeteria" law enforcement, a picking and choosing that can result in the complete absence of enforcement of one or more laws. If any one law is expendable, so are they all.

13. Just as citizens and other residents may not elect what laws they will obey, the executive authority may not elect which laws it will enforce. The duty of the government to enforce the laws is coequal with the duty of citizens to obey them. The executive authority may not pick and choose which laws to enforce such that there results a complete absence of enforcement of one or more laws. The executive may not substitute its own policy preferences for the will of the people as expressed in legislation. The government of the United States was established to get rid of arbitrary, discretionary executive power. Any concept of presidential nullification of disfavored statutes by means of nonenforcement is contrary to the constitutional mandate of Article II, Section 3 that the president take care that the laws be faithfully executed, and to the Article I, Section 1 vesting of all legislative powers in the Congress, and to the constitutional doctrine of separation of powers.

"Our constitution does not contain the absurdity of giving power to make laws, and another power to resist them....The laws of the United States must be executed. I have no discretionary power on the subject--my duty is emphatically pronounced in the constitution." (Andrew Jackson, December 10, 1832.)

"I therefore consider that in view of the Constitution and the laws the Union is unbroken, and to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States." (Abraham Lincoln, March 4, 1861.)

"As a citizen may not elect what laws he will obey, neither may the Executive elect which he will enforce. The duty to obey and to execute embraces the Constitution in its entirety and the whole code of laws enacted under it." (Benjamin Harrison, March 4, 1889.)

"When I was inaugurated, I took an oath, as have all my predecessors, to uphold the laws and the Constitution of the United States. And I'm constrained to do the best I can to enforce the laws." (Jimmy Carter, March 30, 1979.)

"America is a nation of laws, which means I, as the President, am obligated to enforce the law. I don't have a choice about that. That's part of my job. But I can advocate for changes in the law so that we have a country that is both respectful of the law, but also continues to be a great nation of immigrants." (Barack Obama, March 28, 2011.)

"With respect to the notion that I can just suspend deportations through Executive order, that's just not the case, because there are laws on the books that Congress has passed. And I know that everybody here at Bell is studying hard so you know that we've got three branches of Government. Congress passes the law. The executive branch's job is to enforce and implement those laws. And then the judiciary has to interpret the laws. There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system, that for me to simply through Executive order ignore those congressional mandates would not conform with my appropriate role as President." (Barack Obama, March 28, 2011.)

"Now, I know some people want me to bypass Congress and change the laws on my own....But believe me, the idea of doing things on my own is very tempting. I promise you. Not just on immigration reform. But that's not how our system works....That's not how our democracy functions. That's not how our Constitution is written." (Barack Obama, July 25, 2011.)

"The duty of citizens to support the laws of the land is coequal with the duty of their Government to enforce the laws which exist....Our whole system of self-government will crumble either if officials elect what laws they will enforce or citizens elect what laws they will support. The worst evil of disregard for some law is that it destroys respect for all law. For our citizens to patronize the violation of a particular law on the ground that they are opposed to it is destructive of the very basis of all that protection of life, of homes and property which they rightly claim under other laws. If citizens do not like a law, their duty as honest men and women is to discourage its violation; their right is openly to work for its repeal." (Herbert Hoover, March 4, 1929.)

"The greatest crimes that can be committed against our government are to put on the statute-books, or allow to remain there, laws that are not meant to be enforced, and to fail to enforce the laws that exist." (Theodore Roosevelt, President of the Police Commission of New York, "The Enforcement of Law," *The Forum Magazine*, September 1, 1895, *www.theodore-roosevelt.com*, 9/13/12.)

The executive authority must not substitute its policy preferences for the will of the people expressed in legislation. "I do not deal with public sentiment. I deal with the law. How I might act as a legislator or what kind of legislation I should advise has no bearing on my conduct as an executive officer charged with administering the law....I am an officer of the law, and I recognize the public sentiment that is embodied in the law." (Theodore Roosevelt, President of the Police Commission of New York, Statement to the Press, *New York Sun*, June 20, 1895, *www.theodore-roosevelt.com*, 8/20/12.)

"Have we given up law? Must we fall back on discretionary executive power? The government of the United States was established to get rid of arbitrary, that is, discretionary executive power. If we return to it, we abandon the very principles of our foundation, give up the English and American experiment and turn back to discredited models of government." (Woodrow Wilson, "Law or Personal Power," Address at the National Democratic Club, New York, April 13, 1908, in *College and State: Educational, Literary and Political Papers (1875-1913) by Woodrow Wilson*, Vol. II, New York: Harper & Brothers Publishers, Kraus Reprint Co., 1970, p.25.)

A president's effective repeal of a statute he dislikes by refusal to enforce it is rightly considered not only a violation of the take care clause, but an unconstitutional usurpation of the power of Congress to make laws pursuant to Article I, Section 1 ("All legislative powers herein granted shall be vested in a Congress of the United States..."). In the Massachusetts Constitution of 1780 (Article XXX), drafted principally by John Adams, there was a prohibition of violations of separation of powers by any of the three branches of the Commonwealth's government "to the end it may be a government of laws and not of men." (The Founders' Constitution, *http://press-pubs.uchicago.edu*, 8/27/12) Thomas Jefferson was defending the principle of separation of powers between "the legislative, executive, and judiciary departments" when he said that "(a)n *elective despotism* was not the government we fought for." (*Notes on Virginia*, Q. XIII, 1785.)

14. One essential principle of the rule of law is that proscriptive laws must include sanctions--punishment for disobedience. A legal sanction, to be effective, must be at least the equivalent of what the offender gained or expected to gain from the offense, and it usually must be that and something more. The offender's gains from the offense must be confiscated from him upon apprehension or conviction. If the sanction is something less than the equivalent of the contemplated gains of the offense, the offender will calculate that by committing the offense he will come out ahead even if he is apprehended and punished.

"A sanction is essential to the idea of law, as coercion is to that of Government." (James Madison, *Vices of the Political System of the United States*, April 1787, *oll.libertyfund.org*, 8/11/12; and quoted in Alpheus Thomas Mason, Richard H. Leach, *In Quest of Freedom:*

American Political Thought and Practice, Eaglewood Cliffs, NJ: Prentice-Hall, Inc., 1959, p. 82.)

"Government implies the power of making laws. It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolution or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation." (Alexander Hamilton, *The Federalist*, No. 15.)

"The consequences of committing the crime consist of rewards (what psychologists call 'reinforcers') and punishments; the consequences of not committing the crime (i.e., engaging in noncrime) also entail gains and losses. The larger the ratio of the net rewards of crime to the net rewards of noncrime, the greater the tendency to commit the crime." (James Q. Wilson, Richard J. Herrnstein, *Crime & Human Nature*, New York: Simon & Shuster, Inc., 1985, p. 44.)

15. The contemplated gain of illegal immigration is presence in the United States, with the opportunities such presence provides. The indispensable, minimum sanction needed to deter and prevent illegal entry and illegal presence is removal from the United States, with the resulting elimination of the opportunities presented. With anything less, there is little deterrence, and immigration lawbreaking pays: the lawbreaker knows he will come out ahead, even after being apprehended and paying the prescribed penalty.

If the government does not take away what the immigration lawbreaker gained by breaking the law, but lets him keep his ill-gotten gains, and instead substitutes a lesser sanction, then for that lawbreaker the sanction is similar to a mere "cost of doing business." And what is missing is the primary means by which law enforcement achieves results: deterrence--both "specific" as to the individual and "general" as to the public. There is no real immigration *law*. And without immigration laws to protect the nation's borders, the nation has no real borders.

16. Given the significant support that E-Verify has received from quarters in both major political parties, E-Verify ought not to be considered a partisan issue. And it is here acknowledged that most people on each side of the major divisions on the illegal immigration issue are people of sincerity and good will. But government is an influential teacher, by word and by example, and it is an inescapable fact that tolerating lawbreaking and rewarding lawbreaking, when doing so is not necessary, constitute governmental ratification of lawbreaking, and send a baneful message, at odds with our tradition, that people do not have a serious moral obligation to obey the law.

"A new Rasmussen Reports national telephone survey finds that 61% of Likely U.S. Voters favor a law in their state that would shut down companies that knowingly and repeatedly hire illegal immigrants....Eighty-Two percent (82%) think businesses should be required to use the federal government's E-Verify system to determine if a potential employee is in the country legally. Twelve percent (12%) disagree and oppose such a requirement....The U.S. Chamber of Commerce joined with the Obama administration in the unsuccessful Supreme Court challenge of Arizona's employer sanctions law. But then 68% of voters believe that government and big business work together against the interests of consumers and investors....Ninety-one (91%) of

Republicans think businesses should be required to check that potential employees are here legally, but there is less GOP support (72%) for a state law that would close companies that knowingly and repeatedly hire illegal immigrants. Most Democrats and voters not affiliated with either party support both efforts but not as strongly." ("Rasmussen Poll: 82% of Likely Voters Support E-Verify," *www.alzucaro.com*, 6/18/11.)

