When the Apocalypse Comes, Will Anything Change?: Gay Marriage, Black Lives Matter, and the Rule of Law

Andrew Chongseh Kim

I. Introduction

Guess the world changed. — T-Dog
No, it's the same as it ever was: the weak get taken. — Guillermo

Most conceptions of life after the apocalypse, be it nuclear, zombie, natural disaster, or otherwise, are dominated by a single image: lawlessness. Not all apocalyptic visions are dominated by lawlessness. In particular, apocalypses caused by alien invasion often focus more on the cooperative struggle of humanity against the invading hordes. See, e.g., Independence Day (Twentieth Century Fox Film Corp. 1996) ("[S]hould we win the day, the Fourth of July will no longer be known as an
society collapses, the rule of law ceases to function. Whether one person owns a particular house no longer depends on clean title, the statute of frauds, nor whether the person’s adverse possession was “open and notorious.” It depends mostly on whether that person has enough guns to keep everyone else (or everything else) out. To be more precise, after civilization falls, a person’s individual rights will be limited to those rights one can enforce with force, and those rights others are willing to respect voluntarily. Beyond statutory law, common law, or even “natural law,” this is a law of nature. Although the laws of nature will become more obvious after the apocalypse, they are as true today as they will be when civilization falls.

Under the laws of nature, rights and laws matter only to the extent they are enforced. People scavenging for food in empty supermarkets will rarely pause to ask whether the corporation that owns the store has abandoned its property interests in the Twinkies on the shelves. Rather, they will simply take what they

American holiday, but as the day the world declared in one voice: ‘We will not go quietly into the night! We will not vanish without a fight! We’re going to live on! We’re going to survive! Today we celebrate our Independence Day!’ (1997). Darryl K. Brown, Jury Nullification Within the Rule of Law, 81 MINN. L. REV. 1149 (1997) (suggesting that jury nullification in several circumstances occurs within the rule of law rather than in contravention of the law); Brian Z. Tamanaha, The Dark Side of the Relationship Between the Rule of Law and Liberalism, 3 N.Y.U. J. L. & Liberty 516 (2008) (arguing that a tension is created when the rule of law pairs with liberalism that antagonizes democracy) My purpose in writing this piece is not to contribute to these debates in any meaningful way. Rather, I seek only to make a simple argument about the functional nature of our rights in light of the coming apocalypse, an apocalypse that will most likely involve zombies.

See, e.g., Zombieland (Columbia Pictures 2009) (depicting Woody Harrelson’s character, Tallahassee, foraging through a zombie-infested country in search of one last Twinkie before all Twinkies reach their expiration date).
want, ignoring niceties like shoplifting laws or words like “felony burglary” that currently have great meaning. Similarly, desperate men and women who encounter others with useful goods will often try to take them by force. When one person is willing to kill another for that person’s possessions, the true owner of those goods depends not on who invested personal labor to create the goods, but on who is stronger.

Even when zombies walk the earth, however, most people will not simply shoot everyone they see. For example, even the most ruthless woman might hesitate to take a gun belonging to another, particularly if that gun is loaded and pointed at her. Others will voluntarily respect the rights of others, believing that it is wrong to take from others even if it would be convenient for themselves. Finally, people will often decide that they will be better off working together, even if the terms of working together are not as fun or fair as they would like. These principles of the laws of nature (force, voluntary respect, and communality) help us understand the character of the rule of law today.

First, with respect to the vaunted rule of law, consider a few United States Supreme Court cases: Bush v. Gore, King v. Burwell, Obergefell v. Hodges, Ledbetter v. Goodyear Tire & Rubber Company, and Korematsu v. United States. Almost all readers familiar with these cases can point to at least one case they believe was not only wrongly decided, but one in which they believe the majority opinion flouted the rules of statutory and constitutional interpretation the Justices of the Court have sworn to uphold. Although the decisions in many

---

11 In contradiction to John Locke’s labor theory of property. John Locke. The Second Treatise of Civil Government 22 (Hayes Barton Press 2006) (1690) (“His labour hath taken it out of the hands of nature, where it was common, and belonged equally to all her children, and hath thereby appropriated it to himself.”).

12 In contradiction to the property law doctrine of capture. Pierson v. Post, 3 Cai. R. 175, 177 (N.Y. Sup. Ct. 1805) (holding that mere pursuit without capture of a wild animal does not create a property entitlement).

13 In accord to the property law doctrine of conquest. Johnson v. M’Intosh, 21 U.S. 543, 545 (1823) (stating that the English government previously obtained title to land in North America by conquest).

14 531 U.S. 98 (2000) (declaring, in effect, George W. Bush the winner of the presidential election before a recount could be completed).

15 135 S. Ct. 2584 (2015) (interpreting a provision of the Affordable Care Act contrary to the plain meaning of its text).

16 135 S. Ct. 2480 (2015) (holding that the fundamental right to marry is guaranteed to same sex-couples even though such a provision was unthinkable when the Fourteenth Amendment was ratified).


18 323 U.S. 214 (1944) (declaring constitutional the government’s detention of U.S. citizens of Japanese descent for two years based solely on their race).

19 See, e.g., Obergefell, 135 S. Ct. at 2611 (Roberts, C.J., dissenting) (“[T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. 
ways flout the rule of law, they are obeyed as law, even by most of those who disagree with them.