Although the most consistent support for Basic Pilot/E-Verify has come from Republicans, Democrats were early proponents of the concept of state mandates. In Arizona, "Democrats and Republicans alike" proposed licensing sanctions against employers improperly hiring illegal workers, which could be avoided by use of electronic verification. ("State finally may step in where feds have feared treading," *azcentral.com/arizonarepublic*, January 11, 2006.) Legislation was proposed by "top Arizona Democrats" requiring use of electronic verification. ("Migrant bills put pressure on hirers," *azcentral.com/arizonarepublic*, January 19, 2006.) In the Arizona House, every Republican and nearly half of the Democrats voted for an affidavit procedure that would encourage all Arizona employers to protect themselves by using the federal registry. ("Penalties for hiring migrants advance," *azcentral.com/arizonarepublic*, March 16, 2007.) The Arizona Senate legislated mandatory use of the Basic Pilot Program by employers with the support of six of the ten Democrats voting. ("State Senate Oks penalties for employers who hire illegal workers," *azcentral.com/arizonarepublic*, May 24, 2007.) On July 2, 2007, Arizona's Democratic governor signed legislation requiring all Arizona employers to use the Basic Pilot Program. Critics asserted the law was unconstitutional, denounced it as "a crippling blow to Arizona business," and predicted it "will be disastrous for the state of Arizona." ("Napolitano signs immigrant bill targeting employers," *azcentral.com/arizonarepublic*, July 2, 2007.) (The U.S. Supreme Court upheld the Arizona law by a 5 to 3 vote in *Chamber of Commerce v. Whiting*, 563 U.S. __ (2011). The critics' dire predictions have yet to materialize.)

The Obama administration has followed the Bush administration in supporting enhancements and improvements to E-Verify, promoting increased voluntary use of E-Verify by businesses, and asserting E-Verify's accuracy and effectiveness. (See E-Verify at *www.dhs.gov*.) While it has not supported state and local E-Verify requirements, the administration defended, successfully, the E-Verify requirement for federal contractors. (*Chamber of Commerce v. Napolitano*, 648 F.Supp. 726 (Dist. Court, D. Maryland, 2009).)

"Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." (Justice Louis D. Brandeis, dissent in *Olmsted v. United States*, 277 U.S. 438, 485 (1928).)

"If we fail to do all that in us lies to stamp out corruption we can not escape our share of responsibility for the guilt. The first requisite of successful self-government is unflinching enforcement of the law and the cutting out of corruption." (Theodore Roosevelt, December 7, 1903.)

"I oppose amnesty. Rewarding lawbreakers would encourage others to break the law and keep pressure on our border." (George W. Bush, December 3, 2005.)

17. There are a myriad of factors that affect the rate of crime, which at any given time is either increasing or decreasing. One of the major factors is what government teaches through rewards and punishments. When our government rewards breach of a law or effectively penalizes compliance with a law, it impairs respect for law. "The worst evil of disregard for some law is that it destroys respect for all law." To every small degree we diminish respect for the law we engender more lawbreaking, and more people become victims of crime.

The rule of law to which the United States is committed encompasses the concept of criminal justice that "guilt shall not escape or innocence suffer." (*United States v. Nixon*, 418 U.S. 683, 708-709, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).)

"The power of executing as well as making laws (as has been hinted) is inseparable from government. And the demands of justice are to be comply'd with, in the one as well as the other. If 'tis just that rulers should make righteous laws, 'tis equally so, when they are made, that they should take effectual care to enforce a proper regard to them. Of what service would laws be, though ever so wisely calculated to promote the public good, if offenders against them should be connived at, or suffered, by one means or another, to go unpunished? And what might reasonably be expected in consequence of such a breach of trust, but that the best laws, together with the authority that enacted them, should be held in contempt? There is no such thing as supporting the honour of government, or securing the good ends proposed by the laws it establishes, but by unsheathing the sword, in a faithful and impartial execution of justice." (Rev. Charles Chauncey, "Civil Magistrates Must be Just, Ruling in the Fear of God," Boston, May 27, 1747, in Ellis Sandoz, ed., *Political Sermons of the American Founding Era, 1730-1805*, Second Edition, Vol. 1, Indianapolis: Liberty Fund, 1998, p. 151.)

"Legislatures and courts are the formal instruments for setting just penalties, but they must conform to the prevailing consensus on what is fair or the legal system loses legitimacy. Deviating from the consensus in either direction damages society. An excessively cruel system of law may control the behavior of its citizens even more strictly than a just one, but people will surely hate it, may resist submitting to it, and, if the occasion ever arises, may try to overthrow it. Too lax a system of law will fail to satisfy the public desire for justice and thereby risk vigilantism. It will fail to deter and to educate morally, and it will impair the public's sense of respect for the law. Inconsistent enforcement of laws will also seem unjust and fail to serve the purposes of the law, from incapacitation to retribution...." (James Q. Wilson, Richard J. Herrnstein, *Crime & Human Nature*, New York: Simon & Shuster, Inc., 1985, pp. 506-507.)

"To be serious about promoting civil society, the government has to be serious about curbing crime. And to do that it has to proceed vigorously against the small as well as large transgressions of the law....The failure to enforce the law may be even more demoralizing to the community than the crime itself, for it brings a spirit of lawlessness into the very heart of the legal system. Conversely, the enforcement of law--the visible, conspicuous evidence of enforcement--is as morally fortifying as the reduction of crime itself, not only because it makes

individuals safer and communities more secure, but also because it signifies a reaffirmation of the law itself, a relegitimization, as it were, of the law." (Gertrude Himmelfarb, *One Nation, Two Cultures*, New York: Alfred A. Knopf, 1999, pp. 64-65.)

"I have always held it in opinion (making it also my practice) that it is better to obey a bad law, making use at the same time of every argument to shew its errors and procure its repeal, than forcibly to violate it; because the precedent of breaking a bad law might weaken the force, and lead to a discretionary violation, of those which are good." (Thomas Paine, 1792, *Rights of Man*, Part Second, Preface, The Online Library of Liberty, *oll.libertyfund.org*, 4/30/10.)

"Free government has no greater menace than disrespect for authority and continual violation of law. It is the duty of a citizen not only to observe the law but to let it be known that he is opposed to its violation." (Calvin Coolidge, December 6, 1923.)

"The worst evil of disregard for some law is that it destroys respect for all law." (Herbert Hoover, March 4, 1929.)

"We have to maintain inviolate the great doctrine of the inherent right of popular self-government; to reconcile the largest liberty of the individual citizen with complete security of the public order; to render cheerful obedience to the laws of the land, to unite in enforcing their execution, and to frown indignantly on all combinations to resist them..." (Franklin Pierce, December 4, 1854.)

"The rule of law is not automatic. Each citizen must accept a share of responsibility to administer and obey the law, if the rights and opportunities of all citizens are to be preserved." (Jimmy Carter, March 27, 1979.)

"To palliate crime is to be guilty of its perpetration." (William Lloyd Garrison, "No Compromise with Slavery," *Selections from the Writings and Speeches of William Lloyd Garrison*, Boston: R.F. Wallcut, 1852, p. 140, in *books.google.com*, 9/6/12.)

18. It is the poor and the least powerful who are the greatest beneficiaries of, and the most dependent upon, the rule of law and the ethic of adherence to the rule of law. From a comparison of the degrees of freedom, safety, and prosperity that exist in countries that adhere to the rule of law to the degrees of freedom, safety, and prosperity that exist in countries where corruption predominates, it is obvious that it is detrimental to the common good to attempt to help people in need by methods that degrade the principle of the rule of law. Compassion is truly humane not when it focuses just on those in need and how proposed remedial action will redound to their benefit, but when it focuses, as well, on the consequences of the proposed remedy for everyone. Policies that have the effect of diminishing adherence to the law and to the rule of law, however well-intentioned they might be, are ultimately not humane.

The poor and the least powerful are the greatest beneficiaries of, and the most dependent upon, the rule of law and the ethic of adherence to the rule of law. Andrew Jackson was comparing law-abiding and scofflaw cultures when he told John Quincy Adams: "In general, the great can

protect themselves, but the poor and humble, require the arm and the shield of the law." (John Spencer Bassett, ed., *Correspondence of Andrew Jackson*, Vol. 3, New York: Kraus Reprint Co., 1969, p. 115.)

"The law is the only sure protection of the weak and the only efficient restraint upon the strong. When impartially and faithfully administered, none is beneath its protection and none above its control." (Millard Fillmore, December 2, 1850.)

Senator Fred Thompson said: "The importance of the rule of law cannot be overstated. In our country the rule of law is the foundation for every institution. In many countries, the chief drawback to the formation of a prosperous and civil society is the absence of the rule of law." (Fred Thompson, "Scandal, Corruption, and the Rule of Law," in Roger Pilon, ed., *The Rule of Law in the Wake of Clinton*, Washington, D.C.: Cato Institute, 2000, p. 111.)

"Countries whose governments are ineffectual, arbitrary, or corrupt can remain poor despite an abundance of natural resources, because neither foreign nor domestic entrepreneurs want to risk the kinds of large investments which are required to develop natural resources into finished products that raise the general standard of living....A study by the World Bank concluded that 'across countries there is strong evidence that higher levels of corruption are associated with lower growth and lower levels of per capita income.'...For fostering economic activities and the prosperity resulting from them, laws must be reliable, above all. If the application of the law varies with the whims of kings or dictators, with changes in democratically elected governments, or with the caprices or corruption of appointed officials, then the risks surrounding investments rise, and consequently the amount of investing is likely to be much less than purely economic considerations would produce in a market economy under a reliable framework of laws." (Thomas Sowell, *Basic Economics*, Third Edition, New York: Basic Books, 2007, pp. 366-369.)

"Some nations have superior natural resources and more fertile land than others, but this does not explain why nations are prosperous or poor....Although all prosperous countries have private markets, so do some poor ones....Increasingly, it is recognized that law itself is the foundation for the private market in the prosperous modern nation. Not just any kind of law will do, however. Only a legal system that gives incentives to the production and exchange of the resources that people need or want creates the potential for prosperous nations....Three concepts establish the most effectively functioning marketplace for business in the modern nation: law, the rule of law, and property....Under the **rule of law**, laws that are made are *generally* and *equally* applicable....Under the rule of law, law applies to lawmakers as well as to the rest of society. Thus, lawmakers have an incentive to make laws that benefit everyone. Rule-of-law nations adopt laws supporting the private marketplace because it is in everyone's interest, including the lawmakers'. In today's international business environment, more and more voices are calling for the rule of law." (O. Lee Reed, et al., *The Legal & Regulatory Environment of Business*, 13th Edition, New York: McGraw-Hill/Irwin, 2005, p. 4.)

There are said to be more than a billion people living in poverty in the world. It seems quite unlikely that the United States could accept all or even a significant percentage of the world's poor and continue to function as a free and prosperous society and leader of the free world. "No free and prosperous nation can by itself accommodate all those who seek a better life or flee

persecution." (Ronald Reagan, July 30, 1981.) But if we take the rule of law seriously, and reinstate the rule of law here, and export the principle of the rule of law worldwide, and thereby reduce the poverty-producing corruption that plagues so many countries, we would be acting with true compassion toward the victims of poverty in this world.

"For millennia, history has taught that civilization and human progress depend on the rule of law. That lesson is evident today in nations around the world in which law barely exists. To the extent that the rule of law is eclipsed by the rule of man, civilization, progress, and real people are the victims. Indeed, America, which arose as a revolt against official disrespect for the law, is a testament to the importance of the rule of law." (Roger Pilon, "Introduction," in Roger Pilon, ed., *The Rule of Law in the Wake of Clinton*, Washington, D.C.: Cato Institute, 2000, p. 1.)

Professor Lillian R. BeVier says that "what is...dangerous--no, what is likely to be fatal--is to embrace a conception of the common good whose achievement could be won only in disregard of the rule of law." ("Civilization, Progress, and the Rule of Law," in Roger Pilon, ed., *The Rule of Law in the Wake of Clinton*, Washington, D.C.: Cato Institute, 2000, p. 24.)

19. All nations, or nearly all nations, are, at least in terms of historical origin, nations of immigrants. But unlike many nations, America is a nation of laws, as we use the term. America has been able to remain both a nation of immigrants and a nation of laws by means of adherence to immigration law and assimilation of its immigrants. It has required immigrants to accept its basic values. Immigrants have been, and should be, obliged to respect our cultural heritage and obey our laws. The Founding generation set the precedent of restricting naturalization to people who share our nation's republican principles. We should not now proceed, contrarily, to effectively reward people with legal residency status and citizenship for violating republican principles. Governmental ratification of a path of crime to citizenship would not be unprecedented, but it would be contrary to rule of law principles of respecting observance and punishing inobservance, and would replicate one of the features of the 1986 immigration law that most strongly encouraged unlawful immigration. The adverse consequences of the 1986 amnesty law are ample proof that rewarding lawbreakers cannot constitute an element of true immigration reform.

"America has been in part an immigrant nation, but much more importantly, it has been a nation that assimilated immigrants and their descendants into its society and culture....The assimilation of different groups into American society has varied and has never been complete. Yet overall, historically assimilation, particularly cultural assimilation, has been a great, possibly the greatest, American success story. It enabled America to expand its population, occupy a continent, and develop its economy with millions of dedicated, energetic, ambitious, and talented people, who became overwhelmingly committed to America's Anglo-Protestant culture and the values of the American Creed, and who helped make America a major force in global affairs. At the heart of this achievement, unmatched by any other society in history, was an implicit contract, which Peter Salins has termed 'assimilation, American style.' According to this implicit understanding, he argues, immigrants would be accepted into American society if they embraced English as the national language, took pride in their American identity, believed in the principles of the American Creed, and lived by 'the Protestant ethic (to be self-reliant, hardworking, and morally

upright).'...The critical first phase of assimilation was the acceptance by the immigrants and their descendants of the culture and values of American society....Historically America has thus been a nation of immigration *and* assimilation, and assimilation has meant Americanization. Now, however, immigrants are different; the institutions and processes related to assimilation are different; and, most importantly, America is different. The great American success story may face an uncertain future." (Samuel P. Huntington, *Who Are We?*, New York: Simon & Shuster Paperbacks, 2004, pp. 182-184, footnotes omitted.)

From the time of the Founders, the ideas that new citizens should be persons of good moral character and they should be sympathetic to American institutions have been constant aspects of our immigration policy. James Madison, in debate on August 13, 1787, said he "wished to maintain the character of liberality which had been professed in all the Constitutions & publications of America. He wished to invite foreigners of merit & republican principles among us." (James Madison, Notes of Debates of the Federal Convention of 1787, *teachingamericanhistory.org*, 8/24/07; Debates in the Federal Convention of 1787 as Reported by James Madison, in Charles Callan Tansill, *The Making of the American Republic: The Great Documents, 1774-1789*, New Rochelle, NY: Arlington House, p. 524.)

In the early decades of the Republic, Congress exercised its power over naturalization but largely left immigration to the states. It did, however, in 1778, recommend to the states that they "pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States." (E.P. Hutchinson, *Legislative History of American Immigration Policy 1798-1965*, Philadelphia: University of Pennsylvania Press, 1981, pp. 11, 396.)

George Washington questioned the wisdom of settling immigrant groups in bodies, in which they would "retain the Language, habits and principles (good or bad) which they bring with them." He favored "an intermixture with our people" so that they or their descendants would "get assimilated to our customs, measures and laws." (George Washington, Letter to the Vice President, November 15, 1794, John Frederick Schroeder, ed., *Maxims of Washington*, Mount Vernon: The Mount Vernon Ladies' Association, 1963, p. 66.)

"With immigration on the rise after American independence, the Congress passed a series of laws regulating the citizenship naturalization of newcomers. The Naturalization Acts of 1790 and 1795 required new citizens to take an oath of allegiance to support and defend the Constitution and laws of the United States and to renounce all previous political allegiances. In addition, the new citizens were required to be of 'good moral character,' 'attached to the principles of the Constitution' and 'well disposed to the good order of the United States.' All of these requirements remain part of the law today. The Founding Fathers favored what could be called the 'patriotic assimilation' of immigrants into the mainstream of American life." (Dr. John Fonte, The Hudson Institute, "To Prescribe the Oath of Renunciation and Allegiance for Purposes of the Immigration and Nationality Act," Statement to House Subcommittee on Immigration, Border Security, and Claims, April 1, 2004, pp. 34-35, *commdocs.house.gov*, 8/20/12.)