Why do almost all of us obey and follow laws we think were enacted or enforced in contravention of the law? One can speak of the legitimacy of the process used in creating the laws, or faith in the democratic process to correct major errors. Ultimately, however, the answer comes down to the fact that, for most of us, the costs of resisting laws we find illegitimate are simply higher than the costs of cooperating with what most accept is the law. For example, the Affordable Care Act (ACA), colloquially known as Obamacare, requires most large employers to offer health insurance to their full-time employees. Although some employers have attempted to reduce their obligations under the ACA by reclassifying employees as part-time, it appears that few, if any, major employers are choosing to ignore the law completely. Given the uproar of people who claim that the ACA is unconstitutional, it is unlikely that this massive compliance can be explained because everyone believes that the ACA is legitimate. Rather, they follow the law because a majority of the Court has ruled that the ACA is constitutional and employers are generally quite certain that, right or wrong, the government would impose large penalties upon those refusing to obey the law. Moreover, they know that the relevant government agents and banks would cooperate in collecting those penalties as well. As a result of this national consensus that rulings by a majority of the Court will be followed, a consensus of five people dressed in rather simple robes largely have the power to impose whatever law they choose. As such, the laws of our entire country can be, and sometimes are, determined by a tyranny of five.

Under the Constitution, judges have power to say what the law is, not what it should be,).  

25 See generally Tom R. Tyler, Why People Obey the Law (2006) (explaining that the belief in the legitimacy of laws people find inconvenient is often a larger factor in compliance with the law than fear of punitive sanctions). 
26 Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012) (“The Affordable Care Act’s requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it or to pass upon its wisdom or fairness.”). 
27 See e.g., Obergefell v. Hodges, 135 S. Ct. 2684, 2612 (2015) (Roberts, C.J., dissenting) (“Five lawyers have closed the debate and enacted their own vision of
At the same time, however, today, just like after the apocalypse, people sometimes refuse to obey the rules most of us choose to follow. Whether the rules people flaunt have any meaning depends on whether, and to what extent, they are enforced. For example, *Brown v. Board of Education*\(^{28}\) declared school segregation unconstitutional.\(^{29}\) Nonetheless, many schools remained segregated for years after 1954, because state and local governments, as well as common citizens, resisted, often with violent force.\(^{30}\) Indeed, it was not until 1963 that the first African-American students enrolled in previously “white” Alabama schools, and only after federal authorities called in armed soldiers to face down the state patrolmen and angry civilians who aggressively enforced segregation.\(^{31}\) Although African Americans had a right to a desegregated education under the Constitution, they did not have that right in any practical sense until those rights were enforced by government might.

In Part II of this Article, I explain the nature of laws and governance after the apocalypse. In Part III, I argue that the laws of nature are fundamental to our society and, indeed, have been recognized in our courts and society today. Lastly, in Part IV, I explore two important timely issues, same-sex marriage and the Black Lives Matter movement, in light of the laws of nature.

II. The Rule of Law v. The Laws of Nature

*You see the rules of the hunt don’t mean jack out here. Now that rabbit you’re holdin’ is claimed, boy. . . . So if I was you, I’d hand it over, now, before you get to wish you didn’t even get out of bed this morning.* —Len\(^{32}\)

A. Life and Laws After the Apocalypse

*Do you miss the sword? — Rick Grimes*

*It wasn’t really mine in the first place. I found it, in the very beginning. — Michonne*\(^{33}\)

Every fall, law students across the country begin a three-year journey in which they learn both the black letter law that governs our society, and the justifications for those laws. They learn how property laws validate moral rights

---

\(^{28}\) 347 U.S. 483 (1954).

\(^{29}\) Id. at 495.

\(^{30}\) See *This Day in History: The Desegregation of Alabama Schools in 1963 (PHOTOS), Huffington Post* (Sept. 10, 2013, 10:03 AM), http://www.huffingtonpost.com/2013/09/10/this-day-in-history-desegregation-alabama-schools_n_3896460.html.

\(^{31}\) Id. This, obviously, is a gross simplification of the often horrific and often heroic battle to desegregate public schools in the South.


to things they create with their personal labor.\textsuperscript{34} They learn how theft laws encourage societally efficient behavior.\textsuperscript{35} They debate the originalist and functional justifications for the Fourth Amendment rights against unreasonable search and seizure.\textsuperscript{36} As Len, a psychotic hunter in the television drama \textit{The Walking Dead}, put it, however, all of these legal niceties “don’t mean jack” after the apocalypse.\textsuperscript{37} What \textit{The Walking Dead} teaches us, above all else, is that laws about who owns what, what is illegal, and what rights people have only matter to the extent they are respected and enforced.

When civilization falls, legislatures, courts, and police will cease to exist in any meaningful way.\textsuperscript{38} Some people may still feel they have the same rights promised by the defunct government, and some others might feel a moral obligation to respect those rights. Crucially, however, some people will not. What form of redress will exist for people whose neighbors break the locks on the gates, letting in the undead hordes?\textsuperscript{39} Where can a woman find justice when her sisters are killed by a mutant warlord?\textsuperscript{40} With no courts in which to file a claim, nor police to enforce law and order, the answer to these questions generally involves lots of guns.