"We are defined as Americans by our beliefs--not by our ethnic origins, our race or our religion. Our beliefs in religious freedom, political freedom, and economic freedom--that's what makes an

American. Our belief in democracy, the rule of law, and respect for human life--that's how you become an American." (Mayor Rudolph Giuliani, Speech to the U.N. General Assembly, October 1, 2001, quoted in Anne-Marie Slaughter, *The Idea That is America*, New York: Basic Books, 2007, p. 164.)

"It's easy to understand why the idea of an amnesty would spark such a negative reaction. The country tried one with the 1986 law. Nearly 3 million people took advantage of it, and the amnesty was followed by an explosion of illegal immigration." ("Special Report: Immigration: Should They Stay or Should They Go?," *TIME* Magazine, April 10, 2006, p. 40.)

The Immigration Reform and Control Act of 1986, "in addition to granting legal status to 2.7 million illegal aliens, paved the way for hundreds of thousands of their relatives to join them. Although the law contained increased enforcement and sanctions aimed at ending illegal immigration, the illegal alien population in the U.S. today has been estimated at more than quadruple the 1986 total." ("Ex-agents OK guest-worker plan," *The Washington Times*, November 27, 2006, *www.washtimes.com*, 8/6/12.)

"As a result of the Immigration Reform and Control Act of 1986, more than one million illegal immigrant workers in the state [of California] were allowed to apply for legal permanent residence. Many who became legal residents sent for family members to join them, and many of those family members were initially illegal immigrants." (Hans Johnson and Laura Hill, *AT ISSUE: Illegal Immigration*, Public Policy Institute of California, 2011, p. 7, *www.ppic.org*, 9/13/12.)

"I was Attorney General two decades ago during the debate over what became the Immigration Reform and Control Act of 1986....Since the Immigration and Naturalization Service was then in the Department of Justice, I had the responsibility for directing the implementation of that plan....The lesson from the 1986 experience is that such an amnesty did not solve the problem. There was extensive document fraud, and the number of people applying for amnesty far exceeded projections. And there was a failure of political will to enforce new laws against employers. After a brief slowdown, illegal immigration returned to high levels and continued unabated, forming the nucleus of today's large population of illegal aliens....Today it seems to me that the fair policy, one that will not encourage further illegal immigration, is to give those here illegally the opportunity to correct their status by returning to their country of origin and getting in line with everyone else." (Edwin Meese III, "Reagan Would Not Repeat Amnesty Mistake," *Human Events*, December 13, 2006, *www.humanevents.com*, 8/6/12.)

20. Grants of amnesty and pardon should not counteract the rule of law and enforcement of law. Powers to grant amnesty and pardon, when properly used, are fully consistent with government by law, even though at times necessity dictates their use in a manner that allows prior disobedience to escape punishment. The Framers of the Constitution understood the pardoning power to be principally an instrument of law enforcement. It was considered to be exercised most appropriately in making offers of pardon in conflict situations for purposes of restoring the peace. Government undermines its ability to perform its basic function of securing our inalienable rights when its policies convey a message that people need not respect its legitimate authority. Government should not

capitulate to lawbreaking, even mass lawbreaking, except when it is not possible to do otherwise.

There is nothing in the text of the Constitution that would justify considering the Article II, Section 2 "Power to grant Reprieves and Pardons for Offenses against the United States" to be an exception to the Article II, Section 3 mandate that the president "take Care that the Laws be faithfully executed." The pardoning power complements, rather than qualifies, the take care clause.

There is practically nothing in the early record respecting a connection between the pardon power and justice, mercy, and liberty. It appears, rather, that "the Framers were more inclined to see the pardon as an instrument of law enforcement than as an act of grace." The Framers wrote a pardoning power into the Constitution, placing it in the hands of the executive: "not so that he could partake of the divine virtue of forgiveness, but so that he could enforce the law." (Kathleen Dean Moore, *Pardons: Justice, Mercy and the Public Interest*, New York: Oxford University Press, 1989, pp. 25-27.)

"The most famous pardons of the nineteenth century were those used exactly as Alexander Hamilton foresaw: to 'restore the tranquility of the commonwealth' by a 'well-timed offer of pardon to the...rebels.' The pardon could bring rebels back into the fold, or it could repopulate the army by restoring deserters to service." Although the Supreme Court, for a long period, ignored the Framers' views and introduced the English concept of pardon as mercy, the presidents feared undermining deterrence and justice, and they "used pardon very much the way they used their armies--to end wars." (Kathleen Dean Moore, *Pardons: Justice, Mercy and the Public Interest*, New York: Oxford University Press, 1989, pp. 49-51; John E. Nowak, Ronald D. Rotunda, *Constitutional Law*, Fifth Edition, West Publishing Co., 1995, §7.3, p. 244.)

"The social order cannot exist except upon the basis of a respect for and observance of the law, and it is only when the people of a country are secure in their homes and in the normal activities of their lives from the depredations of the criminal classes that national progress can be maintained. This respect for law and this security are possible only when the administration of justice is entrusted to wise, upright, patriotic and courageous officials." (Franklin D. Roosevelt, September 27, 1934.)

John Locke said "*the end of Law* is not to abolish or restrain, but *to preserve and enlarge Freedom*: For in all the states of created beings capable of Laws, *where there is no Law, there is no Freedom*. For *Liberty* is to be free from restraint and violence from others which cannot be, where there is no Law…" (*Two Treatises of Government*, Peter Laslett, ed., Cambridge, UK: Cambridge University Press, 1988, pp. 305-306 (The Second Treatise of Government, Chapter VI, §57).) If law preserves and enlarges freedom, degradation of law decreases freedom. We become less democratic and less free when the government fails to prevent lawlessness, whether violent or non-violent, and fails to engender respect for the law. We become less democratic and less free when our votes count for less and less--that is, when our votes increasingly fail to translate into laws that are enforced and obeyed, and thereby protect us and provide opportunity and advance our ideals.

"Constitutional government under the rule of law requires...a culture of respect for law. Examples at the top and at all levels of government who do in fact take care that the laws are faithfully executed are essential to facilitate both the substance and image of integrity." (Chester A. Newland, "Faithful Execution Clause," *How Government Works*, New York: Macmillan Library Reference USA, 1999, p. 552.)

21. Amnesty, historically, can be absolute or conditional. If absolute, the prescribed legal sanction is waived in full. If conditional, the sanction is waived to some significant degree, and a lesser sanction or other condition is imposed. One measure of a proposed policy of amnesty for illegal immigrants is whether its proponents are willing to forthrightly call it by name, rather than seeking to masquerade some substantially lesser or token or nominal penalties as the substantial equivalent of prescribed deportation.

Amnesty and pardon may be granted absolutely or conditionally. A pardon is an act for the public welfare, and pursuant to the pardoning power a president may impose less severe punishments for the public welfare. The pardoning power encompasses the capacity "to grant amnesty to specified classes or groups" and "to pardon conditionally as well is absolutely." (John E. Nowak, Ronald D. Rotunda, *Constitutional Law*, Fifth Edition, West Publishing Co., 1995, §7.3, pp. 244-245; *Biddle v. Perovich*, 274 U.S. 480, 47 S.Ct. 664, 71 L.Ed. 1161 (1927); *United States v. Klein*, 80 U.S. (13 Wall) 128, 20 L.Ed. 519 (1871): "Pardon includes amnesty." (80 U.S. 128, at 147); *Ex parte William Wells*, 59 U.S. (18 How.) 307, 15 L.Ed. 421 (1855).) "The plain purpose of the broad [pardoning] power conferred by [Art. II,] 2, cl.1, was to allow plenary authority in the President to 'forgive' the convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable....Of course, the President may not aggravate punishment; the sentence imposed by statute is therefore relevant to a limited extent. But, as shown, the President has constitutional power to attach conditions to his commutation of any sentence." (*Schick v. Reed*, 419 U.S. 256, 266-267, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974).)

"The Constitution authorizes the Executive to grant or withhold the pardon at his own absolute discretion, and this includes the power to grant on terms, as is fully established by judicial and other authorities." (Abraham Lincoln, Third Annual Message, December 8, 1863, in James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents 1789-1897*, Washington, D.C.: Government Printing Office, 1897, Vol. VI, p. 189.)

"Whereas with reference to said rebellion and treason, laws have been enacted by Congress declaring forfeitures and confiscation of property and liberation of slaves, all upon terms and conditions therein stated, and also declaring that the President was thereby authorized at any time thereafter, by proclamation, to extend to persons who may have participated in the existing rebellion in any State or part thereof pardon and amnesty, with such exceptions and at such times and on such conditions as he may deem expedient for the public welfare..." (Abraham Lincoln, A Proclamation, December 8, 1863, in James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents 1789-1897*, Washington, D.C.: Government Printing Office, 1897, Vol. VI, p. 213.)