This concept is well illustrated in a scene from \textit{The Walking Dead}. Darryl, a protagonist, tracked a rabbit for hours, found the rabbit, and was about to shoot it when Len, a psychotic hunter, swooped in and shot it first.\textsuperscript{41} Darryl then picked up the rabbit.\textsuperscript{42} One could argue that under John Locke’s theory of property,\textsuperscript{43} the rabbit should belong to Darryl, who invested his personal labor into tracking the rabbit, and without whom the rabbit would likely remain in the

\begin{footnotesize}
\begin{footnotes}
\item[34] \textsc{Locke, supra} note 11, at 22.
\item[36] \textit{See, e.g.}, \textit{Mapp v. Ohio}, 367 U.S. 643 (1961) (applying the exclusionary rule by prohibiting any illegally obtained evidence from being introduced to court at all levels of government).
\item[37] \textit{The Walking Dead: Us, supra} note 32.
\item[38] Indeed, after the apocalypse, the readers of this Article might most like to avoid those adhering to the words of Dick the Butcher: “The first thing we do, let’s kill all the lawyers.” \textsc{William Shakespeare, The Second Part of King Henry the Sixth} act 4, sc. 2; Debbie Vogel, ‘\textit{Kill the Lawyers,’ A Line Misinterpreted}, N.Y. \textsc{Times} (June 17, 1990), http://www.nytimes.com/1990/06/17/nyregion/1-kill-the-lawyers-a-line-misinterpreted-599990.html (“Dick the Butcher was a follower of the rebel Jack Cade, who thought that if he disturbed law and order, he could become king. Shakespeare meant it as a compliment to attorneys and judges who instill justice in society.”); \textit{see also Star Trek: The Next Generation: Encounter at Fairpoint} (Paramount Television broadcast Sept. 28, 1987) (Captain Jean-Luc Picard: “We humans know our past, even when we’re ashamed of it. I recognize this court system as the one that agreed with that line from Shakespeare: ‘Kill all the lawyers.’” Q: “Which was done.”).
\item[39] \textit{The Walking Dead: Killer Within} (American Movie Classics television broadcast Nov. 4, 2012).
\item[40] \textit{Mad Max: Fury Road, supra} note 2.
\item[41] \textit{The Walking Dead: Us, supra} note 32.
\item[42] \textit{Id.}
\item[43] \textsc{Locke, supra} note 11, at 22.
\end{footnotes}
\end{footnotesize}
Gay Marriage, Black Lives Matter, and the Rule of Law

wild, rather than Len, who simply stumbled upon the rabbit while searching for Darryl. Under *Pierson v. Post*, and the laws of most states, however, the rabbit would legally belong to Len, who had “intercepted and killed” it first. This is the law in Georgia, where *The Walking Dead* is set. However, this right based on Georgia statutes as interpreted by Georgia courts and validated by the capture theory of property means very little during the zombie apocalypse if the person in current possession of the item in dispute is willing to use force to retain possession. In *The Waking Dead* rabbit scenario, Darryl held a crossbow and looked willing to kill Len in order to keep the rabbit he found. If Darryl were to kill Len, he would clearly own the rabbit, and Georgia’s laws of criminal forfeiture would be equally irrelevant.

However, before Darryl killed Len, another psychotic hunter interceded, who acknowledged that Len and Darryl both had legitimate claims and then cut the rabbit in two, giving half to each man in the spirit of King Solomon. Darryl, the toughest non-female on the show, could still have killed Len and taken the rest of the rabbit, but he chose not to. As a result, Len owned one half of the rabbit not because he either held legal title under Georgia law, nor was he following the code of his own clan, but because Darryl was not willing to kill Len over half of a rabbit.

In the post-apocalypse, laws matter only to the extent that people respect those laws. Property rights and morality mean nothing in the face of a person who is willing and able to kill you rather than recognize those rights. At the same time, however, the power to take whatever you can matters only to the extent that you are willing to accept the consequences of doing so. This, then, is what rights mean when civilization falls. Rights only matter to the extent they are enforced, either through force or by convincing others to voluntarily respect those rights. Conversely, the rights people take are, by definition, quite real.

B. Voting and Governance in the Apocalypse

Maybe you people are better off without me. . . . You can do better? Let’s see how far you get. No takers? Fine. But get one thing straight [if] you’re staying. This isn’t a democracy anymore. —Rick Grimes

---

44 This narrative may differ slightly from that portrayed in the episode.
45 3 Cal. R. 175 (N.Y. 1805).
46 *Id.* at 178. This, of course, ignores the fact that Len likely shot the rabbit without a valid license and outside the span of the legal hunting season.
48 *The Walking Dead: Us*, supra note 32.
50 *The Walking Dead: Us*, supra note 32; 1 Kings 3:24-5 (King James).
I’m sorry. What I said last year, . . . it can’t be like that. What we do, what we’re willing to do, who we are, it’s not my call. . . . We’re the reason we’re still here, not me. . . . We stick together. We vote.—Rick Grimes

When society falls, the luckiest of us will find ourselves as part of a racially diverse group of misfits fighting together for survival. How will such a group be governed? In *The Walking Dead*, Rick Grimes announces that he will be the dictator of his group, and that his word, rather than the will of the majority, will be law. All members of his group assent. Why would someone follow a leader whose primary campaign promise was that he would ignore what most people wanted? The answer is the same today as it will be when viruses plague the earth: sometimes the cost of resisting illegitimate laws and leaders is greater than the benefits of cooperating.