"In the mid-80's, many members of Congress…advocated amnesty for long-settled illegal immigrants. President Reagan considered it reasonable to adjust the status of what was then a relatively small population, and I supported his decision….Note that this path to citizenship was not automatic. Indeed, the legislation stipulated several conditions: immigrants had to pay application fees, learn to speak English, understand American civics, pass a medical exam and register for military selective service. Those with convictions for a felony or three misdemeanors were ineligible. Sound familiar? These are pretty much the same provisions included in the new Senate proposal and cited by its supporters as proof that they have eschewed amnesty in favor of earned citizenship. The difference is that President Reagan called this what it was: amnesty. Indeed, look up the term 'amnesty' in Black's Law Dictionary, and you'll find it says, 'the 1986 Immigration Reform and Control Act provided amnesty for undocumented aliens already in the country.' Like the amnesty bill of 1986, the current Senate proposal would place those who have resided illegally in the United States on a path to citizenship, provided they meet a similar set of conditions and pay a fine and back taxes. The illegal immigrant does not go to the back of the line but gets immediate legalized status, while law-abiding applicants wait in their home countries for years to even get here. And that's the line that counts. In the end, slight differences in process do not change the overriding fact that the 1986 law and today's bill are both amnesties." (Edwin Meese III, "An Amnesty by Any Other Name…," *The New York Times*, May 24, 2006, *www.nytimes.com*, 8/3/12.)

"But the simple truth is that we've lost control of our own borders, and no nation can do that and survive. And I think the thing that they should be looking at, that should be of the greatest appeal to them is the very generous amnesty, that all the way up to 1982, we're ready to give those people permanent residency." (Ronald Reagan, June 14, 1984.)

"Our Administration continues to support legislation to reform the Nation's immigration laws. This includes granting amnesty to certain qualified aliens and prohibiting employment of illegal aliens." (Ronald Reagan, February 6, 1986.)

"But we had a general amnesty when the immigration act was passed before....I think it's difficult to justify a general amnesty for people who did not come here lawfully, because if you do that, then you are really burning the people who have been waiting in line patiently to come here legally. And you don't want to discriminate against them." (William J. Clinton, October 30, 2000.)

22. We welcome from abroad--as we are grateful that our forebears were welcomed from abroad--those who would share with us the American Dream: the "perennial conviction that those who work hard and play by the rules will be rewarded with a more comfortable present and a stronger future for their children." We honor Americans by birth and by legal immigration who do the true hard work of making a living and endeavoring to better their circumstances by those means only that are consistent with our society's immigration and domestic rules. We assert that government should honor such Americans by policies that restrict to them the rewards and privileges that justly result from honest efforts, and should decline to accord discretionary benefits to those who seek unfair advantages by employment of means of advancement that violate our laws. We insist there is a

contradiction between our sacred principle of equal justice under law and policies that gratuitously accord to some the privilege of breaking the law with impunity.

The American Dream was recently summarized as "(t)he perennial conviction that those who work hard and play by the rules will be rewarded with a more comfortable present and a stronger future for their children." (Jon Meacham, "The History of The American Dream: Is it still real?," *TIME* Magazine, July 2, 2012, p. 28.)

"A free society, according to Jefferson and Adams, depended upon qualities that they called 'republican virtues,'--civic virtue, the ethic of honest work, and local control by local people." (Gerald R. Ford, February 7, 1976.)

"Thomas Jefferson hoped that although previous regimes had promoted 'an artificial aristocracy, founded on wealth and birth,' American democracy would be ruled by 'a natural aristocracy' grounded on 'virtue and talents.' Democratic equality, therefore, would be an equality of opportunity that would allow all people to develop their talents, so that the naturally best could rise to the top. Abraham Lincoln conveyed this thought in his image of life as a race. The primary aim of popular government, he believed, was 'to elevate the condition of men--to lift artificial weights from all shoulders--to clear the paths of laudable pursuit for all--to afford all, an unfettered start, and a fair chance, in the race of life.' This is the noble vision that elevates American political rhetoric. It's the American Dream--a fair chance for all to get ahead in life." (Larry Arnhart, *Political Questions: Political Philosophy from Plato to Rawls*, Second Edition, Prospect Heights: Waveland Press, Inc. 1993, pp. 349-350, footnotes omitted.)

President Eisenhower said (Statement by the President on the Observance of Law Day, April 30, 1958):

> Freedom under law is like the air we breathe. People take it for granted and are unaware of it--until they are deprived of it. What does the rule of law mean to us in everyday life? Let me quote the eloquent words of Burke: "The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter; the rain may enter--but the King of England cannot enter; all his forces dare not cross the threshold of that ruined tenement!"
>
> But the rule of law does more than ensure freedom from high-handed action by rulers. It ensures justice between man and man however humble the one and however powerful the other. A man with five dollars in the bank can call to account the corporation with five billion dollars in assets--and the two will be heard as equals before the law. The law, however, has not stopped here. It has moved to meet the needs of the times. True, it is good that the King cannot enter unbidden into the ruined cottage. But it is not good that men should live in ruined cottages.
>
> The law in our times also does its part to build a society in which the homes of workers will be invaded neither by the sovereign's troops nor by the storms and winds of insecurity and poverty. It does this, not by paternalism, welfarism and hand-outs, but by

creating a framework of fair play within which conscientious, hard-working men and women can freely obtain a just return for their efforts.

"The preservation of liberty depends on submission to the Law, which is the expression of the general will...Equality consists in the enjoyment by every one of the same rights....The law should be equal for all, whether it rewards or punishes, protects or represses." (Thomas Paine, *Declaration of Rights*, 1791, in Moncure Daniel Conway, ed., *The Writings of Thomas Paine*, Vol. III, New York: G.P. Putnam's Sons, 1894, at *oll.libertyfund.org*, 4/30/10.)

"When one undertakes to administer justice, it must be with an even hand, and by rule; what is done for one, must be done for every one in equal degree." (Thomas Jefferson, Letter to Dr. Benjamin Rush, 1803, in John P. Foley, ed., *The Jeffersonian Cyclopedia*, Funk & Wagnalls Company, 1900, No. 4228, p. 452, *books.google.com*, 6/4/10.)

"Americans have always been proud that their institutions rest on the concept of equal justice under law. We must never forget that the rights of all of us depend upon respect for the lawfully determined rights of each of us. As one nation, we must assure to all our people, whatever their color or creed, the enjoyment of their Constitutional rights and the full measure of the law's protection. We must be faithful to our Constitutional ideals and go forward in good faith with the unremitting task of translating them into reality." (Dwight D. Eisenhower, October 1, 1958.)

"This is an exacting season in our national life, because we strive toward the exacting standards of free men: equal rights and equal responsibilities, equal opportunity and equal obligation, equal justice under law and equal respect for law. We have raised our standards high. We will maintain them without compromise. As Thomas Jefferson once put it, 'Laws made by common consent must not be trampled on by individuals.'" (Lyndon B. Johnson, August 18, 1964.)

"Justice dictates not only that the innocent man go free but that the guilty be punished for his crimes." (Richard M. Nixon, March 11, 1971.)

President Clinton enumerated the principles he wanted to see enshrined at the Justice Department as follows: "No one is above the law. Our legal system must protect the innocent and punish the wrongdoers. That the promise of equal justice under law must be a reality for every American." (February 11, 1993.)

"If the laws are to be trampled upon with impunity, and a minority is to dictate to the majority, there is an end put at one stroke to republican government." (George Washington, quoted in Ron Chernow, *Alexander Hamilton*, New York: The Penguin Press, 2004, p. 473.)

23. The people of Mission Viejo share with other Americans a patriotic devotion to the principles upon which our nation was founded, and they take pride in their previous efforts to uphold our nation's ideals. The city considers its adoption of one of the nation's first local government E-Verify laws to be an example of legitimate local efforts to enhance compliance with U.S. immigration and employment laws and to uphold the bedrock American principle of the rule of law. The city chose to do business with only those firms that were willing to make an extra effort to better comply with federal immigration law. It

took the risk that its contracting costs would increase. It applied the electronic verification requirement to both its contractors and itself. We consider it to be our duty--indeed, it is our privilege--to pay whatever cost is entailed in doing all we can to defend the American system of religious, political, and economic freedom secured by popular government under the rule of law.