People in the apocalypse band together and stay together for the same reasons people always have done so. They think their lives are better and safer in a group than on their own. Being with other people allows for a pooling of skills and division of labor, allowing for greater prosperity. When groups form, however, disagreements arise, work must be distributed, and decisions must be made that affect the entire group. After the courthouses have burned down and formal law ceases to exist, we will find that we must create our own rules and law to govern ourselves. We will set schedules for ourselves for who will stand watch over the camp, who will cook, who will forage for food and water. Rules for how our scarce food and water will be rationed and shared. Rules for when, and whether, newcomers will be allowed to join the group. Laws to dictate fair punishment for those who violate those rules. We will agree to processes for how such decisions will be made. Will we submit to the will of a single leader, trusting, or hoping, that she will be wise and benevolent? Will we vote by majority? As the group grows and more decisions must be made, will we create our own government? Perhaps electing a council of the wise to decide in our stead?

Once we have created processes to rule our small societies, how will we react when our leaders discover that our rules and processes are impractical or simply betray the trust we give them? Sometimes we will exile or kill leaders who have betrayed us. Other times a difference of opinion will cause some members of the group to leave, preferring to take their chances in the wild rather than obey

---

54 *The Walking Dead: Beside the Dying Fire*, supra note 50.
55 Id.
58 See, e.g., *The Walking Dead: Live Bait* (American Movie Classics television broadcast Nov. 17, 2013) (depicting a leader being exiled after losing the faith of the group); *Game of Thrones: Mother’s Mercy* (Home Box Office television broadcast June 14, 2015) (depicting a leader being killed for flouting the will of the group).
Gay Marriage, Black Lives Matter, and the Rule of Law

the leader. More often, however, as the group did in The Walking Dead, we will simply follow the leader even when they disregard our new laws, because we believe the other options, like regicide or a fractured group, would leave us worse off than cooperating with leaders who themselves violate our laws. As explained in Part III, this is exactly how we behave today when our leaders and judges violate the law: we usually do not resist because the cost of resisting is much higher than simply following what those in power declare is legal or the law.

III. The Rule of Law Under the Laws of Nature

Analyzing the nature of rights and laws in the post-apocalypse reveals a number of principles:

1. Rights are meaningless if others have the power to deny those rights and are willing to do so.
2. Rights that people take are real as long as others are not able or willing to stop them.
3. People will obey illegitimate decisions and authority if the cost of not following them is greater than the cost of obeying.

More than black letter law or natural law, these principles are immutable laws of nature (or of the supernatural, depending on the type of apocalypse in question). They define the nature of our rights, not only after the collapse of civilization, but in our courts today.

A. The Laws of Nature and the Courts

Consider, for example, the infamous case of Johnson v. M’Intosh, in which Johnson purchased land in North America from the Piankeshaw tribes who had inhabited those lands. Decades later, M’Intosh received title to those same lands from the United States government. The question, then, was whether Johnson’s title to the land, which was based on the Piankeshaw’s rights to their ancestral lands, was valid against M’Intosh’s claims. The Court applied the European law of nations, under which legal title to land could only be derived from the power of a sovereign nation, primarily white European nations. Because the Piankeshaw never received title to the lands from a European

---

59 See, e.g., Battlestar Galactica: The Farm (Syfy television broadcast Aug. 12, 2005) (depicting the fleet splintering over differences in religious views).
60 The Walking Dead: Beside the Dying Fire, supra note 52.
61 As George Sabine explains, under David Hume’s views of political theory: “The political world over, absolute governments which do not even do lip-service to the fiction of consent are more common than free governments, and their subjects rarely question their right except when tyranny becomes too oppressive.” George H. Sabine, A History of Political Theory 603 (1937).
63 Id. at 560.
64 Id. at 572.
65 Id. at 563.
nation, they never owned the land and could never have sold it to Johnson. Although this opinion has been excoriated by scholars as racist, self-justifying, and morally wrong, it is also clearly correct under the laws of nature. The Piankeshaw could only own their land if others were willing to respect those rights voluntarily, or if they could enforce those rights. Conversely, if the United States Government claimed ownership to those lands and backed up those claims with sufficient numbers of guns, they would own the lands under the laws of nature. In fact, the United States did assert its rights backed by guns and forced the Piankeshaw out, finalizing their ownership.

B. The Tyranny of the Five

Johnson v. M’Intosh was decided by a unanimous Court, and each Justice apparently agreed the case was decided according to sound legal principles. In other cases, however, Justices of the Court dissent, sometimes accusing the majority of flaunting the constitutional and legal principles they are sworn to uphold. Nonetheless, dissenting Justices of the Court have always acknowledged that the legally incorrect opinions of the majority are to be respected as the law, at least for the time being. Why?