The Mission Viejo City Council in adopting its ordinance in March 2007 contemplated the possibility of an increase in city contracting expenses as a result of the contractor verification requirement. Council Member Ledesma said, "We have no way of knowing what the economic impact might be because we don't know what the answer is in terms of how many people we're talking about." It is evident from the council's discussions that Council Member Frank Ury was speaking for the others in saying: "We need to make sure that we uphold the laws regardless of economic impact, and if that means paying more for services, that's the way it's going to be." (Mission Viejo City Council Meeting, discussion on proposed Lawful Hiring Compliance Ordinance, March 19, 2007, *cityofmissionviejo.org*.)

Sacrifice in service of our country is justly viewed not as a burden, but as a privilege. As President Roosevelt said two days after Pearl Harbor (December 9, 1941): "I was about to add that ahead there lies sacrifice for all of us. But it is not correct to use that word. The United States does not consider it a sacrifice to do all one can, to give one's best to our Nation, when the Nation is fighting for its existence and its future life. It is not a sacrifice for any man, old or young, to be in the Army or in the Navy of the United States. Rather it is a privilege. It is not a sacrifice for the industrialist or the wage earner, the farmer or the shopkeeper, the trainman or the doctor, to pay more taxes, to buy more bonds, to forgo extra profits, to work longer or harder at the task for which he is best fitted. Rather it is a privilege."

24. Mission Viejo was one of the first cities in the nation to adopt an E-Verify requirement for its city contractors. Within four years, there were E-Verify requirements in about 20 California cities and counties, some of which had considered the experience of Mission Viejo in their evaluation of E-Verify. Mission Viejo has often been contacted about E-Verify, and its ordinance has been consulted, by jurisdictions in California and other states.

In discussing Mission Viejo's pending adoption of the Basic Pilot ordinance in 2007, the *Los Angeles Times* reported: "As few as three cities in the U.S. require their contractors to participate in Basic Pilot. Two other cities that recently approved similar ordinances include Inola, Okla., and Hazelton, Pa., where a broader ordinance is being challenged in court on the grounds that local government cannot enforce federal law. Georgia and Oklahoma have passed laws for state contractors. Cherokee County in Georgia and Beaufort County in South Carolina have approved the rule for their contractors." ("O.C. city considers workers screening"/"Mission Viejo may require worker-eligibility checks," *Los Angeles Times*, March 17, 2007, pp. B1, B10.)

Simi Valley's City Attorney said that Simi Valley had a study showing 15 California jurisdictions with E-Verify requirements before that city adopted its ordinance in late 2010.

"Before the bill [AB 1236] was signed, at least 20 municipalities in California required use of E-Verify for either city contractors or all businesses within city limits: Mission Viejo, Palmdale, San Clemente, Murrieta, Lake Elsinore, Lancaster, Temecula, Escondido, Menifee, Hemet, Wildomar, San Juan Capistrano, Hesperia, Norco, San Bernardino County, Rancho Santa Margarita, Yorba Linda, Placentia, Orange, and Simi Valley. Many more California cities use E-Verify for government employees; such use is not prohibited by the new state bill." (Jon Feere, "California Limits E-Verify, Supports Illegal Hiring Practices," *www.cis.org*, October 2011.)

Mission Viejo City Hall staff members have said that numerous inquiries respecting E-Verify have come in from Orange County and other California jurisdictions and other parts of the country since 2007. Officials from such cities as San Clemente, Villa Park, and Simi Valley have indicated they were influenced in their adoption of E-Verify requirements by Mission Viejo's experience.

A Lewisville, Texas, city council member's proposed contractor E-Verify requirement was "modeled after a program in Mission Viejo, Calif." ("Lewisville may crack down on hiring of illegal immigrants," *The Dallas Morning News*, January 8, 2010, *www.dallasnews.com*, 8/6/12.)

Portions of a City of Novato, California E-Verify ballot initiative proposed in 2009 were copied word-for-word from Mission Viejo's ordinance. A summary of the initiative issued by its sponsor said, "We based our initiative on ordinances in Mission Viejo, CA and Lakewood, WA. The Mission Viejo ordinance has been in effect for over two years." (*www.clecnovato.com*, 8/6/12.)

Cities such as Temecula, California, Lakewood, Washington, and Camas, Washington, have E-Verify ordinances titled "Lawful Hiring Compliance," a title that originated in Mission Viejo. Lakewood's ordinance, from 2009, is identical to Mission Viejo's in many respects. (*municode.cityoflakewood.us*, 8/6/12.)

Simi Valley, by 2011, was requiring of its contractors periodic submission of "E-Verify compliance statements," a procedure that originated in Mission Viejo's 2010 amendment to its ordinance.

25. In 2010, the city amended the ordinance to add contractor E-Verify participation reporting requirements. As of the first reporting period, in 2011, the city achieved 100% compliance by its contractors subject to the E-Verify requirement, numbering approximately 70 companies. We commend our city's contractors for their positive response to the city's efforts in support of the integrity of American law.

In July/August 2010, the council unanimously passed the amended ordinance (No. 10-281), which added provisions designed to improve city monitoring of contractor compliance.

An October 2010 council resolution (No. 10-56) required that the results of the contractors' responses be publicly available and posted on the city's website for public review. The City Clerk's March 2011 report showed 100% compliance by the city's contractors.

26. In September 2011, the California Legislature passed, and in October 2011, the governor signed, Assembly Bill 1236, the Employment Acceleration Act of 2011 (California Labor Code §§2811-2813), prohibiting the state, cities, counties, and special districts from requiring nongovernmental employers to use electronic employment verification systems, such as E-Verify, as a condition of receiving governmental contracts, as a condition for applying for or maintaining business licenses, or as a penalty for violating licensing laws, except when required by federal law or to receive federal funds.

As relevant to Mission Viejo, AB 1236 provides that "neither the state nor a city, county, city and county, or special district shall require an employer to use an electronic employment verification system, including under the following circumstances: (a) As a condition of receiving a government contract...." (It also prohibits requiring use of an electronic employment verification system as a condition of applying for or maintaining a business license, which nullifies E-Verify ordinances passed in about a half-dozen California cities in 2009 and 2010. Mission Viejo is not a business license city, so it never had occasion to consider an E-Verify requirement for all city businesses.)

27. In California, the legislative power of the people, excepting rights of initiative and referendum, is vested in the Legislature. State government is sovereign, and local governments are mere subdivisions of the state. The state preempts power in issues of statewide concern. Local ordinances may not authorize acts prohibited by state statute or prohibit acts specifically authorized by state statute. AB 1236 prevents the City of Mission Viejo from entering into contracts with city contractors requiring use of the E-Verify system, on or after January 1, 2012.

In our federal system, the national government and the states share sovereignty, but cities and counties do not. In California, as elsewhere, cities and counties are mere creatures of the state and exist only at the state's sufferance. The state is sovereign and, in a broad sense, all local governments and districts are subdivisions of the state. (*California Redevelopment Association v. Matosantos*, 53 Cal.4th 231, 255 (2011).)

"Passage of local legislation must avoid conflicts with state law, and the state preempts power in issues of statewide concern. Local ordinances may not authorize acts prohibited by state statute, nor prohibit acts specifically authorized by the legislature." ("About Municipal Government," California State Government Guide to Government from the League of Women Voters of California, *www.guidetogov.org*, 5/20/12.)

28. AB 1236 was premised upon four principal findings; each of them was questionable, outdated, and/or misleading:

For the Legislature's findings, see AB 1236, Section 1, available at *leginfo.ca.gov*.

(1) The Legislature said that a 2007 independent evaluation commissioned by the Department of Homeland Security "found that the electronic employment verification database was still not sufficiently up to date to meet requirements for accurate verification," and this "has led to employers being unable to hire employees in a timely

manner and kept workers from earning wages." E-Verify screening takes place only after a worker is hired, so it cannot be that it has resulted in employers being unable to hire employees in a timely manner and eligible workers being kept from earning wages. The only workers who are terminated are those who initially receive Tentative Nonconfirmations and then fail to contact the Social Security Administration or Department of Homeland Security and resolve discrepancies in identity or eligibility data within the prescribed period of time. In referencing the now-outdated 2007 Westat evaluation (which at the time resulted in DHS saying E-Verify is "an enormous success"), the Legislature inexplicably ignored the more recent Westat study made public in early 2010, which determined that E-Verify: authorizes over 99% of eligible workers initially ("a resounding affirmation of the accuracy and efficiency of the system," per USCIS), and authorizes the majority of the rest in the second step of the E-Verify process; accurately detects the status of unauthorized workers almost half of the time; may deter many unauthorized workers from applying for jobs; is much more effective than the Form I-9 verification process used without E-Verify; reduces discrimination against foreign-born workers; is generally considered by employers to be non-burdensome; and is the best available tool to help employers determine whether their employees are authorized to work in the U.S. The Legislature likewise did not mention the CFI Group 2010 Customer Satisfaction Survey wherein "E-Verify received an exceptionally high overall customer satisfaction score." The Legislature ignored administration congressional testimony that E-Verify is "a smart, simple and effective tool" that is "fast, free, and easy-to-use." In our view, a law enforcement tool that is inexpensive, quick, and non-burdensome, and cuts the rate of a particular crime nearly in half, must be considered to be an extremely economical and effective one.