Consider again the cases noted in Part I of this Article: Bush v. Gore, King v. Burwell, Obergefell v. Hodges, Ledbetter v. Goodyear Tire & Rubber Company, and Korematsu v. United States. All of these cases, with the exception of Korematsu, were five-to-four decisions in which the dissenting Justices of the Court concluded not only that the majority reached the wrong conclusion, but also often argued that the majority flaunted the principles of constitutional and statutory interpretation they were sworn to uphold. And yet each of these was

66 Id.
67 See, e.g., Robert A. Williams Jr., The American Indian in Western Legal Thought: The Discourses of Conquest 325-26 (1990) (arguing that M’Intosh is part of a “discourse of conquest, which denies fundamental human rights and self determination to indigenous tribal peoples,” and “assert[s] the West’s lawful power to impose its vision of truth on non-Western peoples through a racist, colonizing rule of law”).
68 Id. at 571.
69 See, e.g., Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens J., dissenting) (“The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land.”); Korematsu v. U.S., 323 U.S. 214, 244 (1944) (Jackson J., dissenting) (“But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient.”).
70 531 U.S. 98 (2000).
73 550 U.S. 618 (2007).
74 323 U.S. 214 (1944).
75 See, e.g., King, 135 S. Ct. at 2497 (2015) (Scalia, J., dissenting) (“Under all the usual rules of interpretation, . . . the Government should lose this case. But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.”).
treated as if they were legitimate law. In none of these cases did the minority urge the executive or legislative branches to ignore the majority’s opinion or to impeach the majority Justices of the Court for violating their oaths. Moreover, with the notable exception of Obergefell discussed in Part IV of this Article, very few American officials or citizens have responded as if they were free to ignore these rulings. Why not?

Clearly the answer to these questions cannot be because the decisions, upon deeper reflection, are legally and morally correct. Almost everyone familiar with these cases believes that at least one of them was decided incorrectly. Nor can the answer be that they are followed because people recognize that, although incorrect, they are legitimate because decided through constitutional processes. Applying the laws of nature, the answer is simple: people usually follow even outrageous decisions by five Justices of the Court because the cost of ignoring them is greater than the cost of following them. Most government officials and citizens understand that ignoring a decision by the Court will usually be pointless, because the vast majority of people, who are ultimately backed by all the weapons of the United States Military, will behave as if the decision is the law. In theory, a large enough group of people armed with weapons comparable to those of the United States Military could force their contrary interpretations of the law to be accepted. The one time this was attempted in American history, however, things went poorly for both sides, dissuading further such attempts. Because of these realities, all it takes is five people on the Court to implement legal realities in broad contradiction to prior understandings of the law, two notable examples of which include the Warren Court’s revolution and the more recent rise of originalism, often attributed to the late Justice Antonin Scalia.

76 Consider the comments by some liberals after Bush v. Gore, or the comments of some conservatives after the several Affordable Care Act decisions. See e.g., ALAN DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 174, 198 (2001) (“[T]he decision in the Florida election case may be ranked as the single most corrupt decision in Supreme Court history, because it is the only one that I know of where the majority justices decided as they did because of the personal identity and political affiliation of the litigants. This was cheating, and a violation of the judicial oath.”); Senator Rand Paul, Obamacare Is Not Constitutional, NAT’L REV. (June 28, 2012, 11:00 PM), http://www.nationalreview.com/article/304386/obamacare-not-constitutional-sen-rand-paul (“[J]ust because a majority of the Supreme Court declares something to be ‘constitutional’ does not make it so. . . . Make no mistake: Obamacare is not constitutional.”).


79 See generally Michael C. Dorf, The Undead Constitution, HARV. L. REV. (June 20, 2012), http://harvardlawreview.org/2012/06/the-undead-constitution/ (reviewing JACK BALKIN, LIVING ORIGINALISM (2011) & DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010)) (“When [Justice Scalia] was appointed to the Supreme Court in 1986, dead constitutionalism, that is to say, originalism, was still a
C. Presidents Acting Outside the Law

*John Marshall has made his decision; now let him enforce it!* — Attributed to President Andrew Jackson

As explained in Part II, one day in *The Walking Dead*, Rick decided he would no longer be bound by the laws and rules of governance upon which his group had agreed. He was able to do so because he had the power to do so. Although some people in his group may have thought his decision was unwise or unfair, they were unwilling to accept the consequences of rejecting that decision, and so did not have the power to stop him. For the same reasons, American Presidents often act contrary to what most would assume is the law, simply because they have the power to do so.

For example, in 2005, the New York Times revealed that President George W. Bush had authorized the National Security Agency (NSA) to listen to certain American phone calls without a warrant. The President chose to act as though Americans did not have privacy rights to certain phone calls and, as a result, they effectively did not have those rights. Subsequent lawsuits confirmed what many suspected at the time, that the warrantless wiretapping program was flagrantly unconstitutional. Nonetheless, the NSA violated the rights of Americans and, some argue, used the information they collected to better protect the United States for years before and years after the program was revealed. The officials who authorized these actions were never held civilly or criminally liable for their violations of the law, in large part because of the doctrines of qualified and absolute immunity, which shield government officials from liability for reasonable and even blatant rights violations.

mostly insurgent position within constitutional theory. Since then, and in no small part thanks to Justice Scalia’s own influence, originalism has become a leading approach to constitutional interpretation.”); Eric J. Miller, *The Warren Court’s Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 4 (2010) (arguing that the Warren Court revolutionized the right to privacy by “mount[ing] a consistent attack on . . . pre-existing versions of the right to privacy”).