Is the Legislature correct in saying, respecting eligible workers, that errors in the verification databases have "led to employers being unable to hire employees in a timely manner and kept workers from earning wages"? E-Verify screening is done only for someone who has been hired. Prescreening is prohibited. So E-Verify does not actually prevent someone from being hired, and earning wages, in the first place. If a Tentative Nonconfirmation (from SSA or DHS) is issued, the employer refers an employee who wishes to contest the result to the SSA or the DHS to resolve the problem, privately explaining to the employee what needs to be done, and providing a notice of the TNC and an instructional referral letter. The employee must follow up with the appropriate government agency within eight work days to update his information. The employer may not terminate the employee until that process is complete. If the discrepancy is not resolved, the finding becomes a final nonconfirmation (FNC), and the employment may then be, and must then be, terminated. (In some circumstances there can be a further contest of the results.) (See Employment Verification/E-Verify at *www.uscis.gov*.)

The 2007 independent evaluation was done for DHS by Westat (*Findings of the Web Basic Pilot Evaluation*, September, 2007, *www.uscis.gov*, 8/7/12). The portion of the 2007 Westat report referenced by the Legislature reads, in context: "The accuracy of the USCIS database used for verification has improved substantially since the start of the Basic Pilot Program. However, further improvements are needed, especially if the Web Basic Pilot becomes a mandated national program – improvements that USCIS personnel report are currently underway. Most importantly, the database used for verification is still not sufficiently up to date to meet the

IIRIRA [Illegal Immigration Reform and Immigrant Responsibility Act of 1996] requirement for accurate verification, especially for naturalized citizens. USCIS and SSA accommodate this problem by providing for manual review of these cases. This review is time consuming and can result in discrimination against work-authorized foreign-born persons during the period that the verification is ongoing, if employers do not follow procedures designed to protect employee rights." The Legislature neglected to note that the accuracy problem seems to be a real problem only in cases where employers do not follow E-Verify procedures.

The 2007 Westat report said (p. xxii): "Most employers using the Web Basic Pilot found it to be an effective and reliable tool for employment verification and indicated that the Web Basic Pilot was not burdensome."

The DHS Assistant Secretary for Policy said following the issuance of the 2007 Westat report: "E-Verify is an enormous success." ("An Immigration Enforcement Tool That Works - For Everyone," Leadership Journal Archive, November 29, 2007, *www.dhs.gov*, 8/6/12.)

The Supreme Court said in the *Whiting* case: "According to the Department of Homeland Security, 'the E-Verify system can accommodate the increased use that the Arizona statute and existing similar laws would create.' Brief for United States as *Amicus Curiae* 34. And the United States notes that '[t]he government continues to encourage more employers to participate' in E-Verify. *Id.*, at 31."

In the *Whiting* case, the administration told the Supreme Court that "E-Verify's successful track record...is borne out by findings documenting the system's accuracy and participants' satisfaction." The Court quoted the government's statement (in the E-Verify User Manual for Employees, p. 4, September 2010) that the program is "the best means available to determine the employment eligibility of new hires."

Without explanation, the Legislature's findings reference only the now-outdated 2007 Westat study, and make no mention of the more recent Westat study that was released in early 2010 (*Findings of the E-Verify Program Evaluation*, December 2009, *www.dhs.gov*, 8/6/12), which then became the best source of information on the accuracy and effectiveness of E-Verify. The Obama administration's summary of the Westat report ("Westat Evaluation of the E-Verify Program: USCIS Synopsis of Key Findings and Program Implications," January 28, 2010, *www.uscis.gov*, 8/6/12) says that:
--"over 99 percent of authorized workers are initially found to be employment authorized," and the majority of the rest are ultimately found to be authorized.
--E-Verify "accurately detects the status of unauthorized workers almost half of the time."
--it may be that E-Verify "deters many" unauthorized workers from even applying for jobs.
--E-Verify is "much more effective" than the Form I-9 verification process used without E-Verify.
--E-Verify is "the best available tool to help employers determine whether their employees are authorized to work in the United States."
--E-Verify "reduces discrimination against foreign-born workers."
--"Employers are generally satisfied with the program and feel it is non-burdensome."

"Looking just at the group of authorized workers, Westat found that over 99 percent of that subset of E-Verify cases are initially found to be employment authorized – a resounding affirmation of the accuracy and efficiency of the system." ("Westat Evaluation of the E-Verify Program: USCIS Synopsis of Key Findings and Program Implications," January 28, 2010, *www.uscis.gov*, 8/6/12.)

The Legislature also did not mention the CFI Group 2010 Customer Satisfaction Survey - E-Verify: "A recent customer satisfaction survey validates what U.S. Citizenship and Immigration Services (USCIS) has long asserted – that the Obama administration's commitment to building the E-Verify system is the right investment in building a viable tool to ensure a legal workforce in the United States….The customer survey evaluated key aspects of the E-Verify program such as registration, tutorial, ease of use, technical assistance, and customer service. E-Verify received an exceptionally high overall customer satisfaction score – 82 out of 100 on the American Customer Satisfaction Index scale – compared to the government's overall satisfaction score of 69….'The E-Verify Program works exceptionally well, according to employers, and is a very promising tool for ensuring a legal workforce in the U.S.,' said USCIS Director Alejandro Mayorkas." (USCIS, "E-Verify Gets High Marks from Employers in Customer Satisfaction Survey," January 18, 2011, *www.uscis.gov*, 8/6/12.)

Per Obama administration testimony in February 2011, "E-Verify is a smart, simple and effective tool..." It is "fast, free, and easy-to-use." The administration is not impressed with criticism of E-Verify based upon the fact that not all eligible workers will receive immediate confirmation: "It is noteworthy that E-Verify is often deemed to have erred when a new hire receives a TNC and is subsequently determined to be work authorized. Yet, the TNC may have been caused by a variety of reasons independent of E-Verify's accuracy. For example, through no fault of E-Verify, various errors - from employer typos to employees incorrectly filling out the Form I-9 - may lead to a TNC. In addition, an employee who neglected to update his or her SAA records upon changing his or her name after marriage could receive a TNC even though he or she is work authorized. More generally, although our goal is to minimize TNCs of work authorized employees, it bears noting that the E-Verify process was designed as a two-step one precisely so that initial TNC data mismatches would not result in inaccurate final verification." (Testimony of USCIS Associate Director Theresa C. Bertucci, House Subcommittee on Immigration Policy and Enforcement, "E-Verify: Preserving Jobs for American Workers," February 10, 2011, *www.dhs.gov*, 8/6/12.)

(2) The Legislature found that mandatory use of electronic verification "would increase the costs of doing business in a difficult economic climate," citing a United States Chamber of Commerce estimate that "the net societal cost of all federal contractors using the E-Verify Program would amount to $10 billion a year, federally." It found that employers report that "the cost, technological demands, and staff time that an electronic employment verification system requires to use and implement come at a time when they are already struggling." Mission Viejo's experience since 2007 has been that E-Verify takes an HR staff member only about five minutes per newly hired worker found to be work authorized. A few additional steps are needed for hires initially found not work authorized (3.6% of all workers in 2008, per the recent Westat study; about half that rate in Fiscal Year 2011, per

***www.uscis.gov*). E-Verify is provided by the federal government free to a business except for the cost of a computer and an Internet connection, and employee training and use time.**

E-Verify is provided to a business by the federal government free of charge. The business, of course, must pay for its own computer and Internet connection, and the cost of the time it takes for employee training and use. Very likely the hiring staff at any company that secures a Mission Viejo contract worth $30,000 or more already has a computer and an Internet connection.

As for staff time, use of E-Verify in the hiring process, according to the Human Resources Analyst for the City of Mission Viejo, adds about five minutes for each new employee who is a legal worker. Additional steps and thus additional time--but probably not very much time--are required if E-Verify returns a Tentative Nonconfirmation for a new employee.

(3) The Legislature found that employers using the program "report that staff must receive additional training that disrupts normal business operations," which if E-Verify was mandated nationwide would cost $2.7 billion, most of it borne by small businesses. Mission Viejo's experience since 2007 has been that, far from disrupting normal business operations, E-Verify has required just a few hours of HR staff training over a period of years.

Does E-Verify involve "additional training that disrupts normal business operations"? That has not been the experience of the City of Mission Viejo, which is now in its sixth year using E-Verify. The Human Resources Analyst for the City of Mission Viejo, who since the beginning in 2007 has handled the E-Verify checks for new city employees, says the initial training in 2007 took about two hours. Subsequently, periodically-necessary training on program updates (done through Webinars) has required an estimated one-half hour to one hour for training over any given two-year period. It is difficult to imagine how a few hours of training over a period of years could disrupt normal business operations and result in substantial additional costs.

(4) The Legislature said its intent was "that the state maintain the intent of federal law by ensuring that private employers retain the ability to choose whether to participate in the electronic verification program." It mischaracterized federal law in implying there is an intent that employers retain an ability to choose not to participate in E-Verify despite state or local government mandates. Federal immigration law preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." In May 2011, the U.S. Supreme Court, in *Chamber of Commerce v. Whiting*, found that Arizona's 2007 licensing law requiring use of E-Verify by all Arizona employers "falls well within the authority Congress chose to leave to the States" and "is entirely consistent with the federal law."

States and local governments do not have free rein in combating employment of unauthorized workers. Federal immigration law preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." (8 U.S.C. §1324a(h)(2).)

In *Chicanos Por La Causa, Inc. (CPLC) v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), the Ninth Circuit determined that Arizona's business licensing sanctions and its E-Verify mandate were not preempted by federal law. The Ninth Circuit referenced the District Court's statement that "while Congress made participation in E-Verify voluntary at the national level, that did not in and of itself indicate that Congress intended to prevent states from making participation mandatory." The Ninth Circuit agreed: "Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation."

On May 26, 2011 (months before AB 1236 passed the State Senate), the United States Supreme Court, in *Chamber of Commerce of the United States of America v. Whiting*, 563 U.S. __ (2011), upheld Arizona's 2007 licensing sanctions law, including its E-Verify mandate. Even though Congress itself has not made E-Verify mandatory rather than voluntary, the Court found Arizona's E-Verify requirement to be "entirely consistent with the federal law."

The Court said federal immigration law "expressly preempts some state powers dealing with the employment of unauthorized aliens and it expressly preserves others. We hold that Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted." The Court found likewise that Arizona's law was not impliedly preempted by federal law, as its procedures "simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws."

29. As of the beginning of 2012, two states--California and Illinois--prohibited local governments from mandating E-Verify for their contractors and business licensees. Seven states--Alabama, Arizona, Georgia, Mississippi, North Carolina, South Carolina, and Utah --mandated E-Verify for all, or most, employers. Two states, Louisiana and Tennessee, had made E-Verify an option in requiring additional verification by all, or most, employers. Seven other states mandated E-Verify for public agencies and state contractors, and three mandated E-Verify for state contractors but not public agencies. In the great majority of states, local E-Verify requirements are allowed and E-Verify has not yet been instituted on a statewide basis; in these states, local governments--cities, counties, and special districts--have the opportunity to adopt E-Verify requirements for their employees, contractors, and/or business licensees, and thereby substantially increase the chances of American jobs going to legal residents rather than illegal aliens.

There are a number of websites that list state and local E-Verify laws and policies. Some of them are not updated regularly. The information on state E-Verify laws presented here was obtained mainly from the National Immigration Law Center website, *www.nilc.org*, which features a table showing the laws as of November 2011, and a map depicting current state E-Verify laws and policies as of January 2012, and from LawLogix, *www.lawlogix.com*, which has an E-Verify State Map updated to 2012 and information on the individual states.

According to Obama administration testimony in 2011: "As of today, more than 246,000 employers are enrolled, representing more than 850,000 locations. More than 1,300 new employers enroll each week and the number of employers enrolled in E-Verify has more than doubled each fiscal year since 2007. The volume of queries per fiscal year has increased from

3.27 million in FY 2007 to 16.4 million in FY 2010. In FY 2011 to date, employers have run more than 5.3 million queries. As of January 2011, federal contractors who use E-Verify total more than 33,000; 21,360 contractors indicate that they are covered by the Federal Acquisition Regulation (FAR) clause in their contracts requiring them to use E-Verify….The E-Verify program is well-equipped to handle continued expansion. E-Verify currently has the capacity to receive at least 60 million electronic queries annually if all new hires were run through the E-Verify program." (Testimony of USCIS Associate Director Theresa C. Bertucci, House Subcommittee on Immigration Policy and Enforcement, "E-Verify: Preserving Jobs for American Workers," February 10, 2011, *www.dhs.gov*, 8/6/12.)

30. The city makes no finding as to whether AB 1236, the Employment Acceleration Act of 2011, operates retroactively, such that it prohibits future enforcement of E-Verify provisions contained in city contracts entered into prior to its effective date. However, if AB 1236 has no retroactive effect, the city's suspension of enforcement of its contractor E-Verify requirement is considered, nonetheless, to include suspension of enforcement of E-Verify provisions contained in pre-2012 city contracts, for the sake of continuity respecting nonenforcement begun immediately after the passage of AB 1236.

It may be that California E-Verify cities are not in agreement as to whether AB 1236, which is silent on retroactivity, prevents enforcement of E-Verify requirements in pre-2012 contracts. The mayor of Rancho Santa Margarita has indicated that his city assumes the law operates retroactively. The City Attorney for the City of Orange noted in November that legislation typically cannot impair existing contracts ("Mission Viejo delays repeal of E-Verify law," *The Orange County Register*, November 23, 2011, Local 6), and an attorney in that office subsequently stated that the city views AB 1236 as nonretroactive and it will continue to enforce its pre-2012 requirements.

Mission Viejo discontinued enforcement of pre-2012 contractual requirements after the passage of AB 1236, and in the interest of clarity and continuity should not reverse course. Mission Viejo should avoid making a determination on the retroactivity of AB 1236, as that would be taking sides, unnecessarily, on an issue respecting which the cities seem to differ.

SECTION 2 - RESOLUTION

BE IT RESOLVED that the City Council of the City of Mission Viejo respectfully calls upon all who love this country to join us in reacquainting ourselves with, and recommitting ourselves to, the foundational American principle of the rule of law, and specifically to those rule of law principles, enunciated here, that are most relevant to the massive and complex problem of illegal immigration.

"The rule of law--the glue that holds together the various structural elements of a democracy--cannot be developed without citizen buy-in. It is public participation in the making of laws and oversight in their implementation, coupled with the demand that both rulers and the ruled be governed by the law, that guards against the arbitrary exercise of state power and against general lawlessness. There is now growing interest in providing average citizens and government officials with a vision and narrative that explains rule of law principles, why people have a stake

in them, and what it takes to foster a supportive culture. This 'culture of lawfulness'--and not just words on paper or institutions by themselves--creates the environment for democracy and the rule of law to flourish. As much as any factor, the rule of law separates societies where citizens feel secure and free to develop their individual potential, from others where people live in fear of the state's arbitrary actions or of criminals enabled or emboldened by corruption and public apathy." (National Strategy Information Center, "Developing Support for the Rule of Law: A Culture of Lawfulness," *www.strategycenter.org*, 7/1/12.)

BE IT RESOLVED that the City Council of the City of Mission Viejo calls upon local governments, including cities, counties, and special districts, in the great majority of states where E-Verify requirements are allowed and statewide requirements are not already in effect, to consider instituting E-Verify requirements for their employees, contractors, and/or business licensees.

BE IT RESOLVED that the City of Mission Viejo shall continue to utilize E-Verify in the hiring of city employees.

AB 1236 does not prohibit a governmental entity from participating in E-Verify in its hiring of employees if it chooses to do so. (California Labor Code §2813(b).)

BE IT RESOLVED that the City Council of the City of Mission Viejo calls upon local governments in California, including cities, counties, and special districts, to consider instituting E-Verify requirements for their newly hired employees, so as to better comply with federal immigration law and to set a good example for business owners and employers in their jurisdictions.

BE IT RESOLVED that the City of Mission Viejo shall suspend operation of its Lawful Hiring Compliance Ordinance as required by AB 1236, but will maintain the ordinance in the city's Municipal Code for historical and reference purposes. In the city's Municipal Code, the Lawful Hiring Compliance Ordinance shall be accompanied by a reference to this resolution, and a link to this resolution to facilitate access.

The complete Mission Viejo E-Verify ordinance will still be accessible on the Internet to those (in other states) who are interested in E-Verify.

SECTION 3 - CERTIFICATION.

(The Certification portion of the proposed resolution is not included in this research paper.)