80 This quote, often attributed to President Andrew Jackson, appears to paraphrase part of a letter Jackson wrote to John Coffee commenting on Chief Justice John Marshall’s opinion in *Worcester v. Georgia*, 31 U.S. 515 (1832). PAUL F. BOLLER, JR. & JOHN GEORGE, THEY NEVER SAID IT: A BOOK OF FAKE QUOTES, MISQUOTES, & MISLEADING ATTFIBUTIONS 53 (1989). What President Jackson actually wrote was that “the decision of the Supreme Court has fell still born, and they find that they cannot coerce Georgia to yield to its mandate.” *Id.*

81 *The Walking Dead: Beside the Dying Fire*, supra note 52.

82 *Id.*

83 *Id.*


absolute immunity, just like the doctrine of conquest, anticipate that our governmental officials will violate people’s rights with some regularity. Many critics argue that President Barack Obama has repeatedly taken unilateral action that exceeds the power granted to him under the Constitution or by Congress. Regardless of their legality, however, they still have the force of law. Moreover, sometimes Presidents are lauded for actions that arguably exceed their constitutional power. Most famously, in 1863, Abraham Lincoln claimed unilateral executive power to free millions of slaves in the South. Although Lincoln’s actions arguably constituted massive executive overreach, the Emancipation Proclamation holds the well-deserved status as the most lauded executive order in United States history. Today, just like after the apocalypse, society expects that our leaders will violate our rights from time to time, that they will often do so with no consequences, and that doing so will sometimes be for the betterment of all.

D. People Acting Outside the Law

In 1993, Cliven Bundy, a Nevada rancher, stopped paying mandatory fees for grazing his cattle on federal land. He did not, however, stop grazing his cattle on federal land. In 1998, a federal district court permanently enjoined Bundy from grazing livestock on the given land and ordered him to pay damages and back fees. Bundy declined to follow the injunction. Over the next sixteen years, Bundy ignored repeated court orders to remove his livestock from federal land, accumulating over $1 million dollars in unpaid grazing fees and court-
ordered fines. Finally, in April of 2014, the Bureau of Land Management (BLM) began rounding up Bundy’s cattle to physically remove them from the land. Bundy gathered hundreds of armed supporters who, in spite of clear law to the contrary, declared that the BLM had no right to take Bundy’s cattle. These supporters faced off with around two dozen federal agents and local police officers, demanding the return of Bundy’s cattle. After a tense standoff, during which both sides pointed rifles at each other, the BLM returned Bundy’s cattle. For almost two years after the standoff, Bundy continued to graze his cattle illegally and refused to pay his taxes without legal repercussions. What happened? Did Bundy succeed in convincing the BLM and the Obama administration that, contrary to over 200 years of American legal precedent, individual citizens do have the right to interpret the laws as they see fit? Did President Obama decide that the combined might of the FBI, the Nevada National Guard with its M1A1 Abrams tanks, and local police officers were simply no match for 300 men and women armed with rifles? No.

The Cliven Bundy situation clearly violated the rule of law. The laws of nature, however, help explain why Bundy was allowed to blatantly flout the law. Although the federal government had the power to enforce the law, it simply was not willing to use that power to force Bundy and his supporters to comply. Bundy made clear that he and his supporters were willing to kill and be killed for their cause. President Obama, on the other hand, made it clear that he was not willing to kill or arrest that many Americans over a few cows.

Similarly, a year and a half later, Cliven’s sons, perhaps emboldened by their father, decided to seize a similarly isolated parcel of federal land, this one at the Malheur Wildlife Refuge in Eastern Oregon, and refused to leave until the federal government gave the land to local ranchers. Again, the Bundys flouted

---

96 Reuters, supra note 91.
97 Id.
98 Id.
99 Id.
101 President Obama would probably prefer to avoid another Ruby Ridge, in which a white separatist facing charges had a bloody stand-off with United States marshals and FBI agents that sparked a national debate regarding the acceptable levels of force by federal law enforcement agencies. 1992: Incident at Ruby Ridge, HISTORY, http://www.history.com/this-day-in-history/incident-at-ruby-ridge (last visited Mar. 20, 2016).
102 Kaplan & Wolf, supra note 100.
Gay Marriage, Black Lives Matter, and the Rule of Law

the law, and the federal government let them do so.\textsuperscript{103} Eventually, however, government agents arrested the leaders of the group and cleared out the refuge with only one fatality.\textsuperscript{104} The government also took the opportunity to peacefully arrest Cliven Bundy, nearly two years after his followers threatened to shoot federal officials for carrying out their lawful duties.\textsuperscript{105}

Thus, today, just as after a virus destroys civilization, people with enough guns can take and keep anything they want so long as no one with more guns is willing to stop them.\textsuperscript{106}

IV. The Laws of Nature Today

There are innumerable examples of situations in which the laws of nature take precedence over the laws of man. This section explores two such examples: Obergefell’s effect on the evolving contours of the right to marry,\textsuperscript{107} and the issues at the focus of the Black Lives Matter Movement.\textsuperscript{108}

A. Same-Sex Marriage

\textit{The Supreme Court [Justices] are the final interpreters of our Constitution, and their decisions cannot be overturned, even by the president. The only person with more power is a Kentucky county clerk. Not sure why the Founders put that in there. — Stephen Colbert}\textsuperscript{109}

In June of 2015, the Court recognized that the fundamental right to marry must not exclude same-sex couples in Obergefell v. Hodges.\textsuperscript{110} As explained in Part II, however, legal rights matter only to the extent they are actually respected and enforced. For example, Brown declared school segregation unconstitutional in 1954.\textsuperscript{111} Nonetheless, not a single African-American student was enrolled in “white” schools in Alabama until 1963, when federal authorities backed with guns intervened.\textsuperscript{112} In reality, African-American children did not have the right to an equal education for years; indeed, many argue that they are still denied that right today.\textsuperscript{113}

Before the Court issued its opinion in Obergefell, the Chief Justice of the Alabama Supreme Court openly defied a federal court order to begin issuing

\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} See generally The Postman (Warner Bros. Pictures 1997) (depicting a former salesman appointing himself as the leader of an army in a post-viral apocalypse).
\textsuperscript{107} Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (5–4 decision) (holding that the fundamental right to marry includes same-sex couples).
\textsuperscript{109} The Late Show with Stephen Colbert (CBS television broadcast Sept. 14, 2015).
\textsuperscript{110} 135 S. Ct. 2584 (2015).
\textsuperscript{112} See This Day in History: The Desegregation of Alabama Schools in 1963 (PHOTOS), supra note 30.
\textsuperscript{113} Id.
marriage licenses to same-sex couples. After Obergefell, a Kentucky clerk defied multiple court orders to issue marriage licenses, citing her religious and moral objections to same-sex marriage. Although a handful of public officials have openly defied court orders to issue marriage licenses to same-sex couples, not a single governor or mayor ordered police to bar same-sex couples from entering a courthouse. No mobs of armed citizens gathered to threaten same-sex couples attempting to obtain marriage licenses. No riots broke out when the decision was announced. Only a short time after Obergefell, it appears that substantially all adult couples have a real right to marry in all fifty states. Why was the reaction to Obergefell so relatively bloodless?

Perhaps we as a nation have become more civilized, more willing to respect the rights of others, and less willing to flout the rule of law even when we disagree with its dictates. Although a pleasant thought, that seems unlikely. Nationally, only a slim majority, fifty-five percent, supports same-sex marriage while thirty-nine percent oppose it. Indeed, well-known conservative politicos like Mike Huckabee and Rick Santorum have publicly pledged to defy the

---


117 Officials in all fifty states have now issued marriage licenses to same-sex couples. See Jacob Koffler, The Last Holdout Has Now Issued Gay Marriage Licenses, Time (June 29, 2015), http://time.com/3940330/gay-marrying-loisulfania/. Although clerks in some counties are still refusing to issue marriage licenses to any couples, it seems likely that most couples could bypass this problem simply by driving to a nearby county that is issuing marriage licenses. Id.

118 Although the public reaction to Obergefell was relatively peaceful compared with the reaction to Brown, many LGBT Americans and their supporters have been and continue to be killed for their gender orientation and views, most notably in the recent massacre in an Orlando LGBT nightclub. See Lizette Alvarez and Richard Pérez-Peña, Orlando Gunman Attacks Gay Nightclub, Leaving 50 Dead, N.Y. Times (June 12, 2016), http://www.nytimes.com/2016/06/13/us/orlando-nightclub-shooting.html?r=0. See generally Michelle A. Marzullo & Allyn J. Libman, Hum. Rts. Campaign Found., Research Overview: Hate Crimes and Violence Against Lesbian, Gay, Bisexual and Transgender People (2009), http://hrc-assets.s3-east-1.amazonaws.com/files/assets/resources/Hatecrimesandviolenceagainstlgbtpeople_2009.pdf (documenting criminal violence against LGBT people).

Gay Marriage, Black Lives Matter, and the Rule of Law

Court’s decision and praised Kim Davis for disobeying legal court orders. Additionally, a recent poll found that twenty-nine percent of Americans and forty-three percent of Republicans could imagine supporting a military coup of the federal government. Further, last year, hundreds of armed supporters flocked to southeastern Nevada for the opportunity to face off against government agents carrying out their legal duties. Clearly, many in the United States would like to challenge the tyranny of the five and stand up for what they believe. Yet, so far, none have tried to deny the right to marry with violent force. Thus, unlike the resistance that occurred after Brown and other desegregation cases, the vast majority of people who disagreed with Obergefell have complied with its ruling.

Why has the response to Obergefell differed so dramatically from the response to desegregation? Perhaps those who disagree with same-sex marriage simply feel less strongly about the issue than segregationists felt about their issues. Where segregationists were willing to use force and even kill for what they believed, perhaps opponents of same-sex marriage are simply less passionate in their beliefs. It seems more likely, however, that same-sex marriage opponents simply recognize that there is a strong enough national consensus that same-sex couples should not be excluded from the right to marry, and that taking more drastic measures to prevent marriages between loving and consenting adults would be futile and self-defeating. Because Obergefell’s ruling is now the law and most people are willing to respect and enforce it, the ruling is also real under the laws of nature—unlike the right to desegregated education for years after Brown.

However, the story does not end with Obergefell, nor with the government enforcing its ruling against Kim Davis. Many states have proposed or enacted Religious Freedom Restoration Acts, which are designed to give private citizens the affirmative right to discriminate against same-sex couples in ways the

---


government is not allowed.\textsuperscript{123}\ If enough people exercise their rights to discriminate under these Acts, LGBT couples and individuals may well find that the rights the government cannot deny, like the right to fair housing or to purchase the wedding cake of one’s choice, are instead being denied by their neighbors.\textsuperscript{124}

B. Black Lives Matter: Enforcement of Public Rights

The Fourth and Fifth Amendments to the Constitution provide all Americans with the right not to be shot by police when they do not pose an actual threat.\textsuperscript{125} As recent events have shown, however, this right is not always enforced for all Americans.\textsuperscript{126} In particular, supporters of the Black Lives Matter movement believe there are systemic problems that have led to unjustifiable police shootings of African-American men.\textsuperscript{127} A person’s right not to be killed is meaningful only if it can be enforced.

Under the laws of nature, there are three general ways the right not to be killed by police can be made a reality. First, after the apocalypse, the best strategy for people who want to enforce their right not to be killed will usually be


\textsuperscript{125} See generally Tennessee v. Garner, 471 U.S. 1 (1985) (ruling that a police officer may use deadly force in order to prevent a fleeing suspect from escaping arrest, if the officer has probable cause to believe that such fleeing suspect may cause serious physical harm to the officer or others).


\textsuperscript{127} Guiding Principles, supra note 108.
Gay Marriage, Black Lives Matter, and the Rule of Law

to carry a gun and to shoot the other person first. This, of course, would be an incredibly bad strategy for African-American men who are worried about police violence today. Although carrying a weapon could allow someone to protect themselves against an individual police officer, carrying and using a gun against an officer would dramatically increase the number of police who might be willing to use deadly force against that person. Hence, because African-American men cannot realistically enforce their rights with coercive force, neither individually nor as a group, they can only establish their right not to be killed through conduct that might convince the police to voluntarily act affirmatively to avoid killing them.128

Second, the most effective strategy for individuals to enforce their right not to be killed may be to sacrifice some of their other rights. For example, some individuals might decrease their odds of a deadly encounter with police by sacrificing their right of self-expression and cultural identity. Avoiding manners of dress that some police associate with criminal behavior unfairly forces individuals to conform to certain stereotypes, but can help avoid being targeted by police. Driving a more expensive car can similarly help avoid unwanted police attention, as long as the car is not more expensive than police would expect to see. Being more deferential and cooperative with police, especially when the officer is displaying racial bias towards the individual, can help ensure that a constitutionally unfair police encounter does not escalate to police violence.

These strategies for enforcing the right not to be killed by police are patently unfair and likely offensive to many who believe they should not be forced to organize their entire lives to avoid unjust stereotypes and behave deferentially or even subserviently to those who treat them unfairly. Moreover, these strategies do not always work perfectly. For example, in July of 2009, a white police officer arrested Henry Louis Gates, an African-American man, for disorderly conduct after the officer challenged Gates for trying to enter his own home.129 Gates, a fifty-eight-year-old professor at Harvard University with degrees from both Yale and Cambridge, was returning home from a business trip to China.130 He likely excelled at the strategy of avoiding negative police stereotypes, but was still treated unfairly by police. Nonetheless, by not resisting a patently unfair arrest, Gates survived this encounter with his physical life and body intact.

129 Krissah Thompson, Arrest of Harvard’s Henry Louis Gates Jr. Was Avoidable, Report Says, WASH. POST (June 30, 2010, 1:45 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/06/30/AR2010063001356.html. In this incident, a neighbor in Cambridge, Massachusetts, called the police to report a possible break-in when the neighbor saw Professor Henry Louis Gates Jr., an African-American male, forcing open a stuck door on his own home. Professor Gates refused the officer’s request of him to leave his house, the incident quickly escalated, and Professor Gates was thereafter arrested for disorderly conduct—a charge that was subsequently dismissed. Id.
130 Id.
Finally, as explained above, under the laws of nature, the only way for people who lack the coercive power to enforce their rights is to convince others to voluntarily respect their rights. Where some might be able to avoid unwanted police attention as individuals, by acting deferentially in the face of discrimination, conscious activism can also help encourage police to voluntarily adopt better practices towards people as a whole. The first step towards this is forcing police to recognize that there is a problem they might want to solve. As we have seen in recent years, video recordings of police violence can help convince many would-be doubters that sometimes the fault in fatal encounters does lie with police. Peaceful protests can help ensure that policy makers cannot ignore the problem and encourage them to look for solutions. Convincing policy makers to adopt best practices, like dashboard cameras and police worn body-cameras, can help ensure that both police who misbehave are disciplined and police who serve well are not subjected to baseless accusations. Those who lack the coercive power to stop police violence can only effect change by convincing police leaders to effect change. If the existing leaders cannot be convinced, voting to replace those policy makers might be the only other solution.

V. Conclusion

Today, like after the apocalypse, some people often benefit from more rights than they are entitled to, while others are promised more rights than they receive. This is inevitable under the laws of nature because the rights a person benefits from are nothing more or less than those they can enforce and those others are willing to respect. Accepting this brutal truth can help us understand what we need to do to ensure that all members of our society benefit from the rule of law on which we pride ourselves. After the apocalypse, the strong and brutal survive while “the weak get taken.”131 Hopefully, by recognizing the laws of nature, we can ensure that the same is not true today.

131 The Walking Dead: Vatos, supra note 1.